Coates, Sharon

From: Deborah Westbrook <Deborah.Westbrook@clarkcountynv.gov>
Sent: Friday, January 14, 2022 2:13 PM
To: Eisenberg, Robert L.; Petty, John; Alexander Chen; charles finlayson; Noble, Jennifer; Kalicki, Phaedra; Edwards, Kimberly; Coates, Sharon
Cc: Pickering, Justice Kristina; Silver, Justice Abbi
Subject: RE: Rule 4 Criminal Subcommittee -- Federal Authority on "excusable neglect or good cause"
Attachments: RULE 4 - Criminal Sections CF.docx

Hello Rule 4 Criminal Subcommittee Members (and Bob),

I am circulating a revised copy of our proposed Rule 4 for your review and consideration. Earlier this week, Phaedra Kalicki brought up an excellent point that our subcommittee had not addressed at any of our prior meetings -- whether appeal periods that are fixed by statute could be extended by court rule, or whether our subcommittee intended to "expressly exclude those statutory appeal periods from any extension provision added to NRAP 4(b), similar to NRAP 4(b)(1)."

Based on our review of the US Supreme Court's ruling in *Hamer v. Neighborhood Housing Servs. Of Chicago*, 138 S.Ct. 13 (2017), available at https://scholar.google.com/scholar_case?case=11267774423786459037&q=hamer+v+neighborhood+housing+services&hl=en&as_sdt=806, we do not believe that a court can extend a jurisdictional deadline set forth in a statute containing an express time-limit for filing an appeal.

In email correspondence, Phaedra offered the following suggestion: "At the very least, I think any provision allowing for an extension of time on the appeal period would need to make clear that the rule does not apply to any appeal period set by statute. We could go a bit further by including an illustrative list of statutory appeal periods. That would provide concrete direction as to specific statutory appeal periods that are out there but also make it clear that the extension rule generally doesn't apply to any statutory appeal periods (even if they are not listed in the rule)."

With this in mind, we came up with the following proposed language for NRAP 4(b)(4), which modifies the language of FRAP 4(b)(4) as indicated in red, to incorporate the statutory exemptions from NRAP 4(b)(1):

> **FRAP(4)(b)(4) Motion for Extension of Time.** Except when an appeal period is set by statute such as in NRS 34.560(2), NRS 34.575(1), NRS 34.575(2), NRS 176.09183(4), NRS 176.09183(6), and NRS 177.015(2), upon a *finding of excusable neglect or good cause*, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule.

I have incorporated that revision in the current version of our subcommittee's proposal for Rule 4, attached. (And Bob – in light of the above, there may be a need for a similar statutory carve-out for the civil subcommittee's proposal to NRAP 4(a)(6), regarding motions for extension of time.)

I also wanted to let everyone know that Charlie Finlayson consulted with the chiefs of several divisions of State government who indicated that they have some concerns about our proposal to adopt the FRAP 4(b)(4) language permitting motions for extension of time. Charlie will be communicating with them further, to see if we can allay their concerns with legal research. I bring this up because our prior subcommittee minutes reflected that we all unanimously agreed with the recommendation to adopt the FRAP 4(b)(4) language, and this changes that position somewhat. I have revised the attached document to reflect this changed position.

Finally, I noticed that our subcommittee has not yet decided whether to recommend revising NRAP 4(b)(3) to align with FRAP 4(b)(3). It would be helpful if everyone could look at the language in the attached document and let me know whether you like the revision, or would prefer to go back to the old NRAP 4(b)(3).

To save us from having to schedule an additional criminal subcommittee meeting this month, please email me your comments about the above proposals in writing by 1/21 and I can incorporate those comments into a memo to share with the Justices in advance of our 1/31 Commission meeting.

Thanks so much everyone!

Deborah

From: Deborah Westbrook
Sent: Wednesday, January 12, 2022 8:53 AM
To: Pickering, Justice Kristina <kpickering@nvcourts.nv.gov>; Silver, Justice Abbi <Silver@nvcourts.nv.gov>
Cc: Eisenberg, Robert L. <rle@lge.net>; Petty, John <JPetty@washoecounty.gov>; Alexander Chen <Alexander.Chen@clarkcountyda.com>; charles finlayson <charles.finlayson@gmail.com>; Noble, Jennifer <jnoble@da.washoecounty.gov>; Kalicki, Phaedra <pkalicki@nvcourts.nv.gov>; kedwards@nvcourts.nv.gov; scoates@nvcourts.nv.gov
Subject: Rule 4 Criminal Subcommittee -- Federal Authority on "excusable neglect or good cause"

Justices Pickering and Silver,

In advance of our next NRAP Commission meeting, I wanted to share some research on how the phrase "finding of excusable neglect or good cause" has been interpreted by the federal courts, given the criminal subcommittee's recommendation that we adopt FRAP 4(b)(4):

> **(4) Motion for Extension of Time.** Upon a *finding of excusable neglect or good cause*, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule.

The attached 2 articles offer background on FRAP 4(b)(4), and how it has changed over time. Some highlights:

- The district court must make the "finding" of excusable neglect/good cause in the first instance, and can do so in response to an extension request (e.g., a motion) or the substantial equivalent of a notice of appeal being filed within the permissible extension period – thus, a motion is not required.

- The phrase "excusable neglect" is interpreted in accordance with the Supreme Court's decision in *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).

- The *Pioneer* test considers: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on proceedings; (3) the reason for the delay, including whether it was within the movant's control; and (4) whether the movant acted in good faith.

- FRAP 4(b)(4) also permits extensions for "good cause" (in addition to excusable neglect as defined in *Pioneer*) so a request for extension that didn't pass muster under the *Pioneer* line of authority need not necessarily be rejected.

- The "What is excusable neglect or good cause?" article addresses unique factual circumstances where extensions were/were not granted, such as: mail delays, errors in the notice of appeal, illness, vacation,

counsel's preoccupation with other matters, counsel's personal problems, and confusion created by the court (and those cases show that it is a highly fact-based determination, left to the district court's discretion).

If I locate anything else, particularly 9th Circuit authority, I will send it along as well.

Deborah

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RULE 4. APPEAL — WHEN TAKEN

(b) Appeals in Criminal and ~~Habeas Corpus~~Postconviction Cases.

(1) Time for Filing a Notice of Appeal.

(A) Appeal by Defendant or Petitioner. Except as otherwise provided in NRS 34.560(2), NRS 34.575(1), NRS 176.09183(6), NRS 177.055, and Rule 4(c), the notice of appeal by a defendant or petitioner in a criminal case shall be filed with the district court clerk within 30 days after ~~the entry of the judgment or order being appealed.~~the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the ~~S~~state's notice of appeal.

(B) Appeal by the State. Except as otherwise provided in NRS 34.575(2), NRS 176.09183(4), and NRS 177.015(2), when an appeal by the state is authorized by statute, the notice of appeal shall be filed with the district court clerk within 30 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

~~entry of the judgment or order being appealed.~~

(2) Filing Before Entry of Judgment. A notice of appeal filed after the announcement of a decision, sentence or order — but before entry of the judgment or order — shall be treated as filed after such entry and on the day thereof.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions, the notice of appeal from a judgment of conviction must be filed within 30 days after the entry of the order disposing of the last such remaining motion, or within 30 days after the entry of the judgment of conviction, whichever period comes later. This provision applies to a timely motion:

Commented [CLF1]: For consistency with the sections below

Commented [DW2]: FRAP 4(b)(1)(A) provides the defendant with only 14 days to file a notice of appeal while FRAP 4(b)(1)(B) provides the government with 30 days to file a notice of appeal. In fairness to both parties, the Rule 4 Criminal Subcommittee recommends retaining the 30-day filing deadline that currently exists in the rule.

Commented [CLF3]: If we use state, for consistency we should keep it lowercase as it is elsewhere. The federal rule says government instead of state, but I'm not sure that it matters.

Commented [DW4]: Rule 4 Criminal Subcommittee recommends adding this language to bring the rule into conformity with FRAP 4

Commented [DW5]: Rule 4 Criminal Subcommittee recommends adding this language to bring the rule into conformity with FRAP 4

Commented [DW6]: No change needed; this rule is already identical to FRAP 4(b)(2)

(i) for judgment of acquittal under NRS 175.381(2);

(ii) for a new trial under NRS 176.515, but if based on newly discovered evidence, only if the motion is made no later than 30 days after the entry of the judgment; or

(iii) for arrest of judgment under NRS 176.525. ~~files a motion in arrest of judgment or a motion for a new trial on any ground other than newly discovered evidence and the motion has not been denied by oral pronouncement or entry of a written order when the judgment of conviction is entered, the notice of appeal from the judgment of conviction may be filed within 30 days after the entry of an order denying the motion.~~

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction. ~~If a defendant files a motion for a new trial based on the ground of newly discovered evidence before entry of the judgment of conviction and the motion has not been denied by oral pronouncement or entry of a written order when the judgment of conviction is entered, the notice of appeal from the judgment of conviction may be filed within 30 days after the entry of an order denying the motion. If a defendant makes such a motion within 30 days after the entry of the judgment of conviction, the time for the defendant to file the notice of appeal from the judgment of conviction will be similarly extended.~~

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

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Commented [DW7]: Rule 4 Criminal Subcommittee redrafted NRAP 4(b)(3) to align with FRAP 4(b)(3), keeping the current 30-day timeframes from our existing rule, to see what the new rule would look like and to evaluate whether we prefer it to the old version. No recommendation yet.

~~**(4) Entry Defined.** A judgment or order is entered for purposes of this Rule when it is signed by the judge and filed with the clerk.~~

(4) Motion for Extension of Time. Except when an appeal period is set by statute such as in NRS 34.560(2), NRS 34.575(1), NRS 34.575(2), NRS 176.09183(4), NRS 176.09183(6), and NRS 177.015(2), ~~U~~upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule.

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under NRS 176.555 or NRS 176.565, nor does the filling of a motion under those statutes affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under NRS 176.555 or NRS 176.565 does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule when it is signed by the judge and filed with the clerk.

(~~5~~7) Time for Entry of Judgment; Content of Judgment or Order in Postconviction Matters.

(A) Judgment of Conviction. The district court judge shall enter a written judgment of conviction within 14 days after sentencing.

(B) Order Resolving Postconviction Matter. The district court judge shall enter a written judgment or order finally resolving any postconviction matter.

Commented [DW8]: Rule 4 Criminal Subcommittee recommends moving NRAP 4(b)(4), and renumbering it NRAP 4(b)(6), like the analogous federal rule. Also notes that the language in the NV rule seems more tailored to Nevada practice than the federal rule, which says "A judgment or order is entered for purposes of this Rule 4(b) when it is **entered on the criminal docket**."

Commented [pdw9]: Phaedra Kalicki suggested the addition of language clarifying that, in accordance with *Hamer v. Neighborhood Housing Servs. of Chicago*, jurisdictional appeals deadlines that are established by statute are not impacted by this court rule.

Commented [DW10]: The majority of the Rule 4 Criminal Subcommittee recommends adding this provision from FRAP 4(b)(4), but omitting the federal-specific language that is not applicable in NV. Consensus was that this language could reduce the number of postconviction appeal deprivation claims that have to be filed and simplify matters.

Commented [pdw11R10]: Note – after consulting with the chiefs of several divisions of State government, Charlie Finlayson indicated that there may be some concern with this amendment, and additional legal research may be necessary for those chiefs to support this amendment.

Commented [DW12]: Rule 4 Criminal Subcommittee recommends adding this provision from FRAP 4(b)(5), with modifications to reflect Nevada's statutes that are analogous to Federal Rule of Criminal Procedure 35a (e.g., NRS 176.555, NRS 176.565).

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Commented [DW13]: Rule 4 Criminal Subcommittee recommends moving this provision, which was previously NRAP 4(b)(4), here because this is where the analogous federal provision is located.

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If the district court judge first makes an oral pronouncement of a final decision in such a matter, the written judgment or order shall be issued within 21 days after the district court judge's oral pronouncement ~~of a final decision in such a matter~~. The judgment or order in any postconviction matter must contain specific findings of fact and conclusions of law supporting the district court's decision.

(C) Sanctions; Counsel's Failure to Timely Prepare Judgment or Order. The court may impose sanctions on any counsel instructed by the district court judge to draft the judgment or order and who does not submit the proposed judgment or order to the district court judge within the applicable time periods specified in Rule 4(b)(5).

(~~6~~8) Withdrawal of Appeal. If an appellant no longer desires to pursue an appeal after the notice of appeal is filed, counsel for appellant shall file with the clerk of the Supreme Court a notice of withdrawal of appeal. The notice of withdrawal of appeal shall substantially comply with Form 8 in the Appendix of Forms.

(c) Untimely Direct Appeal From a Judgment of Conviction and Sentence.

(1) When an Untimely Direct Appeal From a Judgment of Conviction and Sentence May Be Filed. An untimely notice of appeal from a judgment of conviction and sentence may be filed only under the following circumstances: (A) A postconviction petition for a writ of habeas corpus has been timely and properly filed in accordance with the provisions of NRS 34.720 to 34.830, asserting a viable claim that the petitioner was unlawfully deprived of the right to a timely direct appeal from a judgment of conviction and sentence; and

Commented [DW14]: Rule 4 Criminal Subcommittee recommends a minor revision to reflect the fact that, in many cases, district court judges will not make an oral pronouncement before issuing a written order; and the 21-day period only applies when the judge has made such a pronouncement.

(B) The district court in which the petition is considered finds that the petitioner has established a valid appeal deprivation claim and is entitled to a direct appeal.

(C) In compliance with Rule 4(b)(7), the district court shall enters a written order containing:

(i) specific findings of fact and conclusions of law finding that the petitioner has established a valid appeal-deprivation claim and is entitled to a direct appeal with the assistance of appointed or retained appellate counsel;

(ii) if the petitioner is indigent, directions for the appointment of appellate counsel, other than counsel for the defense in the proceedings leading to the conviction, to represent the petitioner in the direct appeal from the conviction and sentence; and

(iii) directions to the district court clerk to prepare and file — within 7 days of the entry of the district court's order — a notice of appeal from the judgment of conviction and sentence on the petitioner's behalf in substantially the form provided in Form 1 in the Appendix of Forms.

(DC) If a federal court of competent jurisdiction issues a final order directing the state to provide a direct appeal to a federal habeas corpus petitioner, the petitioner or his or her counsel shall file the federal court order within 30 days of entry of the order in the district court in which petitioner's criminal case was pending. The clerk of the district court shall prepare and file — within 30 days of filing of the federal court order in the district court — a notice of appeal from the judgment of conviction and sentence on the petitioner's behalf in substantially the form provided in Form 1 in the Appendix of Forms.

(2) Service by the District Court Clerk. The district court clerk shall serve certified copies of the district court's written order and the notice of appeal

Commented [DW15]: Rule 4 Criminal Subcommittee recommends adding this language to clarify that the defendant's right to an untimely direct appeal is tied to the district court's *finding* that the appellant has stated a valid appeal deprivation claim, not whether the district court has issued a compliant order.

required by Rule 4(c) on the petitioner and petitioner's counsel in the postconviction proceeding, if any, the respondent, the Attorney General, the district attorney of the county in which the petitioner was convicted, the appellate counsel appointed to represent the petitioner in the direct appeal, if any, and the clerk of the Supreme Court.

(3) Notice of Appeal Filed by Petitioner's Counsel or Petitioner. If the district court has entered an order containing the findings required by Rule 4(c)(1)(B) and the district court clerk has not yet prepared and filed the notice of appeal on the petitioner's behalf, the petitioner or petitioner's counsel may file the notice of appeal from the judgment of conviction and sentence.

(4) Motion to Dismiss Appeal. The state may challenge a district court's written order granting an appeal-deprivation claim by filing a motion to dismiss the appeal with the clerk of the Supreme Court within 30 days after the date on which the appeal is docketed in the Supreme Court. The state's motion to dismiss shall be properly supported with all documents relating to the district court proceeding that are necessary to the Supreme Court's or Court of Appeals' complete understanding of the matter.

(5) Effect on Procedural Bars. When a direct appeal of a criminal conviction and sentence is conducted under this Rule, the timeliness provisions governing any subsequent habeas corpus attack on the judgment shall begin to run upon the termination of the direct appeal, as provided in NRS 34.726(1) and NRS 34.800(2). A habeas corpus petition filed after a direct appeal conducted under this Rule shall not be deemed a "second or successive petition" under NRS 34.810(2).

(d) Appeal by an Inmate Confined in an Institution. If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is delivered to a prison official for mailing on or before the last day for filing. If the institution has a notice-of-appeal log or another system designed for legal mail, the inmate must use that log or system to receive the benefit of this Rule.

(e) Mistaken Filing in the Supreme Court. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the Supreme Court rather than the district court, the clerk of the Supreme Court must note on the notice the date when it was received and send it to the district court clerk. The notice is then considered filed in the district court on the date so noted.

(f) Expediting Criminal Appeals. The court may, with or without motion by the parties, by a majority of its members, make orders to expedite the handling of criminal appeals, including without limitation the following:

(1) Elimination of steps in preparation of the record and the briefs.

(2) Expediting preparation of stenographic transcripts.

(3) Priority of calendaring for oral argument.

(4) Utilization of court opinions or per curiam orders.

(5) Other lawful measures reasonably calculated to expedite the appeal and promote justice.

Commented [DW16]: Rule 4 Criminal Subcommittee recommends adding this language to clarify that the parties may move to expedite criminal appeals and need not wait for the court to act. Subcommittee is divided on whether this section is actually necessary given NRAP 2, although no one objects to it remaining.

Coates, Sharon

From: Deborah Westbrook <Deborah.Westbrook@clarkcountynv.gov>
Sent: Wednesday, January 12, 2022 8:53 AM
To: Pickering, Justice Kristina; Silver, Justice Abbi
Cc: Eisenberg, Robert L.; Petty, John; Alexander Chen; charles finlayson; Noble, Jennifer; Kalicki, Phaedra; Edwards, Kimberly; Coates, Sharon
Subject: Rule 4 Criminal Subcommittee -- Federal Authority on "excusable neglect or good cause"
Attachments: 39509 Criminal CasesExtension of Time.rtf; 122 What is excusable neglect or good cause.rtf

Follow Up Flag: Follow up
Flag Status: Flagged

Justices Pickering and Silver,

In advance of our next NRAP Commission meeting, I wanted to share some research on how the phrase "finding of excusable neglect or good cause" has been interpreted by the federal courts, given the criminal subcommittee's recommendation that we adopt FRAP 4(b)(4):

> **(4) Motion for Extension of Time.** Upon a *finding of excusable neglect or good cause*, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule.

The attached 2 articles offer background on FRAP 4(b)(4), and how it has changed over time. Some highlights:

- The district court must make the "finding" of excusable neglect/good cause in the first instance, and can do so in response to an extension request (e.g., a motion) or the substantial equivalent of a notice of appeal being filed within the permissible extension period – thus, a motion is not required.

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- FRAP 4(b)(4) also permits extensions for "good cause" (in addition to excusable neglect as defined in *Pioneer*) so a request for extension that didn't pass muster under the *Pioneer* line of authority need not necessarily be rejected.

- The "What is excusable neglect or good cause?" article addresses unique factual circumstances where extensions were/were not granted, such as: mail delays, errors in the notice of appeal, illness, vacation, counsel's preoccupation with other matters, counsel's personal problems, and confusion created by the court (and those cases show that it is a highly fact-based determination, left to the district court's discretion).

If I locate anything else, particularly 9th Circuit authority, I will send it along as well.

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16A Fed. Prac. & Proc. Juris. § 3950.9 (5th ed.)

Federal Practice and Procedure (Wright & Miller) | April 2021 Update

Jurisdiction and Related Matters

Chapter 9A. Federal Rules of Appellate Procedure
Catherine T. Struve

Title II. Appeal From a Judgment or Order of a District Court

Rule 4. Appeal as of Right—When Taken

§ 3950.9 Criminal Cases—Extension of Time

Link to Monthly Supplemental Service

Primary Authority

- Fed. R. App. P. 4

Forms

- 1B West's Federal Forms, Court of Appeals §§ 2:25 to 2:42

Extensions of time to take a criminal appeal are addressed by Federal Rule of Appellate Procedure 4(b)(4).[1] It places in the hands of the district judge the power to extend the appeal time; Federal Rule of Appellate Procedure 26(b) forbids the courts of appeals from doing so.[2] This section first summarizes the history of Rule 4(b)(4). It then considers the procedure for seeking a Rule 4(b)(4) extension, the standard the district court should apply in adjudicating a Rule 4(b)(4) request, and the standard of review applied by the court of appeals. The section discusses whether Rule 4(b)(4) extensions are available to the government when its appeal time is also set by statute. Finally, this section considers measures the courts have taken in cases where an attorney's failure to file a notice of appeal constituted constitutionally ineffective assistance of counsel.

The story of Rule 4(b)(4)'s extension provision can begin in 1960, when the Supreme Court held in United States v. Robinson that Federal Rule of Criminal Procedure 37(a)(2)'s 10-day deadline for defendants' appeals was "mandatory and jurisdictional" and that the appeal time could not be extended based upon a finding of excusable neglect.[3] The 1966 amendments to Criminal Rule 37(a)(2) added a new sentence stating that "[u]pon a showing of excusable neglect, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal otherwise allowed to any party for a period not to exceed 30 days from the expiration of the original time prescribed by this paragraph."[4] Citing Robinson, the Committee Note observed that this new sentence "effects a major change in the rule, under which courts have been held powerless to extend the time fixed by rule for taking an appeal."[5] When the

Appellate Rules were adopted effective in 1968, new Appellate Rule 4(b) included an excusable-neglect provision that was substantially similar to that in former Criminal Rule 37(a)(2).

The text of Rule 4(b)(4)'s excusable-neglect provision remained materially unchanged until 1998.[6] (As will be discussed, the Supreme Court's 1993 decision in the Pioneer Investment case[7] had, in the meantime, changed courts' approaches to interpreting the excusable-neglect provisions in both Rule 4(b)(4) and Rule 4(a)(5).) In addition to restyling Rule 4(b) and designating the extension provision as Rule 4(b)(4), the 1998 amendments made two substantive changes to Rule 4(b)(4)'s extension provision. First, the 1998 amendments added "good cause" as an alternative to "excusable neglect."[8] Second, the 1998 amendments changed the requirement of a "showing" of excusable neglect to one of a "finding" of excusable neglect or good cause.[9]

Rule 4(b)(4) authorizes the district court to grant an extension "before or after the time has expired"[10] and "with or without motion and notice."[11] As the 1966 Committee Note to former Criminal Rule 37(a)(2) explained:

> Contrary to the usual rule (see Rule 45(b); see also Rule 6(b) of the Federal Rules of Civil Procedure) the district court is authorized to extend the time after its expiration without motion and notice. The usual requirement of motion and notice has the effect of reducing the time within which an extension of the time for appeal may be sought, since, unlike other motions for extensions, the relief itself can be granted only within a fixed time after expiration of the original time. While an adverse party ought ordinarily be afforded an opportunity to contest a request for an extension, the special circumstances which not infrequently obtain in criminal cases suggest that the district court should be empowered to grant extensions in appropriate cases without motion and notice.[12]

Thus, technically speaking, cases stating that the lack of a timely *motion* precludes an extension seem somewhat inaccurate; in those cases, the real problem appears to have been that the appellant filed nothing, within the potential extension period, that could have been construed as a *notice of appeal*.[13] The latter omission is the real problem, because Rule 4(b)(4) limits the extension period to "30 days from the expiration of the time otherwise prescribed" by Rule 4(b).[14] Indeed, even if a court is inclined to require a motion (which it should not, in light of the text of Rule 4(b)(4)), it makes sense in the criminal context to construe a late-filed notice of appeal as a motion for a Rule 4(b)(4) extension.[15] A court of appeals that concludes an appeal was filed outside the Rule 4(b) time limit but within the permissible extension period should thus remand for a district-court determination of whether to grant a Rule 4(b)(4) extension.[16] It also makes sense to construe a Rule 4(b)(4) motion as a notice of appeal if no formal notice was filed within the permissible extension period, so long as the motion is the substantial equivalent of a notice of appeal.[17] Thus, it has been held that if a notice of appeal or its substantial equivalent has been filed within the permissible extension period, the extension of time can be granted after the period has run.[18] If a notice of appeal has not yet been filed at the time of the Rule 4(b)(4) extension motion, the notice should be filed along with the motion (or, at the latest, before the end of the permissible extension period), because even if the motion is granted it can only validate a notice of appeal filed within the permissible extension period.[19]

Rule 4(b)(4) extensions are authorized "[u]pon a finding of excusable neglect or good cause." Rule 4(b)(4)'s "excusable neglect" standard should be interpreted in the light of the Supreme Court's discussion of Federal Rule of Bankruptcy Procedure 9006(b)(1)'s similar standard in the Pioneer Investment case.[20] The specific issue in Pioneer Investment was whether an attorney's inadvertent failure to file a proof of claim within the deadline set by the court can constitute "excusable neglect" within the meaning of Bankruptcy Rule 9006(b)(1), which empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier deadline "was the result of excusable neglect." In the Pioneer Investment case the Supreme Court rejected the view that any fault on the part of the late filer would defeat a claim of "excusable neglect." It said that the usual meaning of "neglect" encompasses both simple, faultless omissions to act and omissions caused by carelessness, and that in the Bankruptcy Rule "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control."[21] The Court also invoked the observation that the similar term in Federal Rule of Civil Procedure 6(b) is an "elastic concept"[22] and that it "is not limited strictly to omissions caused by circumstances beyond the control of the movant."[23] The Court went on to say that if neglect is shown, it still must be found to be excusable. This "determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission."[24]

The Pioneer Investment Court said explicitly that it took the case because the circuits were split over the meaning of "excusable neglect," both in the Bankruptcy Rule and in Appellate Rule 4(a)(5).[25] Pioneer Investment is, thus, plainly

relevant to the interpretation of Rule 4(a)(5), as discussed in another section.[26] Even with respect to Rule 4(a)(5), the Pioneer Investment discussion is not an entirely perfect fit: Because the rule construed in Pioneer Investment—Bankruptcy Rule 9006(b)(1)—contained only an "excusable neglect" standard and did not mention "good cause," the Supreme Court had no occasion to consider the distinctions that might be appropriate in construing a provision that contains both standards. With respect to Rule 4(b)(4), particular caution is appropriate to ensure that the Pioneer Investment approach is suitably tailored to the criminal context. In particular, the Pioneer Investment Court's observations that "clients must be held accountable for the acts and omission of their attorneys," and that if the act of the attorney does not constitute excusable neglect, an innocent client cannot win relief,[27] seems to fit awkwardly in the criminal context. After all, attorney failures that result in an untimely appeal and that meet the test for constitutionally ineffective assistance of counsel are—as discussed below—grounds for relief even when the issue is raised after the running of Rule 4(b)(4)'s permissible extension period. It thus could make sense to treat such failures as grounds for a Rule 4(b)(4) extension (though some courts have taken a harder line, remitting the unfortunate defendant to the remedy of a Section 2255 motion).[28]

It seems clear that Rule 4(b)(4)'s "excusable neglect" standard should be no stricter than the standard that Pioneer Investment applied to Bankruptcy Rule 9006(b)(1).[29] The factors highlighted by the Pioneer Investment court were the danger of prejudice to the opponent, the delay's length and impact on the proceedings, the reason for the delay, and whether the appellant showed good faith; courts have applied these factors in the Rule 4(b) context as well.[30] One factor that the district court might permissibly consider is the lawyer's degree of experience with federal practice.[31] In assessing an excuse based on the lawyer's confusion, the court may also take into account whether the case at hand posed particularly difficult or confusing issues with respect to appeal time.[32] Another reason sometimes given for an extension is that the lateness of a notice filed by the defendant pro se was due to the defendant's prior reliance on counsel who failed to timely file the notice.[33] The logistical difficulties that inmates and their lawyers face in communicating with each other—especially when the inmate is moved from one prison to another—may also provide grounds for finding excusable neglect and/or good cause.[34] "Good cause" would exist where, for example, the lateness of the notice was due to the defendant's initial reliance on the clerk's duty under Federal Rule of Criminal Procedure 32 to file a notice of appeal on the defendant's behalf if so requested by the defendant.[35]

Federal Rule of Criminal Procedure 49(d) provides: "When the court issues an order on any post-arraignment motion, the clerk must serve notice of the entry on each party as required by Rule 49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time." The substance of the third sentence of Rule 49(d) derives from the 1966 amendments to that Rule. (At the time of the 1966 amendments, the relevant appeal-time provision was located in Criminal Rule 37(a)(2).) The 1966 Committee Note to what then was Rule 49(c) explains the reasoning behind the limitation:

> The sentence added at the end of the subdivision eliminates the possibility of extension of the time to appeal beyond the provision for a 30-day extension on a showing of "excusable neglect" provided in Rule 37(a)(2). * * * The question has arisen in a number of cases whether failure or delay in giving notice on the part of the clerk results in an extension of the time for appeal. The "general rule" has been said to be that in the event of such failure or delay "the time for taking an appeal runs from the date of later actual notice or receipt of the clerk's notice rather than from the date of entry of the order." * * * In two cases it has been held that no extension results from the failure to give notice of entry of judgments (as opposed to orders) since such notice is not required by Rule 49(d). * * * The excusable neglect extension provision in Rule 37(a)(2) will cover most cases where failure of the clerk to give notice of judgments or orders has misled the defendant. No need appears for an indefinite extension without time limit beyond the 30-day period.

The appeal times set by Appellate Rules 4(b)(1)(A)(i) and 4(b)(1)(B)(i) run from the entry of the relevant judgment or order, not from the time that a party receives notice of that entry. Consistent with the 1966 Committee Note to Rule 49(c), the clerk's failure to give notice of the judgment or order can provide a basis for a Rule 4(b)(4) extension—though at least one court has taken a contrary view.[36] But, of course, such an extension is subject to the limitations discussed in this section—notably, the 30-day limit on the permissible extension period.[37]

The district court should make findings concerning the presence of excusable neglect or good cause.[38] Even in the absence of explicit findings, though, some courts of appeals will interpret a district court's grant of other requests relating to the appeal—such as a request for the appointment of appellate counsel—as an implicit finding of excusable neglect and an

implicit grant of an extension.[39] Even if the district court finds excusable neglect, one court has stated that the district court has discretion to deny the Rule 4(b)(4) extension if there is evidence of bad faith on the appellant's part or evidence of prejudice to the government.[40]

There is a circuit split concerning whether the appellee must file a cross-appeal in order to challenge on appeal the district court's grant of an extension of time to file the notice of appeal.[41] The appellate court will defer to the district court's determination of whether excusable neglect existed.[42] At least one court has stated that the importance of permitting a criminal defendant the opportunity to appeal weighs in favor of giving more deference to a finding that excusable neglect was present than to a finding that excusable neglect was lacking.[43]

Courts have held that Rule 4(b)(4) extensions are available to either party.[44] But the Tenth Circuit, in the Sasser decision discussed in the preceding section,[45] questioned that conclusion as applied to cases in which the government's appeal is taken under 18 U.S.C.A. § 3731. Sasser held that Rule 4(b)(1)(B)(ii)'s cross-appeal provision is unavailable to the government when it takes an appeal under Section 3731, because Section 3731 limits the government's appeal time to "thirty days after the decision, judgment or order has been rendered." The reasoning of the Sasser court—that Section 3731's 30-day limit is jurisdictional and not subject to extension under Rule 4(b)—would apply equally to Rule 4(b)(4), and it is thus unsurprising that Sasser criticized decisions from other circuits holding that Rule 4(b)(4) extensions are available to the government in appeals governed by Section 3731.[46] That criticism, however, no longer holds sway in the Tenth Circuit, which has more recently determined that "Rule 4(b)(4) can extend the jurisdictional time limit imposed by 18 U.S.C.A. § 3731."[47]

Nonetheless, it may be helpful to note why the arguments articulated in Sasser do not provide a persuasive basis for refusing to apply Rule 4(b)(4)'s extension provision to government appeals taken under Section 3731. From 1948 to 1988, 18 U.S.C.A. § 3772 authorized Supreme Court rulemaking with respect to postverdict criminal procedure—including the authority to "prescribe the times for and manner of taking appeals"—and provided supersession authority for those rules.[48] When, in 1966, the rulemakers revised Criminal Rule 37(a)(2) to, inter alia, authorize extensions of appeal time based on excusable neglect, those amendments were clearly within the authority granted by Section 3772 and, under that statute, they superseded anything to the contrary in existing statutory law. The same was true of new Appellate Rule 4(b) when it took effect in July 1968. Though the Appellate Rules, from their adoption until 2002, contained a Rule 1(b) stating that the Appellate Rules should not be taken to "extend or limit the jurisdiction" of the courts of appeals, this limitation need not compel the conclusion that Rule 4(b)'s extension period is inapplicable to appeals taken under Section 3731. As discussed in another section, Federal Rule of Appellate Procedure 1(b)'s limitation did not prevent the rulemakers, over the period from 1968 through 2002, from altering Rule 4 in ways that affected statutory (as well as non-statutory) appeal times[49]—a result that seems particularly appropriate in the case of Rule 4(b), given Section 3772's explicit authorization of rulemaking concerning criminal appeal times.

In 1971, as part of rather extensive revisions to Section 3731, Congress added the word "order" to the sentence setting the 30-day deadline for certain government appeals, so that it now reads: "The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted."[50] The legislative history of the 1971 amendments to Section 3731 does not discuss the 30-day deadline as such.[51] However, there is no reason to think that by amending the sentence setting the 30-day deadline Congress meant to trump Rule 4(b)'s authorization of excusable-neglect extensions; to the contrary—as suggested by the 1971 legislation's directive that "[t]he provisions of this section shall be liberally construed to effectuate its purposes"—the intent of the 1971 legislation was to broaden the government's ability to appeal.[52] Likewise, Congress's subsequent amendments to Section 3731 have concerned other provisions, not the sentence setting the 30-day appeal provision,[53] and thus there is no reason to think that by enacting those amendments Congress meant to trump Rule 4(b)'s extension provision.

Thus, as of the Sasser court's discussion in 1992, its view that Rule 4(b)'s extension provision could not apply to government appeals brought under Section 3731 seems to have been unpersuasive. There remains the question of whether subsequent changes to what is now Rule 4(b)(4) should be viewed as changing that result. In 1988, Congress repealed Section 3772 and located the relevant rulemaking authority in 28 U.S.C.A. § 2072, which, as enacted in 1988, provided the Supreme Court with rulemaking authority concerning civil and criminal cases in the district courts and courts of appeals. Section 2072, as is well known, includes supersession authority but prohibits rules promulgated under its authority from abridging, enlarging or modifying substantive rights.[54] Do the latter limitations render suspect the 1998 amendments to Rule 4(b)(4) that added "good

cause" as an alternative to "excusable neglect" and changed the requirement of a "showing" of excusable neglect to one of a "finding" of excusable neglect or good cause? The answer seems clearly to be no, for at least two reasons.[55] First, if Section 2072's limitation on rulemaking authority precludes any alteration of provisions such as Rule 4(b)(4), that would presumably be true as to all criminal appeals, not just government appeals taken under Section 3731—a conclusion that no court appears to have reached. Second, it is questionable what change the 1998 amendments really worked in Rule 4(b)(4). The addition of a "good cause" alternative was not a very dramatic change, in the light of the fact that the Pioneer Investment decision permits a reading of "excusable neglect" that is so broad as to encompass most or all situations that would constitute "good cause." And the change from "showing" to "finding" was even less dramatic, given the rulemakers' explanation that the change stemmed from the pre-existing feature of Rule 4(b) that permitted an extension without a motion.[56] In sum, there seems to be no reason why Rule 4(b)(4) should not apply to government appeals taken under Section 3731—though perhaps Section 3731's requirement that appeals under that section "be diligently prosecuted" might impose some limitation on the circumstances under which a Rule 4(b)(4) extension might be appropriate.[57]

District judges and litigants should note that Rule 4(b)(4)'s extension cannot "exceed 30 days from the expiration of the time otherwise prescribed by" Rule 4(b). In the context of civil appeals, Rule 4(a)(5) permits an appeal-time extension to run "14 days after the date when the order granting the motion is entered"; Rule 4(b)(4) contains no similar provision.[58] It is possible, though, that at least in the case of appeals by criminal defendants these limits need not be raised by the court sua sponte; one court has held, in the wake of the Supreme Court's decision in Bowles v. Russell, that Rule 4(b)(4)'s time limit, though a strict claim-processing limit, is not a jurisdictional constraint.[59] Even if a court takes this view, however, it will enforce the limit when properly raised.[60]

A number of the untimely filings that gave rise to the cases discussed in this section have involved lawyer incompetence. What relief will be afforded to a defendant whose direct appeal was untimely due to constitutionally ineffective assistance of counsel? Even where an extension request and the substantial equivalent of the notice of appeal have been filed within the permissible extension period, some courts have been unwilling to find that rank lawyer incompetence constitutes excusable neglect under Rule 4(b)(4). In any event, where the motion and notice are filed outside the permissible extension period, Rule 4(b)(4) is unavailable. What, then, is the defendant's remedy?

Collateral relief is available; the Supreme Court has held that when constitutionally ineffective assistance of counsel leads to the failure to file a direct appeal, the defendant can obtain relief under Section 2255. That holding came in Rodriquez v. United States, in which the Court remanded with instructions that the Section 2255 petitioner be "resentenced so that he may perfect an appeal in the manner prescribed by the applicable rules."[61] Under the Court's more recent decision in Peguero v. United States, collateral relief should also be available if the district court failed to inform the defendant of his or her right to appeal as required by Criminal Rule 32 and the defendant did not in fact know of his or her right to appeal.[62]

Accordingly, courts—when an extension under Rule 4(b)(4) is unavailable but the circumstances suggest the possibility that the untimeliness of the notice of appeal arose from constitutionally ineffective assistance of counsel—have noted that the appellant can seek collateral relief on that ground.[63] On such collateral review, the district court's remedy may be to vacate the judgment and re-enter it so as to enable the defendant to take a timely appeal; circuits following this approach appear to take the view that the ensuing appeal is to be treated just like any other direct appeal.[64] As the Eleventh Circuit has put it:

> When the district courts of this circuit conclude that an out-of-time appeal in a criminal case is warranted as the remedy in a § 2255 proceeding, they should effect that remedy in the following way: (1) the criminal judgment from which the out-of-time appeal is to be permitted should be vacated; (2) the same sentence should then be reimposed; (3) upon reimposition of that sentence, the defendant should be advised of all the rights associated with an appeal from any criminal sentence; and (4) the defendant should also be advised [of the time limit] for filing a notice of appeal from that re-imposed sentence * * * , which is dictated by Rule 4(b)(1)(A)(i).[65]

In a variation on this procedure, when constitutionally ineffective assistance resulted in the denial of the petitioner's right to take a direct appeal, the Fifth Circuit directs district courts to use a "judicial remedy" of "reinstating" the judgment and sentence so as to permit a direct appeal.[66] (The analysis differs if a direct appeal was timely filed but then was dismissed for want of prosecution; where the dismissal for want of prosecution arose from constitutionally ineffective assistance, a number of circuits take the view that the proper remedy is for the court of appeals to recall its mandate and reinstate the original direct appeal.)[67]

Where it is clear that the defendant's failure to take a timely direct appeal resulted from constitutionally ineffective assistance of counsel, the Second Circuit has ruled that when dismissing the appeal as untimely the court of appeals can also direct that, on remand, the district court re-enter the judgment so as to enable the defendant to take a timely direct appeal. As the court explained:

> If in this case we were simply to dismiss and remit the defendant to his section 2255 remedy, we would precipitate at least one and possibly two other unfortunate consequences. First, we would incur the waste of time and judicial resources to process the section 2255 motion. Second, we would expose the defendant to the risk that he would use up his first opportunity to file a section 2255 motion, thereby subjecting him to the stringent standards applicable to a second section 2255 motion. See 28 U.S.C. § 2255, ¶ 8. Although the defendant would have a substantial argument that his initial section 2255 motion should not count as a "first" motion for purposes of section 2255, ¶ 8, because it was needed to obtain entitlement to direct review, rather than to present a collateral challenge after direct review, * * * that argument itself would precipitate litigation that should be avoided if possible. Third, dismissal of the appeal would leave the current judgment in place, at least until the granting of a motion under section 2255, thereby risking expiration of a substantial part and possibly all of the one-year limitations period of 28 U.S.C. § 2255, ¶ 6, unless the time devoted to taking the steps required to obtain an appealable judgment were deemed to toll the one-year period.
>
> Rather than limit our disposition to a dismissal, which would precipitate a section 2255 motion, we think the most appropriate disposition is to dismiss the appeal as untimely and remand to the District Court with instructions to vacate the judgment and enter a new judgment from which a timely appeal may be taken.[68]

However, where the record on the ineffective-assistance contention is not fully developed, the Second Circuit has instead dismissed the untimely appeal, leaving the appellant to pursue the ineffective-assistance claim through a Section 2255 proceeding.[69] Also, the Second Circuit has more recently ruled that, where the defendant's notice of appeal may have been filed later than the permissible period for filing a Section 2255 motion, the "Fuller remand" procedure is unavailable. In United States v. Wright, because it was not clear that the filing (if viewed as a Section 2255 motion) would have been timely, the court of appeals remanded with instructions to the "district court—after it solicits consent from [the defendant]—to convert [the] notice of appeal into a petition for habeas relief and to assess whether his petition would be timely under 28 U.S.C. § 2255(f)(4), with or without application of equitable tolling."[69.50]

Readers will notice that the treatment of this issue in the criminal context differs from the treatment of a somewhat analogous issue in the civil context. As discussed in another section of this treatise, prior to the adoption of Appellate Rule 4(a)(6) some circuits had allowed the use of Federal Rule of Civil Procedure 60(b) to re-enter a civil judgment so as to re-start the running of the appeal time; but courts now generally take the view that Appellate Rule 4(a)(6) displaces such a use of Civil Rule 60(b).[70] Courts' unwillingness to permit the use of Civil Rule 60(b) to re-open and re-enter civil judgments (for the purpose of re-starting the civil appeal time) does not require a similar approach to the practices, described above, in the criminal context. In the criminal context, the interests at stake are liberty and even sometimes life. Moreover, criminal defendants have a right to counsel on direct appeal. In addition, Rule 4(b)'s appeal time limits for defendants are tighter than the civil appeal time limits in Rule 4(a). And Rule 4(b) contains no specific provision concerning the reopening of time to appeal that would displace the use of the procedures described above.

Footnotes

1 **Criminal extensions**

Extensions of time to take a civil appeal are discussed in § 3950.3.

2 **Rule 26(b)**

Rule 26(b) provides in part that "the court may not extend the time to file * * * a notice of appeal (except as authorized in Rule 4)." As noted, Rule 4(b)(4) places the authority to extend the appeal time in criminal cases within the power of the district court. Rule 4(a)(5) does the same with respect to appeals in civil cases.

Defendant's designation of the record on appeal sufficed to constitute a notice of appeal, but it was filed outside the Rule 4(b) appeal time. "Fed. R. App. P. 26(b) prevents this court from extending the time to file a notice of appeal. We therefore remand to the district court to determine if Adams has demonstrated 'excusable neglect' sufficient to warrant an extension under Fed. R. App. P. 4(b)." U.S. v. Adams, 106 F.3d 646, 647–648 (5th Cir. 1997).

Although the court of appeals was tempted to grant an extension of time, it is the district court, not the court of appeals, that has power to grant such motions. Thus, the court would remand to the district court for a determination whether the notice had been timely filed and, if not, whether an extension should be granted. Jurisdiction would be retained to proceed with the appeal without further briefing or argument should the district court act so as to support the appeal. U.S. v. Ward, 696 F.2d 1315, 1317–1318 (11th Cir. 1983).

3 **Robinson case**

U.S. v. Robinson, 361 U.S. 220, 224, 80 S. Ct. 282, 285, 4 L. Ed. 2d 259 (1960).

4 **1966 amendment**

39 F.R.D. 69, 199 (1966).

5 **1966 Committee Note**

39 F.R.D. 69, 200 (1966).

6 **Materially unchanged**

As part of the 1993 amendments to Rule 4(b), em dashes rather than commas were used to set off the words "before or after the time has expired, with or without motion and notice."

7 **Pioneer Investment case**

Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).

8 **"Good cause"**

The 1998 Committee Note to Rule 4(b) explains: "Rule 4(a) permits extensions for both reasons in civil cases and the Advisory Committee believes that 'good cause' should be sufficient in criminal cases as well. The amendment does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired. The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do so provided that the extended period does not exceed 30 days after the expiration of the time otherwise prescribed by Rule 4(b)."

9 **"Finding"**

The 1998 Committee Note to Rule 4(b) states: "Because the rule authorizes the court to provide an extension without a motion, a 'showing' is obviously not required; a 'finding' is sufficient."

10 **After expiration**

Notice of appeal was filed one day late, requiring appellant to seek a retroactive extension from the district court. District court did not abuse its discretion, under the circumstances, in granting the extension. U.S. v. Brown, 133 F.3d 993, 997 (7th Cir. 1998).

11 **Without motion**

"Although defendant did not file a motion under Rule 4(b)(4) to extend the period for filing his notice of appeal, we have held 'that a defendant who filed his notice of appeal within the Rule 4(b) thirty-day extension

period may obtain relief by showing excusable neglect notwithstanding his failure to file a motion seeking such relief within that same time frame.'" U.S. v. Espinosa-Talamantes, 319 F.3d 1245, 1246 (10th Cir. 2003) (quoting U.S. v. McMillan, 106 F.3d 322, 324 (10th Cir. 1997)).

Under Appellate Rule 4(b), an extension of appeal time can be granted with or without motion and notice to the other party. There was no abuse of discretion in granting an ex parte request by a criminal defendant for an extension of time, based on a showing that he had relied on his retained counsel to perfect an appeal and been disappointed. The motion was filed within the time provided by Rule 4(b), and with due diligence in light of the fact that the defendant was incarcerated. U.S. v. Houser, 804 F.2d 565, 569 (9th Cir. 1986).

The defendant filed a notice of appeal (but no motion for an extension) within the permissible extension period. The defendant was permitted to try to establish excusable neglect. "Unlike Fed. R. App. P. 4(a), the language of Rule 4(b) empowers the district court to extend the filing period with or without motion. Moreover, the notions of finality in criminal and civil cases are not the same. If this appeal is dismissed for failure to perfect a timely appeal, Reyes may then launch a collateral attack on his conviction, alleging ineffective assistance of counsel for loss of appeal." U.S. v. Reyes, 759 F.2d 351, 353 (4th Cir. 1985).

12 **1966 Committee Note**

39 F.R.D. 69, 200 (1966).

13 **Lack of motion**

"Under Rule 4(b) a district court can consider motions for an extension no later than forty days after entry of judgment. After that forty day period expires, there is nothing that either a district court or a court of appeals can do to extend the time for filing a notice of appeal. * * * Since Cheek's motion was untimely, the district lacked authority to decide whether Cheek had shown excusable neglect for the delay." U.S. v. Cheek, 761 F.2d 461, 462–463 (8th Cir. 1985).

14 **Time limit**

Nothing could be done to help a defendant whose notice of appeal from denial of a Federal Rule of Criminal Procedure 35 motion to reduce and correct sentence was filed 50 days after it was due. The fact that he did not receive notice of the entry of judgment until five days before he filed the notice of appeal, due perhaps to the fact that he had been transferred to a new prison, was of no avail. U.S. v. Awalt, 728 F.2d 704 (5th Cir. 1984). The Fifth Circuit has more recently observed that Awalt's characterization of Rule 4(b)'s defendant-appeal deadlines as jurisdictional is subject to question in the light of the Supreme Court's decision in Eberhart (discussed in the prior section). See U.S. v. Leijano-Cruz, 473 F.3d 571 (5th Cir. 2006).

The court of appeals held that because no notice of appeal had been filed within the permissible extension period, it need not determine whether the district court had been correct in denying the Rule 4(b) motion for an extension of time to file an appeal. "The maximum amount of time given under Fed. R. App. P. 4(b) is forty days. In the instant case, forty eight days elapsed before any notice of appeal was filed." U.S. v. Avery, 658 F.2d 759, 761 (10th Cir. 1981).

See also

Court of appeals denied defendant's motion "to withdraw his direct appeal with leave to reinstate it after he has finished pursuing an application for a writ a habeas corpus in the district court." There was no authority for extending the defendant's time to take a direct appeal beyond the limit set by Rule 4(b)(4). The court of appeals observed that it could grant the defendant "the effective equivalent" of his request by staying the direct appeal pending resolution of the Section 2255 petition. But though the court had done so for some other defendants, it saw no reason to do so here. Consolidating the eventual appeal from the Section 2255 proceeding with the direct appeal would not save judicial resources; any evidence adduced during the Section 2255 proceeding would not be part of the record on the direct appeal; and staying the direct appeal would be unfair to a co-defendant and the government. But the court of appeals granted defendant's request for "a six-month extension to file his appellate brief, so his new appellate counsel can fully digest the record and prepare a zealous defense." U.S. v. Vilar, 645 F.3d 543, 545 (2d Cir. 2011).

15 **Construe notice as motion**

U.S. v. Culbertson, 598 F.3d 40, 45 (2d Cir. 2010).
"[A] notice of appeal filed after the ten day deadline, but before the expiration of the thirty-day grace period, should be treated by the district court as a request for an extension." U.S. v. Montoya, 335 F.3d 73, 74 (2d Cir. 2003) (per curiam).
"[W]here a criminal defendant files a notice of appeal after the ten day deadline of Rule 4(b), but before the additional thirty day period for requesting extensions has expired, the district court should treat the notice as a request for an extension. This holding is supported by the fact that Rule 4(b) does not require formal motion practice, and the filing of a notice of appeal indicates to the district court the defendant's intention and desire to appeal." Though the notice of appeal usually will not address the question of excusable neglect, "[a]llowing the district court to receive that proffer at a later point does no violence to either the letter or spirit of Rule 4(b)." U.S. v. Batista, 22 F.3d 492, 493 (2d Cir. 1994).
U.S. v. Golding, 739 F.2d 183, 184 (5th Cir. 1984).
"In criminal cases, this Court has customarily treated a late notice of appeal, filed within thirty days during which an extension is permissible, as a motion for extension of time." Rather than remand for a ruling as to excusable neglect, however, the court would treat the motion for release pending appeal, which was filed immediately after judgment, as a notice of appeal. U.S. v. Whitaker, 722 F.2d 1533, 1534 (11th Cir. 1984).
U.S. v. Ward, 696 F.2d 1315, 1317 (11th Cir. 1983).
U.S. v. Rothseiden, 680 F.2d 96, 98 (11th Cir. 1982).

16 **Remand**
U.S. v. Espinosa-Talamantes, 319 F.3d 1245, 1246 (10th Cir. 2003).
U.S. v. Petty, 82 F.3d 809, 810 (8th Cir. 1996).
"Because Ono filed the notice of appeal more than ten days after entry of the district court's order, but within forty days, we remand this case to the district court for the limited purpose of determining whether excusable neglect exists for the late filing of the notice of appeal." U.S. v. Ono, 72 F.3d 101, 103 (9th Cir. 1995).
But see
The court of appeals took what may strike some readers as a harsh approach in United States v. Perez-Silvan, 861 F.3d 935 (9th Cir. 2017). The court of appeals consolidated defendant's appeals from his judgment of conviction for illegal reentry after deportation and from the judgment revoking a prior supervised release. Defendant's appellate brief conceded the untimeliness of the appeal from the revocation of the supervised release and requested a limited remand under *Ono* (discussed supra this footnote) so that the district court could determine whether the lateness of that notice of appeal was due to excusable neglect. But the court of appeals refused the request for a remand, reasoning that defendant should have fully briefed the issues relating to his concededly-untimely appeal in his appellate brief. "Perez-Silvan offers no arguments for why the district court's decision to revoke his supervised release was in error, nor does he list it as an issue in his opening brief. By neglecting to brief the merits of the issue, he has not adhered to [Federal Rule of Appellate Procedure] 28. Thus, there is no need to remand to the district court to determine if Perez-Silvan's failure to file a timely appeal was excusable." United States v. Perez-Silvan, 861 F.3d 935, 938 (9th Cir. 2017).

17 **Construe motion as notice**
See generally § 3949.6.
U.S. v. Hoye, 548 F.2d 1271 (6th Cir. 1977).

18 **After period has run**
Notice of appeal was filed a day late, but no extension had been granted by the district court. Roughly a year later, the court of appeals remanded for the district court to consider whether to grant an extension. U.S. v. Long, 905 F.2d 1572, 1574–1575 (D.C. Cir. 1990).
On fortieth day after entry of judgment, defendant tendered a notice of appeal to the district clerk and also moved for an extension. The district court's grant of an extension (on the 43rd day after entry of judgment) validated the previously-filed papers. The motion papers themselves served as the functional equivalent of a notice of appeal; alternatively, the notice of appeal itself could be retroactively validated by the extension, since (though not date-stamped by the clerk until the 43rd day) the notice of appeal was given to the clerk on the 40th day. U.S. v. Christoph, 904 F.2d 1036, 1039 (6th Cir. 1990).

U.S. v. Anna, 843 F.2d 1146, 1147–1148 (8th Cir. 1988).
U.S. v. Kaden, 819 F.2d 813, 817 (7th Cir. 1987).
U.S. v. Rothseiden, 680 F.2d 96, 98 (11th Cir. 1982).
U.S. v. Lucas, 597 F.2d 243, 245–246 (10th Cir. 1979).

19 **File the notice**
"The district court has no power to extend the filing period beyond the time limit prescribed by the rule. Thus counsel should have tendered the formal notice of appeal with his motion and in no event later than forty (ten plus thirty) days after entry of judgment." U.S. v. Hoye, 548 F.2d 1271, 1273 (6th Cir. 1977).

20 **Pioneer Investment case**
Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).
"[T]he Supreme Court's construction of 'excusable neglect' in Pioneer also applies to the term 'excusable neglect' as it is used in Federal Rule of Appellate Procedure 4(b)(4)." U.S. v. Torres, 372 F.3d 1159, 1162 (10th Cir. 2004), **citing Wright, Miller & Cooper**.

21 **Inadvertence, mistake, or carelessness**
507 U.S. at 388, 113 S. Ct. at 1495.

22 **"Elastic concept"**
507 U.S. at 392, 113 S. Ct. at 1496, **citing Wright & Miller.**

23 **Not limited**
507 U.S. at 392, 113 S. Ct. at 1496.

24 **Must be excusable**
507 U.S. at 395, 113 S. Ct. at 1498.

25 **Circuits split**
507 U.S. at 387 n.3, 113 S. Ct. at 1494 n.3.

26 **Interpreting Rule 4(a)(5)**
See § 3950.3.

27 **Accountable for attorneys**
507 U.S. at 396, 113 S. Ct. at 1499.

28 **Harder line**
"In district court Mr. Madrid's only support for his claim of excusable neglect was that his trial counsel thought that he had 30 days in which to file a notice of appeal instead of only 10. But we have held that precisely this error does not constitute excusable neglect." U.S. v. Madrid, 633 F.3d 1222, 1227–1228 (10th Cir. 2011). Subsequently, the district court, "finding that Mr. Madrid's trial counsel was ineffective for failing to file a timely notice of appeal[,] vacated its original judgment and reentered it so that Mr. Madrid could file a timely notice of appeal, which he did * * * ." On that appeal, the court of appeals reached the merits. U.S. v. Madrid, 713 F.3d 1251, 1255 (10th Cir. 2013).
Though the appellant's appeal time could not be extended (because neither his notice nor his extension motion were filed within the permissible extension period), "[h]e may now file a motion under 28 U.S.C. § 2255, contending that Forsyth's failure to ensure that the clerk followed through deprived Hirsch of the assistance of counsel guaranteed by the sixth amendment. * * * If the district court finds that Forsyth was asleep on the job,

then the court must vacate the judgment and reimpose the sentence to permit an appeal." U.S. v. Hirsch, 207 F.3d 928, 931 (7th Cir. 2000).

Compare

One of the considerations cited by the court in upholding the district court's grant of an extension is that if the district court thought that the defendant would have a good chance of showing ineffective assistance concerning the lawyer's failure to timely file the notice of appeal, "it reasonably might have concluded that good cause had also been shown to extend the time for filing a notice of appeal in the ordinary course, thus avoiding the need for a time-consuming ancillary proceeding." The court noted, however, that even taking this consideration into account, a simple miscalculation of the appeal deadline would not constitute excusable neglect. U.S. v. Alvarez-Martinez, 286 F.3d 470, 473 (7th Cir. 2002).

29

No stricter

Stutson v. U.S., 516 U.S. 193, 195, 116 S. Ct. 600, 602, 133 L. Ed. 2d 571 (1996), concerned the application of the Rule 4(b) excusable-neglect standard. The district court denied an extension and the court of appeals summarily affirmed. The Supreme Court granted certiorari, vacated the judgment, and remanded for consideration in light of Pioneer Investment. In so doing, the Supreme Court noted "the unanimous view of the six Courts of Appeals that, unlike the Eleventh Circuit in this case, have expressly addressed this new and important issue and have held that the Pioneer standard applies in Rule 4 cases."

Defendant filed his notice of appeal 28 days after entry of the order for which he sought appellate review. A Rule 4(b)(4) extension was available—despite the lack of a motion seeking such an extension—because the notice of appeal was filed "within the Rule 4(b) thirty-day extension period." "Defendant stated in his notice of appeal that he received the order denying his motion to reconsider on August 15, 2011, the day Rule 4(b)'s fourteen-day time period expired. If this statement is true, Defendant may be able to show good cause for his delay. Because Rule 4(b) is not jurisdictional, we exercise our discretion to consider Defendant's appeal. * * * Therefore, we need not remand for a determination of whether Defendant had good cause for delay." U.S. v. Randall, 666 F.3d 1238, 1241 (10th Cir. 2011).

"The analysis of appeals from orders addressing motions for extensions of time under Fed. R. App. P. 4(b) must be examined pursuant to the recent decisions of Pioneer Inv. Servs. Co. v. Brunswick Assocs., 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) and Stutson v. United States, 516 U.S. 193, 116 S. Ct. 600, 133 L. Ed. 2d 571 (1996) (per curiam). These cases provide us with a more liberal definition of what constitutes excusable neglect when an individual seeks a motion for an extension of time in the district court under Fed. R. App. P. 4." U.S. v. Thompson, 82 F.3d 700, 702 (6th Cir. 1996).

The influence of the Pioneer Investment was clearly shown in U.S. v. Hooper, 9 F.3d 257 (2d Cir. 1993). Counsel for a criminal defendant instructed his legal assistant to file a notice of appeal immediately. She prepared the notice, but she filed it late. In part this was because of her mistaken belief that the appeal period was 30 days and in part it was because she thought it would be more economical to file the notice of appeal together with an application to appeal as a poor person. The district court acted properly under circuit precedent in concluding that these reasons did not establish excusable neglect. Earlier cases in the circuit had held that it is not "excusable neglect" if the failure to file a timely appeal was caused by palpable oversight, administrative or clerical errors by the attorney or the attorney's staff, or by an attorney's busy schedule. The Pioneer Investment Services decision, however, overruled circuit precedent. "[T]he Court's opinion is based on the term 'excusable neglect' and draws upon the use of that term in other federal rules. * * * Because nothing in Pioneer limits its interpretation of 'excusable neglect' to the Bankruptcy Rules, it * * * overrules" stricter views under Appellate Rule 4.

Pre-Pioneer Investment cases

Excusable neglect was demonstrated as a matter of law by the district court's failure to appoint new counsel upon excusing counsel appointed for trial, and by the heavily medicated condition of the defendant. U.S. v. Andrews, 790 F.2d 803, 805–807 (10th Cir. 1986).

It was excusable neglect to expect the mail to deliver the notice within three days, and the district court had not notified the defendant that the notice was late. U.S. v. Reyes, 759 F.2d 351 (4th Cir. 1985).

30

Pioneer Investment factors

Though the court of appeals disapproved the district court's partial reliance on counsel's mistake in interpreting the time-computation rule, it upheld the grant of a Rule 4(b)(4) extension because the delay was very brief and "there was 'inclement weather' that interfered with the attorney's and the court's operations." U.S. v. Vogl, 374 F.3d 976, 981 (10th Cir. 2004).

The district court's finding of excusable neglect was an abuse of discretion. Although three of the Pioneer factors weighed in favor of the district court's finding, the fourth—the reason for the delay—was fatal in this case. "The reason for the delay here was simply that defense counsel confused the filing deadlines for civil and criminal appeals. * * * [D]efense counsel's misinterpretation of a readily accessible, unambiguous rule cannot be grounds for relief." U.S. v. Torres, 372 F.3d 1159, 1162–1163 (10th Cir. 2004).

31 **Level of experience**

His lawyer's experience counted against the appellant in United States v. Guy: "As an experienced federal criminal appellate litigator, he must know how to compute the time for taking an appeal in a federal criminal case. If his neglect is excused, the word 'excusable' is read out of Fed. R. App. P. 4(b)." U.S. v. Guy, 140 F.3d 735, 736 (7th Cir. 1998).

The district court properly considered "the attorney's inexperience, good faith, and the lack of prejudice occasioned by his mistake." Though the court of appeals might have affirmed the denial of an extension under the present circumstances, the grant of the extension was within the district court's discretion. "A district court best knows the impact the error has on the court's operation and calendar. It knows the attorney and his motives, the circumstances of the case and the judicial economy of excusing the neglect." U.S. v. Brown, 133 F.3d 993, 997 (7th Cir. 1998).

32 **Difficult issues**

"To the extent * * * that our prior decisions strictly interpret excusable neglect in conflict with Pioneer, they are disapproved. Accordingly, we remand this matter to the district court to reconsider Clark's motion under the standard announced in Pioneer." The court noted, however, that it was not holding that a denial of a Rule 4(b)(4) extension would be an abuse of discretion under the circumstances. "[T]his is a garden variety criminal appeal; there was nothing complicated or novel about the procedural posture of the case, and noticing an appeal here required nothing unusual or difficult. The applicable rules are, furthermore, unambiguous, and whatever confusion Clark's counsel may have suffered because of these rules, we clearly cannot say that his confusion mandates a finding of excusable neglect as a matter of law." U.S. v. Clark, 51 F.3d 42, 44 (5th Cir. 1995).

33 **Counsel failed**

"[I]t seems that Mr. Kaden was relying upon counsel to file the notice of appeal and only later attempted to file on his own." Under the narrow circumstances of the case, the district court did not abuse its discretion in granting an extension. U.S. v. Kaden, 819 F.2d 813, 817 (7th Cir. 1987).

34 **Communication difficulties**

The district court's grant of a Rule 4(b) extension was not an abuse of discretion. "Smith and his attorney had attempted to contact each other regarding whether to file a notice of appeal, but * * * it was difficult for Smith's attorney to locate Smith because Smith was moved to prisons in different states three times during the period immediately following entry of the judgment." U.S. v. Smith, 60 F.3d 595, 596 (9th Cir. 1995).

35 **Clerk's failure**

Under Rule 4(b)(4), "[t]he clerk's failure would have been 'good cause' for counsel to file a belated appeal." But a Rule 4(b)(4) extension was impermissible because both the extension motion and the notice were filed outside the permissible extension period. U.S. v. Hirsch, 207 F.3d 928, 929 (7th Cir. 2000).

36 **Basis for extension**

In United States v. Awalt, the court voiced the unforgiving view that "[l]ack of notice is not a basis for a plea of excusable neglect and does not excuse noncompliance with Rule 4(b)." However, the court's statement was an alternative holding, since Awalt's notice of appeal was filed outside the permissible extension period.

U.S. v. Awalt, 728 F.2d 704, 705 (5th Cir. 1984).

See also

After an amendment to the Sentencing Guidelines "retroactively lower[ed] the offense levels associated with two of the offenses to which May pleaded guilty," the district court sua sponte decided that May was not entitled to a sentence reduction under 18 U.S.C.A. § 3582(c). May had no counsel at the time of the sua sponte order and claimed he did not receive notice of it. Months later a federal public defender learned of the order and, on May's behalf, filed a motion for reconsideration. On May's appeal from the district court's denial of reconsideration, the court of appeals noted caselaw barring reconsideration motions based on Section 3582(c), but held that the government had waived any objection on that ground. In dictum, the court of appeals noted that it "need not explore other avenues of relief available to a defendant who, as here, was subject to a sua sponte denial of § 3582(c)(2) relief that he or she did not learn about (through no fault of the defendant) until after the applicable appeal deadline has passed. The unfairness of such a situation is self-evident. At a minimum, a defendant in that situation can call upon" Rule 4(b)(4)'s provision for an up-to-30-day extension of the appeal deadline. United States v. May, 855 F.3d 271, 272, 274, 275 n.3 (4th Cir. 2017).

37 **Limits on extension**

The district court abused its discretion in granting an extension. "[T]he filing of the notice of appeal in this case took place three-and-a-half months after the expiration of the standard ten-day time frame for criminal appeals, and two-and-a-half months after the expiration of the statutory thirty-day extension for situations where the parties did not comply with Fed. R. App. P. 4(b) due to excusable neglect." U.S. v. Green, 89 F.3d 657, 659 (9th Cir. 1996).

The clerk's failure to mail notice of the order denying the new trial motion could not provide a basis for an extension beyond the period permitted in Rule 4. U.S. v. Buzard, 884 F.2d 475, 475–476 (9th Cir. 1989).

"Upon a showing of excusable neglect, the district court has the authority to extend this time limit for an additional period of 30 days. Since Schuchardt's motion to file a belated appeal came 43 days after entry of the memorandum opinion and order on August 27, 1981, he failed to comply with Rule 4(b). Indeed, appellant asserted his right to an untimely appeal not based upon excusable neglect, but upon failure of appellant or his retained counsel to receive a copy of the memorandum opinion and order (August 27, 1981) within the 10 day period provided in Rule 4(b)." U.S. v. Schuchardt, 685 F.2d 901, 902 (4th Cir. 1982). Other language in Schuchardt—language characterizing Rule 4(b)'s requirements as "jurisdictional"—was more recently recharacterized by the Fourth Circuit "as referring to the emphatic nature of the time limits at issue, and not to any capacity of a non-statutory rule to restrict subject-matter jurisdiction." United States v. Urutyan, 564 F.3d 679, 686 (4th Cir. 2009).

38 **Findings**

The district court entered an order on October 6 denying defendant's sentence reduction motion. The notice of appeal was thus due on October 20—a deadline that the district court could have extended "to November 19 on a showing of excusable neglect or good cause." Defendant filed his notice of appeal on November 9, and argued on appeal "that the district court implicitly granted him a thirty day extension for excusable neglect or good cause under Rule 4(b)(4) when it docketed his late notice of appeal." The government objected to the appeal's timeliness, and the court of appeals held that a finding by the district court was necessary in order for the appeal to be timely. It remanded for the district court to determine whether "excusable neglect or good cause extends Starks' time for filing a notice of appeal to November 9." United States v. Starks, 840 F.3d 960 (8th Cir. 2016).

39 **Implicit findings**

"[T]he district court's order appointing appellate counsel for Garcia-Paulin amounted to a finding of excusable neglect, and the notice of appeal was timely filed." U.S. v. Garcia-Paulin, 627 F.3d 127, 130 n.1 (5th Cir. 2010).

"[T]he district court's ruling on Lister's motion for appointment of appellate counsel was tantamount to an 'excusable neglect' finding, and as such, we have jurisdiction over Lister's appeal." U.S. v. Lister, 53 F.3d

66, 68 (5th Cir. 1995).
The defendant had written to the clerk within the then-10-day appeal period to ask whether the court had considered his post-trial motions in entering the order. The response to this letter was delayed beyond the 10-day period; the notice of appeal was filed within the 30 days following expiration of the 10-day period. To be sure, the mere acceptance of a tardy notice of appeal by the clerk should not be treated as an automatic grant of an extension. Here, although the letter to the clerk did not of itself show an intent to appeal, it did seek information that would affect the nature of an appeal. The defendant had been diligent in pursuing his appeal. The court was thus "inclined to take a practical view in assessing whether he has satisfied the filing requirement." It concluded that the district court's acceptance of the notice of appeal was, "[u]nder the narrow circumstances of this case, * * * tantamount to a finding of excusable neglect." U.S. v. Roberts, 749 F.2d 404, 407–409 & n.4 (7th Cir. 1984) (abrogated on other grounds by, Libretti v. U.S., 516 U.S. 29, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995)).
Although the defendant's notice of appeal, filed 12 days after entry of the judgment, was untimely, the district court's action thereafter in denying a motion to appoint counsel and granting authority to proceed on appeal in forma pauperis constituted a finding of excusable neglect and operated to extend the time for appeal. U.S. v. Quimby, 636 F.2d 86, 89 (5th Cir. 1981).
But see
The court of appeals remanded for findings on the question of excusable neglect. "[B]ecause the district court's granting of in forma pauperis status to the would-be appellant does not necessarily embrace a finding of excusable neglect, it does not suffice for the finding of excusable neglect that Rule 4(b) requires." U.S. v. Anna, 843 F.2d 1146, 1147 (8th Cir. 1988).

40 **Discretion to deny**
"Should the district court find excusable neglect, the court must then examine the questions of prejudice and bad faith. If there is any indication of bad faith or any evidence of prejudice to the appellee or to judicial administration, the district court may then choose to exercise its discretion and deny the requested extension." U.S. v. Thompson, 82 F.3d 700, 702 (6th Cir. 1996).

41 **Need for cross-appeal?**
The cases on each side of the split are collected in footnote 131 in Section 3950.3; some of those cases involve challenges to the extension (under Appellate Rule 4(a)(5)) of time to take a civil appeal.

42 **Will defer**
The court of appeals held that the district court did not abuse its discretion in holding "that, in light of the [district] court's oral and written notice given to [the defendant] immediately upon the pronouncement of his sentence, any confusion he had regarding his right to appeal did not amount to good cause or excusable neglect to justify an extension of time to file a notice of appeal." United States v. Ramos Juarez, 960 F.3d 709, 710-711 (5th Cir. 2020).
"[D]efense counsel mistakenly believed that the order * * * was not an appealable final order, but a preliminary order that would be followed by a final order on Form 247. He quickly realized his error, seventeen days after the original order * * *. There is no indication of bad faith, or that the government was prejudiced by the three-day delay. The district court recognized the reasonableness of counsel's mistake and concluded that it constituted good cause. We cannot say that was an abuse of discretion." U.S. v. Navarro, 800 F.3d 1104, 1109–1110 (9th Cir. 2015).
A court of appeals reviews the decision of a district court to extend the time to appeal under Rule 4(b)(4) "only for abuse of discretion"—a "generous standard of review." U.S. v. Alvarez-Martinez, 286 F.3d 470, 472–473 (7th Cir. 2002).
"We can disagree with the district court's decision, but we can reverse only if we find that granting the extension was an abuse of his discretion." U.S. v. Brown, 133 F.3d 993, 996 (7th Cir. 1998).
The appellate court gives special deference to the district courts with regard to findings of excusable neglect in criminal cases. U.S. v. Smith, 60 F.3d 595, 596–597 (9th Cir. 1995).
"Someone who misses the deadline for appeal must throw himself on the mercy of the district judge, for Rule

4(b) authorizes but does not compel extensions. * * * Although power to dispense mercy is not licence for whimsy—all judicial discretion must be exercised rationally, and without regard to forbidden characteristics such as race—appellate review is deferential." Reasoned judgment was exercised in denying an extension of appeal time; the appeal was dismissed as untimely. U.S. v. Kimberlin, 898 F.2d 1262, 1264–1265 (7th Cir. 1990).

43 **Importance of appeal**

"Because of the special importance of providing criminal defendants an opportunity to appeal, we will accord greater deference to a district court's finding of excusable neglect in a criminal case than in a civil case. For the same reason we will review more searchingly a district court's finding of no excusable neglect in a criminal appeal." U.S. v. Prairie Pharmacy, Inc., 921 F.2d 211, 213 (9th Cir. 1990).

44 **Either party**

A notice of appeal filed by the government within the 30-day period following expiration of the initial period for appeal by the government was sufficient to authorize the district court to enter an order extending the time to appeal, even though the government first made its express request for an extension of time after the 30-day period had expired. Several courts have held that a notice of appeal filed by the defendant within the period allowing for seeking an extension authorizes such action by the district court. The district court's power to grant an extension does not exist without limit, since the notice of appeal must be filed within the 30-day period: "The key question under Rule 4(b) is when the notice of appeal was filed, not when the time extension was granted." U.S. v. Vastola, 899 F.2d 211, 219–222 (3d Cir. 1990), cert. granted, judgment vacated on other grounds, 497 U.S. 1001, 110 S. Ct. 3233, 111 L. Ed. 2d 744 (1990).

"FRAP 4(b) allows the district court to extend the time for filing a notice of appeal up to 30 days upon a showing of excusable neglect. This provision by its terms applies to both appeals by the defendant and the government." U.S. v. Rothseiden, 680 F.2d 96, 98 (11th Cir. 1982).

45 **Sasser case**

See § 3950.8 (discussing U.S. v. Sasser, 971 F.2d 470, 475 (10th Cir. 1992)).

46 **Decisions criticized**

U.S. v. Sasser, 971 F.2d 470, 473–474 (10th Cir. 1992) (criticizing U.S. v. Vastola, 899 F.2d 211 (3d Cir. 1990), cert. granted, judgment vacated on other grounds, 497 U.S. 1001, 110 S. Ct. 3233, 111 L. Ed. 2d 744 (1990)).

47 **Tenth Circuit / Rule 4(b)(4)**

In re Grand Jury Proceedings, 616 F.3d 1186, 1199 (10th Cir. 2010).

48 **Section 3772**

Act of June 25, 1948, 62 Stat. 846–47. Amendments made to Section 3772 between 1948 and 1988 did not affect these aspects of the statute. See Act of May 24, 1949, c. 139, § 60, 63 Stat. 98; Act of July 7, 1958, Pub. L. No. 85-508, § 12(l), 72 Stat. 348; Act of Mar. 18, 1959, Pub. L. No. 86-3, § 14(h), 73 Stat. 11; Act of Oct. 12, 1984, Pub. L. No. 98-473, Title II, § 206, 98 Stat. 1986.

49 **Rule 1(b)**

See § 3947.1.

50 **1971 amendment**

Act of Jan. 2, 1971, Pub. L. No. 91-644, Title III, § 14(a), 84 Stat. 1890.

51 **1971 legislative history**

The Conference Report suggests that the reason for adding the word "order" to the 30-day appeal provision was simply to clarify the breadth of the availability of the government-appeal authorization: "Technical

distinctions in pleadings as limitations on appeals by the United States were eliminated and in their place the government was authorized to appeal any decision or order terminating a prosecution except an acquittal." Conference Report No. 91-1768, 1970 U.S.C.C.A.N. 5842, 5848.

52 **1971 intent**

"[T]he legislative history makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." U. S. v. Wilson, 420 U.S. 332, 337, 95 S. Ct. 1013, 1019, 43 L. Ed. 2d 232 (1975).

53 **Subsequent amendments**

See Pub. L. No. 98-473, Title II, §§ 205, 1206, 98 Stat. 1986, 2153 (Oct. 12, 1984); Pub. L. No. 99-646, § 32, 100 Stat. 3598 (Nov. 10, 1986); Act of Sept. 13, 1994, Pub. L. No. 103-322, Title XXXIII, § 330008(4), 108 Stat. 2142; Act of Nov. 2, 2002, Pub. L. No. 107-273, Div. B, Title III, § 3004, 116 Stat. 1805.

54 **Section 2072**

28 U.S.C.A. § 2072 provides: "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

"(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

"(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title."

Subsection (c) was added in 1990. See Pub. L. No. 101-650, Title III, §§ 315, 321, 104 Stat. 5115 (Dec. 1, 1990).

55 **At least two reasons**

The Tenth Circuit has offered a third reason—namely, that the extension authorized by Rule 4(b)(4) does not affect substantive rights within the meaning of the Enabling Act: "Substantive rights are the bundle of rights such as due process, the right to a speedy trial, or, under the facts of this case, the Government's right to obtain evidence to pursue a grand jury investigation and Appellee's right to exclude irrelevant evidence from that investigation. Granting an extension of time to file a notice of appeal under Rule 4(b)(4) will not alter the substantive standard for adjudicating the Government's right to obtain evidence or Appellee's right to exclude that evidence." In re Grand Jury Proceedings, 616 F.3d 1186, 1197 (10th Cir. 2010).

56 **Showing to finding**

The 1998 Committee Note to Rule 4(b) explains: "[P]aragraph (b)(4) is amended to require only a 'finding' of excusable neglect or good cause and not a 'showing' of them. Because the rule authorizes the court to provide an extension without a motion, a 'showing' is obviously not required; a 'finding' is sufficient."

57 **Rule 4(b)(4) applies**

The Tenth Circuit now agrees that "Rule 4(b)(4) can extend the jurisdictional time limit imposed by 18 U.S.C. § 3731." In re Grand Jury Proceedings, 616 F.3d 1186, 1199 (10th Cir. 2010).

58 **No similar provision**

37 days after the entry of judgment, the district court granted a belated motion for an extension of time, purporting to authorize an additional 10 days. In fact Rule 4(b) limited the extension to no later than November 10, a point 30 days beyond expiration of the original period. The notice of appeal filed on November 15 thus was ineffective. There was nothing in the case that might justify reliance on the "unique circumstances" doctrine. "Although the order of November 7 might have lulled counsel during the last three days of the time allowed by the rule, it did not mislead counsel during the first 37 days." U.S. v. Dumont, 936 F.2d 292, 294–295 (7th Cir. 1991).

59 **Non-jurisdictional**

"Rules 4(b)(1)(A) and 4(b)(4) are 'inflexible claim-processing rule[s],' which, unlike a jurisdictional rule, may

be forfeited if not properly raised by the government. See Kontrick, 540 U.S. at 456, 124 S. Ct. 906. The timeliness requirements of Rules 4(b)(1)(A) and 4(b)(4), however, remain inflexible" if raised by a party. U.S. v. Garduno, 506 F.3d 1287, 1291 (10th Cir. 2007).

60 **Raising challenge to extension**

"[T]he district court would have lacked authority to grant a motion by the government to reconsider its extension order after the notice of appeal became effective. Therefore, the government's failure to file such a motion did not forfeit its right to challenge the extension order in this court." U.S. v. Madrid, 633 F.3d 1222, 1227 (10th Cir. 2011).

61 **Rodriquez case**

Rodriquez v. U.S., 395 U.S. 327, 332, 89 S. Ct. 1715, 1718, 23 L. Ed. 2d 340 (1969). The Rodriquez Court rejected the Ninth Circuit's approach of requiring the petitioner to show some likelihood that the appeal would have had merit. 395 U.S. at 330, 89 S. Ct. at 1717.

The general test for ineffective-assistance-of-counsel claims adopted in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), requires both (1) substandard performance that falls below the standard of "reasonably effective assistance," 466 U.S. at 687, 104 S. Ct. at 2064, and (2) prejudice, i.e., "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S. Ct. at 2068. In a case involving a state prisoner, the Court has held that the Strickland test "applies to claims, like respondent's, that counsel was constitutionally ineffective for failing to file a notice of appeal." Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000). "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal" plainly meets the first prong of the Strickland test. Flores-Ortega, 528 U.S. at 477, 120 S. Ct. at 1035. The second prong of the Strickland test is met by a showing that "but for counsel's deficient conduct, [the petitioner] would have appealed." Flores-Ortega, 528 U.S. at 486, 120 S. Ct. at 1040. The Supreme Court has subsequently held that "that the presumption of prejudice recognized in Flores-Ortega applies regardless of whether a defendant has signed an appeal waiver." Garza v. Idaho, 139 S. Ct. 738, 749, 203 L. Ed. 2d 77 (2019).

"[T]he district court granted DiFalco's 28 U.S.C. § 2255 application claiming that he had received ineffective assistance of counsel because his lawyer failed to file a notice of appeal despite having been directed to do so. The district court vacated the judgment so that the sentence could be re-imposed, thereby allowing DiFalco to file a timely notice of appeal to this Court." United States v. DiFalco, 837 F.3d 1207, 1213–1214 (11th Cir. 2016).

Just after sentencing, defendant's lawyer urged him to appeal the judgment of conviction and predicted that the government would appeal the partial denial of its forfeiture request; defendant told lawyer he did not wish to appeal. Later, the government filed a notice of appeal of the forfeiture ruling (that appeal was later dismissed). Neither the court nor the defendant's lawyer told defendant he had a right to cross-appeal. The lawyer's performance was deficient: his failure to mention the right to cross-appeal "was due to his ignorance of the rule, and was not a strategic or tactical decision." But Section 2255 relief was unwarranted because prejudice had not been shown: there was no substantial evidence that the defendant would have decided to cross-appeal. Keys v. U.S., 545 F.3d 644, 648 (8th Cir. 2008).

62 **Peguero case**

In Peguero, the Court held that "petitioner is not entitled to habeas relief based on a Rule 32(a)(2) violation when he had independent knowledge of the right to appeal and so was not prejudiced by the trial court's omission." Peguero v. U.S., 526 U.S. 23, 29–30, 119 S. Ct. 961, 965, 143 L. Ed. 2d 18 (1999).

See § 541 (discussing Peguero).

63 **Seek collateral relief**

The necessity for collateral relief can stem from courts' view (discussed in Section 3972.2) that "mandatory" deadlines (even if they are nonjurisdictional) must be enforced when properly invoked. Such was the case in

United States v. Marsh, 944 F.3d 524, 527 (4th Cir. 2019), cert. denied, 140 S. Ct. 2787, 206 L. Ed. 2d 952 (2020). The district judge had failed to fulfill Federal Rule of Criminal Procedure 32(j)'s requirement that "[a]fter sentencing—regardless of the defendant's plea—the court must advise the defendant of any right to appeal the sentence." Long after the entry of judgment, the defendant appealed pro se, and the government objected to the appeal's untimeliness. The panel majority held that "a district court's error in failing to inform a defendant at sentencing of a right to appeal" cannot "excuse a defendant's late filing of a notice of appeal under Rule 4(b)." Marsh, 944 F.3d at 527, 529. The court reasoned that though Rule 4(b)'s deadline for criminal defendants' appeals is nonjurisdictional, it is mandatory, accordingly must be enforced if a proper objection is made, and—under Rule 26(b)(1) and Nutraceutical—cannot be equitably tolled. Marsh, 944 F.3d at 529-531. The court stated that even if the "unique circumstances" doctrine might still be available to rescue litigants from noncompliance with mandatory nonjurisdictional deadlines, that doctrine did not apply where, as here, the district court's failure was the omission of information rather than the provision of misinformation. See Marsh, 944 F.3d at 533. (On the unique circumstances doctrine, see supra note 15.) The panel majority stated that "if Marsh seeks habeas relief based on the district court's Rule 32(j) error, and the government cannot show that Marsh had independent knowledge of his limited right to appeal his sentence, then Marsh would be entitled to relief in the form of a vacatur of his sentence and entry of a new judgment" that he could then timely appeal. Marsh, 944 F.3d at 535. Chief Judge Gregory dissented in part, arguing that the court had authority to excuse the appeal's untimeliness, and that "there is no reason [a defendant] should only be able to seek relief through a habeas petition if * * * a judge failing to comply with a compulsory rule is the reason [the defendant] missed the deadline. It is well known that petitioners seeking collateral relief have to clear a higher hurdle than on direct appeal." Marsh, 944 F.3d at 544 (Gregory, C.J., dissenting in part and from the judgment dismissing the appeal).

In his plea agreement, Dowell reserved his right to appeal a career offender status determination but waived appeal on all other grounds and agreed not to bring collateral attack. Claiming that he had instructed his attorney to file a notice of appeal (but the attorney failed to do so), Dowell filed a motion for relief under 28 U.S.C.A. § 2255. After the district court denied the motion, the court of appeals vacated and remanded for "a determination as to whether Dowell told his attorney to file the appeal." If so, then the failure to file the notice of appeal constituted ineffective assistance of counsel, and Dowell had not waived (in the plea agreement) the right to make a Section 2255 motion on that basis. Dowell v. U.S., 694 F.3d 898, 900, (7th Cir. 2012).

Counsel ignored his client's urging to take a direct appeal; the court of appeals dismissed defendant's pro se direct appeal as untimely and directed him to proceed under Section 2255. On appeal from the denial of the 2255 petition, the court treated the issues as if they were raised on direct appeal: "The rather unusual travel of this case could present a procedural tangle, but at oral argument, the government sensibly waived any objection to our consideration of all of West's issues as though on direct appeal, regardless of how they actually arrived here. This seems to us appropriate, especially since parsing through varying standards of review and differentiating between waived and preserved issues would make no difference; the result by any reckoning is the same." West v. U.S., 631 F.3d 563, 566 (1st Cir. 2011).

Though the appellant's appeal time could not be extended (because neither his notice nor his extension motion were filed within the permissible extension period), "[h]e may now file a motion under 28 U.S.C. § 2255, contending that Forsyth's failure to ensure that the clerk followed through deprived Hirsch of the assistance of counsel guaranteed by the sixth amendment. * * * If the district court finds that Forsyth was asleep on the job, then the court must vacate the judgment and reimpose the sentence to permit an appeal." U.S. v. Hirsch, 207 F.3d 928, 931 (7th Cir. 2000).

But see

"Fredrickson points us to no legal authority, and we cannot find any ourselves, that allows a detainee to contest pretrial detention through a § 2241 petition simply because he missed the deadline to appeal an order of detention." (Fredrickson had argued that "he was denied effective assistance by counsel who allowed his bail hearing to be delayed and then failed to appeal the detention.") Fredrickson v. Terrill, 957 F.3d 1379, 1380 (7th Cir. 2020).

64 **Vacate and re-enter**

"[A] defendant is entitled to habeas relief when he requests that a notice of appeal be filed, and his counsel ignores his request. Such failure by counsel constitutes per se ineffective assistance under the Sixth Amendment and entitles the defendant to habeas relief under § 2255. In such a case, the relief available to the

defendant is a delayed direct appeal." U.S. v. Leachman, 309 F.3d 377, 380 n.4 (6th Cir. 2002).
Where counsel's ineffective assistance denied the defendant the right to appeal, the appropriate procedure is to vacate the sentence and re-enter it; the time for appeal runs from the date of resentencing. U.S. v. Beers, 76 F.3d 204, 205 (8th Cir. 1996).
Failure to file a requested appeal was constitutionally ineffective assistance. "The judgment is reversed, and the case is remanded with instructions to vacate Peak's judgment of conviction and enter a new judgment from which an appeal can be taken." U.S. v. Peak, 992 F.2d 39, 42 (4th Cir. 1993).
In U.S. v. Davis, 929 F.2d 554, 556–557 (10th Cir. 1991), the court found that the criminal defendant had instructed appointed counsel to perfect an appeal but that counsel had failed to do so. On motion to vacate sentence made more than fourteen months after sentence, the district court vacated the sentence and reimposed the same sentence. This tactic was found effective to reinstate the right to appeal. Failure to take a timely appeal as instructed established a denial of effective assistance of counsel. "The proper remedy is a resentencing to enable defendant to perfect an appeal. * * * We have jurisdiction because defendant filed a timely notice of appeal after the valid resentencing."
Counsel's failure to perfect the appeal constituted ineffective assistance. "[T]he District Court is directed to grant petitioner's motion, vacate the sentence imposed, and resentence petitioner on the original conviction in order to start the time for appeal running again." Rosinski v. U.S., 459 F.2d 59, 59–60 (6th Cir. 1972).
See also
"If a petitioner has successfully shown that the petitioner was denied the right to direct appeal, the proper remedy is to vacate the sentence and remand for resentencing. * * * A similar rule applies when the trial court fails to inform a defendant of the defendant's right to appeal. The defendant 'need not specify what appellate claims [he] lost,' and collateral relief is justified unless the Government can show by clear and convincing evidence that the defendant took an appeal, waived his right to appeal, or had independent knowledge of his right to appeal." Garcia v. U.S., 278 F.3d 134, 137 (2d Cir. 2002).
"Ineffective assistance may justify vacating and reentering the judgment of conviction, allowing a fresh appeal." Page v. U.S., 884 F.2d 300, 302 (7th Cir. 1989).
"The procedure followed by this court to remedy petitioner's deprivation of his constitutional right to effective assistance of counsel is to vacate the sentence and to remand the case to the trial court for resentencing, the time for appeal then commencing to run from the date of the resentence." Hollis v. U.S., 687 F.2d 257, 259 (8th Cir. 1982).

65 **Eleventh Circuit**

U.S. v. Phillips, 225 F.3d 1198, 1201 (11th Cir. 2000).
The Phillips court was applying the version of Rule 4(b)(1) in effect prior to the 2009 amendments. The 2009 amendments changed Rule 4(b)(1)(A)'s 10-day periods to 14-day periods.

66 **Fifth Circuit**
The Fifth Circuit instructs district courts to follow the procedure of dismissing the § 2255 petition without prejudice, "reinstating" the judgment and sentence (even though the original judgment and sentence have never been vacated), and permitting the petitioner to appeal from this "reinstated" judgment and sentence. The Fifth Circuit holds that it is the ten-day time limitation of Appellate Rule 4(b)—and not the 30-day limitation of Appellate Rule 4(a)—that applies to the appeal of the "reinstated" judgment. U.S. v. West, 240 F.3d 456, 458–462 (5th Cir. 2001).

67 **Recall mandate**
"In the pending case, we are concerned, not with a failure to file an appeal, but with a failure to pursue a properly filed appeal." The lawyer's failure to pursue the appeal constituted constitutionally ineffective assistance. "[I]t is appropriate to place McHale's appeal back on the appellate track in view of his attempt to complain of the denial of effective assistance of appellate counsel via a section 2255 motion filed within the applicable time limit for such a motion. However, for the reasons stated, we deem it appropriate to accomplish the reinstatement expeditiously by recalling the mandate and reinstating the appeal, rather than by reversing the denial of the section 2255 motion." McHale v. U.S., 175 F.3d 115, 119–121 (2d Cir. 1999).

The Sixth Circuit has held that, following dismissal of a timely appeal for failure to prosecute, a district court lacks authority either to permit an out-of-time appeal or to vacate and reenter the judgment of conviction and sentence for the purpose of starting a new appeal time period. On showing ineffective assistance of counsel on the first and timely appeal, however, the court of appeals recalled its mandate and reinstated the first appeal more than four years after it was dismissed. Allen v. U.S., 938 F.2d 664 (6th Cir. 1991).
"28 U.S.C. § 2255 is not the proper vehicle for the reinstatement of an appeal which has been dismissed by this court for failure to prosecute." Instead, the appellant should move in the court of appeals for a recall of the mandate. U.S. v. Winterhalder, 724 F.2d 109, 111 (10th Cir. 1983).

68 **Second Circuit**

U.S. v. Fuller, 332 F.3d 60, 65 (2d Cir. 2003).
The successive-motions concern noted by the Fuller court appears to have been subsequently resolved through the adoption, by the Second Circuit, of the "substantial argument" that the Fuller court suggested. See Urinyi v. U.S., 607 F.3d 318, 321 (2d Cir. 2010) ("Because Urinyi sought only reinstatement of the right to a direct appeal in his prior 2255 motion, we conclude that Urinyi's proposed § 2255 motion represents his 'one full opportunity to seek collateral review' of his conviction and sentence. * * * Accordingly, Urinyi's proposed 2255 motion is not 'second or successive' under the AEDPA * * * .").

69 **Not fully developed**

"We cannot ascertain on this record whether Moreno-Rivera actually gave timely instructions to his trial counsel to file an appeal. * * * Consequently, he is not entitled to the relief contemplated by Fuller. Moreno-Rivera will have the opportunity to develop the record—and seek a remedy, should he prove that his trial counsel failed to timely file a requested appeal—in a § 2255 motion before the District Court." U.S. v. Moreno-Rivera, 472 F.3d 49, 52 (2d Cir. 2006).

69.50 **Wright case**

United States v. Wright, 945 F.3d 677, 687 (2d Cir. 2019), cert. denied, 140 S. Ct. 1234, 206 L. Ed. 2d 225 (2020).

70 **Civil Rule 60(b)**

See § 3950.3. In addition to the general principle noted in the text, Section 3950.3 also notes that Civil Rule 60(b) relief may be available in the Sixth and Ninth Circuits if the litigant is a habeas petitioner who argues that an egregious circumstance such as attorney abandonment or obstruction by guards barred him or her from taking a timely appeal.

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Fed. Ct. App. Manual § 12:2 (7th ed.)

Federal Court of Appeals Manual | March 2021 Update
David G. Knibb[a0]

Part A. Starting the Appeal

Chapter 12. Extending or Reopening the Time to Appeal

§ 12:2. What is excusable neglect or good cause?

References

In response to an extension motion filed within 30 days after the appeal period has expired, the district court may extend that period only if a would-be appellant shows excusable neglect or good cause for failing to appeal on time.

These alternative reasons for an extension serve different purposes. They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations where there is fault; in such situations the need for an extension is usually due to something within the moving party's control. The good cause standard applies where there is no fault—excusable or otherwise. Then the need for an extension is usually due to something beyond the movant's control.

The difference between excusable neglect and good cause is explained in the advisory committee note for the 2002 amendment of F.R.A.P. Rule 4(a)(5). To illustrate, the advisory committee cites the dilemma of the appellant who mails a notice of appeal, but the Postal Service never delivers it. Here, says the committee, "a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its 'neglect' was excusable, given that the movant may not have been neglectful at all." Notices are rarely mailed anymore, but this still illustrates the point.

Before the 2002 amendment of Rule 4(a)(5), most circuits required excusable neglect to justify any extension sought after the appeal period had expired. Now the rule clarifies that an extension is allowed either for excusable neglect or good cause. Many of the earlier cases purporting to find excusable neglect actually illustrate good cause. Courts blurred the labels to reach an equitable result.

A district court has broad discretion in deciding what is excusable neglect or good cause,[1] but that discretion has limits. A district court finding that an extension is "in the interests of justice" will not by itself support an extension.[2] Nor is an extension justified where the only grounds offered are that appeal is only one day late.[3] Absence of prejudice to appellee may be relevant, but it is not equivalent to excusable neglect or good cause.[4]

The excusable neglect standard has undergone considerable expansion since it was first adopted in 1946. Originally, appeal period extensions were authorized only for excusable neglect in learning of the entry of judgment. Even after that qualification was dropped in 1966,[5] case law continued for some time to emphasize that excusable neglect still focused on counsel's failure to learn that judgment had been entered.[6] The 1966 amendment broadened excusable neglect by allowing district courts to grant extensions on other grounds.

Failure to learn of entry of the judgment,[7] and other circumstances similar to estoppel[8] are still a major reason for extensions. The district clerk's failure to notify parties of entry of a judgment, standing alone, usually does not constitute good cause or excusable neglect, but when coupled with other factors, it may.[9] Failure to learn of entry is unlikely to excuse a late appeal unless you show an effort to fulfill what is sometimes called a "duty to inquire."[10]

A party's failure to receive prompt notice of entry of judgment is the only grounds for an extension request under F.R.A.P. Rule 4(a)(6). That part of the rule relates only to extension requests made more than 30 days after the appeal period has expired. If the motion to extend is filed within 30 days after the appeal period, it should be brought under Rule 4(a)(5) which allows extensions either for good cause or excusable neglect.[11]

In 1993 the Supreme Court relaxed the excusable neglect standard even further when it announced a four part test for deciding whether a delay was due to excusable neglect under F.R.C.P. Rule 6(b). That test is: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on proceedings; (3) the reason for the delay, including whether it was within the movant's control; and (4) whether the movant acted in good faith.[12] The Supreme Court reversed a district court for failing to find excusable neglect in the late filing of a bankruptcy proof of claim when the bankruptcy court had not mailed its notice of the deadline in a separate mailing, as required, and counsel was busy moving from one office to another.

Every circuit to consider the issue has concluded that the Supreme Court's broader definition of excusable neglect is not limited to F.R.C.P. Rule 6(b), but extends to F.R.A.P. Rule 4(a)(5) as well.[13] Most circuits also have applied this more liberal definition to extensions in criminal appeals under F.R.A.P. Rule 4(b)(4).[14]

When considering cases that have applied excusable neglect or good cause to specific facts, keep two points in mind. First, the standards have evolved and earlier, more restrictive decisions may no longer be good law. Second, much is committed to the district judge's discretion.[15] A court of appeals affirmance of a district court's extension does not necessarily mean that the opposite result would have been wrong.[16]

Courts of appeals have reviewed the grant or denial of extensions in these situations:

Failure to make decision to appeal. Failure to appeal may be excused under the various circumstances illustrated throughout this section, but we have found no case where a would-be appellant was excused for failing even to decide whether to appeal. Extension was denied when a outgoing corporate president failed to inform directors of a judgment against the corporation,[17] and where appellant neglected to authorize an appeal due to preoccupation with other urgent business.[18]

Mistakes at counsel's office. Counsel have sometimes been relieved of mistakes within their office that resulted in missing an appeal deadline. Extensions were justified due to an internal docketing error that escaped detection because counsel was over-committed on court-appointed cases, many of them pro bono,[19] and when counsel's office mixed up docket numbers in two similar cases that were pending in the same district.[20]

Extension was approved when counsel accidentally entered the wrong year in a new computer-based calendar,[21] a computer error in counsel's office,[22] and when counsel was confused by handling several cases for the same client simultaneously.[23] In a close case, the Ninth Circuit ruled en banc that a large law firm was justified in relying on its calendaring clerk who miscalculated an appeal deadline.[24] Miscalculation alone is rarely enough to support an extension.[25]

An extension was denied when counsel incorrectly counted the appeal period from the date a document was served rather than filed.[26]

Extensions were not justified when mail was misrouted within counsel's office,[27] or when counsel's secretary misplaced a notice of appeal in the files.[28] Relying on staff to ascertain when judgment is entered so that the appeal period starts is also risky. Counsel was not justified in delegating this duty to a temporary receptionist,[29] paralegal,[30] or an inexperienced lawyer who was given inadequate instructions on the need to file an appeal during lead counsel's absence.[31]

Errors involving co-counsel. Extension was allowed based on a misunderstanding between two lawyers as to who was to file a notice of appeal,[32] but was denied when only one of two counsel received notice that judgment had been entered. Appellant was not justified in waiting for co-counsel to receive notice of entry,[33] or in waiting for an opinion from outside counsel before deciding whether to appeal.[34]

Counsel's legal mistakes. Extensions have been allowed based on counsel's mistaken belief that a longer appeal period applied to admiralty cases,[35] and inexperienced counsel's mistaken reliance on a state rule about excluding weekends when

calculating a deadline.[36] Extensions have also been approved when counsel miscalculated the deadline to appeal,[37] failed to understand the consequences of an order,[38] and concluded in good faith that a post-trial motion suspended the appeal period,[39] especially when the district judge was also mistaken.[40]

Conversely, relying on the wrong rule in computing the appeal period may not be excusable.[41] Extension was not justified based on counsel's mistaken belief that the procedure for service of electronically filed documents gave three extra days to file a notice of appeal.[42] Extensions were not justified when counsel thought a post-judgment motion might suspend the appeal period, even though it was filed too late to have that effect,[43] when counsel was ignorant of the rule regarding the effect of a post-judgment motion on a notice of appeal,[44] when counsel ignored the plain meaning of the rule that a district court could not extend the time to file a post-trial motion that would suspend the appeal period,[45] when counsel erroneously assumed that the extra three days allowed after service of an order applied when the deadline ran from entry not service,[46] or when counsel relied on erroneous advice from opposing counsel about the deadline.[47]

Extension also was not justified when counsel's associate incorrectly researched the law on whether the appeal period was suspended,[48] or when counsel failed to follow usual office practice and relied instead on an inexperienced employee to file a timely appeal, but then gave inadequate instructions and failed to supervise that employee.[49] Failure to realize that an order was final,[50] and failure to understood an unambiguous court order,[51] also do not justify an extension.

Before the rule changed, a post-judgment motion suspended the appeal period only if it was served with 10 days after judgment. Missing that deadline and thereby failing to suspend the appeal period did not justify an extension when counsel mistakenly added three days for service by mail to the time allowed for serving a post-judgment motion.[52] The same mistake might have the same effect when mailing a notice of appeal.

Legal uncertainties. Sometimes the effect of motions or rulings is unclear. Prudent counsel would assume the worst and file a notice of appeal to protect themselves, but extensions have been allowed when they were less prudent. Extensions were justified when:

— A ruling on a post-judgment motion created uncertainty about the finality of the court's order.[53]

— An important decision was published right before expiration of the appeal period.[54]

— Counsel mistakenly believed that a post-judgment motion did not nullify his notice of appeal when the law on that issue was unsettled.[55]

— Counsel was uncertain as to whether opponent's motion to amend the judgment would suspend the appeal period when that motion only sought to add a citation to the district court's opinion.[56]

But waiting for the court to rule on an in forma pauperis request before appealing does not justify an extension.[57]

As these cases suggest, whether an extension is justified due to legal uncertainties depends on the reasonableness of that uncertainty.

Mail delays. Before the advent of electronic filing, this was a frequent area of dispute. Now the issue is more likely to arise when something goes awry in a party's attempt to file electronically.[58]

Extensions have been approved based on unusually slow mail delivery of a notice of appeal to the district clerk,[59] or when mail was delayed by unusual weather[60] or the grounding of all commercial flights after a terrorist attack.[61]

Conversely, extensions were denied or reversed when counsel allowed only four days for regular mail between New York and Chicago during the Christmas holidays,[62] or only three days after an earlier letter had taken longer.[63] The latter case was further aggravated by counsel's failure to inquire with the clerk about receipt of the notice.

The trend has been toward denying extensions based on slow mail.[64] Despite this trend, the issue is still fact-specific and not subject to a per se rule,[65] to the extent that parties still use mail.

Other mailing errors. Extension was allowed when counsel's mail was misrouted after a change of address,[66] or the clerk did not receive a mailed notice of appeal on time because the building number was left off the courthouse address.[67]

Extension was not authorized when the notice of appeal was inadvertently mailed to the wrong court.[68]

Errors in the notice of appeal. If the notice of appeal is too defective to start an appeal,[69] it may still justify an extension of time to file a correct notice. Thus, extensions were allowed when appellants' counsel failed to list all appellants in an original and timely notice of appeal, when the entire list covered 29 pages and it was unclear under prior practice whether all had to be named.[70] The same result followed when the other appellants only numbered seven,[71] and when appellant's timely notice of appeal contained an error in appellant's name.[72] Lack of prejudice to appellee is especially relevant in extensions based on defective notices.[73]

Extension may be denied when counsel made no effort to correct a defective notice of appeal until the court of appeals questioned its sufficiency.[74] This would depend on how obvious the defect was.

Illness. An extension was affirmed based on the sudden illness of a sole practitioner,[75] and when counsel who was responsible for filing the appeal was preoccupied by a severely ill child, even though appellant was represented by multiple attorneys.[76] Extension was also approved when counsel was diagnosed with illness on the date appeal was due.[77] Conversely, extensions were denied or reversed when counsel became ill during vacation, but had made no arrangement for coverage of an active case while away.[78] Nor was an extension justified when counsel's wife was hospitalized, but he kept working on other cases.[79]

Claims of incapacity based on medical treatment must be substantiated.[80]

Vacation. When the appeal period expired while counsel was on vacation, an extension was denied or reversed when both lead and local counsel failed to arrange coverage when they knew the appeal period would expire during local counsel's vacation.[81] The same result occurred when counsel did not check entry of judgment before leaving on vacation and had no system to cover an appeal if judgment was entered while away.[82]

Counsel's preoccupation with other matters. Under "Mistakes at Counsel's Office" we discuss some mishaps where extensions have been allowed based on counsel handling other matters. The "too busy" excuse worked once when counsel had taken on too many pro bono cases.[83] Generally, however, courts are unsympathetic to this complaint. Counsel's preoccupation with his campaign to run for governor did not justify an extension.[84] Preparations for oral argument in another appeal fared no better.[85] As one court noted, counsel's heavy workload cannot justify an extension because it "could be claimed in almost every instance."[86]

Counsel's personal problems. As already shown in this section, some types of problems may be excusable. But without more, counsel's personal and professional problems will not warrant an extension.[87]

Confusion created by the court. As discussed in section 12:3, the "unique circumstances" doctrine no longer applies in civil cases that once allowed an extension based on appellant's reliance on erroneous actions or assurances by the district court, but the same facts may still justify an extension based on excusable neglect or good cause. This is true when the district court enters essentially duplicative orders on different dates,[88] or where it fails to enter judgment on a separate document.[89]

Electronic filing and case management should reduce these problems, but the district clerk's failure to notify counsel of a judgment's entry remains the classic grounds for an extension, especially when the clerk had given prompt notice of all prior orders.[90] Extensions were also allowed when the clerk entered judgment out of sequence on the docket,[91] or failed to transfer the docket sheet when a case was reassigned so that the docket did not show and counsel did not learn of the judgment's entry.[92] Extension was also granted when the clerk gave counsel incorrect information about the entry date for an order denying a post-judgment motion.[93]

When the court does not contribute to counsel's confusion, the chances of an extension are slim. None was justified when counsel failed to check a legal newspaper for orders entered by the judge because of a mistaken belief that the order would be prepared by counsel.[94] And even if the district court does not label its order as one disposing of motions that suspend the appeal period, and the notice of electronic filing is similarly incomplete, that does not excuse counsel's failure to read the readily-available order that would remove any doubt.[95]

***

These cases illustrate how much excusable neglect and good cause depend on the facts. If you need to request an extension, devote much attention to the declarations or affidavits supporting your motion. The more you explain the circumstances, the better your chances of obtaining an extension and having that extension affirmed on appeal. Conversely, failure to explain will work against you.[96]

Footnotes

a0 Of the Washington Bar.

1 Mayle v. State of Illinois, 956 F.3d 966, 968-69 (7th Cir. 2020); Gooch v. Skelly Oil Co., 493 F.2d 366 (10th Cir.), cert. denied, 419 U.S. 997, 95 S.Ct. 311, 42 L.Ed.2d 270 (1974); Gann v. Smith, 443 F.2d 352 (5th Cir. 1971).
Appellate review of this discretion is discussed in section 12:5.

2 Doctor v. Seaboard Coast Line R.R. Co., 540 F.2d 699 (4th Cir. 1976).

3 Sprout v. Farmers Insurance Exchange, 681 F.2d 587 (9th Cir. 1982).

4 Mayle v. State of Illinois, 956 F.3d 966, 969 (7th Cir. 2020); Spound v. Mohasco Indus., Inc., 534 F.2d 404 (1st Cir.), cert. denied, 429 U.S. 886, 97 S.Ct. 238, 50 L.Ed.2d 167 (1976).

5 Advisory Committee Report, F.R.C.P. Rule 73, 39 F.R.D. 69 (1966).

6 Winchell v. Lortscher, 377 F.2d 247 (8th Cir. 1967); Maryland Cas. Co. v. Conner, 382 F.2d 13 (10th Cir. 1967).

7 Long v. Emery, 383 F.2d 392 (10th Cir. 1967); Winchell v. Lortscher, 377 F.2d 247 (8th Cir. 1967); Vac-Air, Inc. v. John Mohr & Sons, Inc., 53 F.R.D. 365 (E.D.Wis. 1971).

8 See Files v. City of Rockford, 440 F.2d 811 (7th Cir. 1971), and authorities cited therein.

9 Vianello v. Pacifico, 905 F.2d 699 (3d Cir. 1990); Mennen Co. v. Gillette Co., 719 F.2d 568 (2d Cir. 1983); Hensley v. Chesapeake & Ohio Ry. Co., 651 F.2d 226 (4th Cir. 1981); Babich v. Clower, 528 F.2d 293 (4th Cir. 1975); Fidelity & Deposit Co. of Maryland v. USAFORM Hail Pool, Inc., 523 F.2d 744 (5th Cir. 1975), cert. denied, 425 U.S. 950, 96 S.Ct. 1725, 48 L.Ed.2d 194 (1976); In re Morrow, 502 F.2d 520 (5th Cir. 1974) and authorities cited therein.
But see Fase v. Seafarers Welfare and Pension Plan, 574 F.2d 72 (2d Cir. 1978).

10 Wilson v. Atwood Group, 725 F.2d 255 (5th Cir.), cert. dismissed, 468 U.S. 1222, 105 S.Ct. 17, 82 L.Ed.2d 912 (1984).

11 Zack v. U.S., 133 F.3d 451 (6th Cir. 1998).

12 Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489,

123 L.Ed.2d 74 (1993).

13 Robb v. Norfolk & Western Ry. Co., 122 F.3d 354 (7th Cir. 1997); Thompson v. E.I. DuPont de Nemours & Co., Inc., 76 F.3d 530, 532 (4th Cir. 1996); Advanced Estimating System, Inc. v. Riney, 77 F.3d 1322 (11th Cir. 1996); Virella-Nieves v. Briggs & Stratton Corp., 53 F.3d 451, 454, n.3 (1st Cir. 1995); Fink v. Union Central Life Ins. Co., 65 F.3d 722 (8th Cir. 1995); Reynolds v. Wagner, 55 F.3d 1426 (9th Cir.), cert. denied, 516 U.S. 932, 116 S.Ct. 339, 133 L.Ed.2d 237 (1995); City of Chanute, Kansas v. Williams Natural Gas Co., 31 F.3d 1041, 1045–46 (10th Cir. 1994).

14 U.S. v. Brown, 133 F.3d 993, n.1 (7th Cir. 1998); U.S. v. Thompson, 82 F.3d 700 (6th Cir. 1996); U.S. v. Clark, 51 F.3d 42, 44 (5th Cir. 1995); U.S. v. Hooper, 9 F.3d 257, 259 (2d Cir. 1993) (overruling earlier, more restrictive decisions). After the government changed its position on appeal, the Supreme Court vacated and remanded for further consideration the only decision reaching a contrary result. Stutson v. U.S., 516 U.S. 193, 116 S.Ct. 600, 133 L.Ed.2d 571 (1996).

15 Mendez v. Knowles, 556 F.3d 757, 765 (9th Cir.), cert. denied, 558 U.S. 999, 130 S.Ct. 509, 175 L.Ed.2d 362 (2009).

16 This point was emphasized in Metropolitan Federal Bank v. W.R. Grace & Co., 999 F.2d 1257, 1260 (8th Cir. 1993) where the Eighth Circuit found a district court's exercise of discretion "arguable."
On appellate review of extensions generally, see section 12:5.
The abuse of discretion standard of review is discussed in section 31:4.

17 Import Specialties, Inc. v. Mylee Digital Sciences, Inc., 518 F.Supp. 1295 (E.D.Wis. 1981).

18 Britt v. Whitmire, 956 F.2d 509 (5th Cir. 1992); Allied Steel v. City of Abilene, 909 F.2d 139 (5th Cir. 1990).

19 Pearson v. Gatto, 933 F.2d 521 (7th Cir. 1991).

20 Marshall v. Hope Garcia Lancarte, Inc., 632 F.2d 1196 (5th Cir. 1980).

21 Stotter v. University of Texas at San Antonio, 508 F.3d 812, 820 (5th Cir. 2007).

22 Treasurer, Trustees of Drury Industries, Inc. Health Care Plan and Trust v. Goding, 692 F.3d 888, 893 (8th Cir. 2012).

23 U.S. v. Marshall, 431 F.Supp. 888 (N.D.Ill. 1977).
But see Airline Pilots v. Executive Airlines, Inc., 569 F.2d 1174 (1st Cir. 1978).

24 Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004) (en banc), cert. denied, 544 U.S. 961, 125 S.Ct. 1726, 161 L.Ed.2d 602 (2005).
The Ninth Circuit also has excused other calendaring errors by counsel. Washington v. Ryan, 833 F.3d 1087, 1099 (9th Cir. 2016) (en banc) (counsel's failure to detect calendaring error that caused late appeal may be excusable neglect) (dicta).

25 Marquez v. Mineta, 424 F.3d 539 (7th Cir. 2005).

26 In re Johns-Manville Corp, 476 F.3d 118 (2d Cir. 2007) (cross-appeal filed one day late).

27 Pasquale v. Finch, 418 F.2d 627 (1st Cir. 1969).

28 Borio v. Coastal Marine Construction Co., 881 F.2d 1053 (11th Cir. 1989).

29 Kings Professional Basketball Club, Inc. v. Green, 597 F.Supp. 350 (D.Mo. 1984).

30 In re O.P.M. Leasing Services, Inc., 769 F.2d 911 (2d Cir. 1985).

31 Ragguette v. Premier Wines & Spirits, 691 F.3d 315 (3d Cir 2012).

32 In re Buckingham Super Markets, Inc., 631 F.2d 763 (D.C. Cir. 1980).
But see Pratt v. McCarthy, 850 F.2d 590 (9th Cir. 1988).

33 Gooch v. Skelly Oil Co., 493 F.2d 366 (10th Cir.), cert. denied, 419 U.S. 997, 95 S.Ct. 311, 42 L.Ed.2d 270 (1974).

34 Bishop v. Corsentino, 371 F.3d 1203 (10th Cir. 2004).

35 Feeder Line Towing Serv., Inc. v. Toledo, Peoria & Western R.R. Co., 539 F.2d 1107 (7th Cir. 1976).
But see Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1 (1st Cir. 2001) (non-admiralty case).

36 U.S. v. Brown, 133 F.3d 993 (7th Cir. 1998).
But see U.S. v. Guy, 140 F.3d 735 (7th Cir. 1998) (experienced lawyer not excused).

37 Marx v. Loral Corp., 87 F.3d 1049 (9th Cir. 1996) overruled on other grounds by Lacey v. Maricopa County, 693 F.3d 896 (9th Cir. 2012).
But see Marquez v. Mineta, 424 F.3d 539 (7th Cir. 2005); Barnes v. Cavazos, 966 F.2d 1056 (6th Cir. 1992).

38 Torockio v. Chamberlain Mfg. Co., 56 F.R.D. 82 (W.D.Pa. 1972), affirmed, 474 F.2d 1340 (3d Cir. 1973).

39 Milwee v. Peachtree Cypress Investment Co., 510 F.Supp. 290 (E.D.Tenn.1979).
But see Parke-Chapley Construction Co. v. Cherrington, 865 F.2d 907 (7th Cir. 1989).

40 Varhol v. National R.R. Passenger Corp., 909 F.2d 1557 (7th Cir. 1990) (when district court gave extra time for post-judgment motion, even though not allowed, no abuse of discretion in later granting appellant's excusable neglect motion).

41 U.S. v. Madrid, 633 F.3d 1222, 1226-27 (10th Cir. 2011); U.S. v. Torres, 372 F.3d 1159 (10th Cir. 2004); Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1 (1st Cir. 2001); Amatangelo v. Borough of Donora, 212 F.3d 776 (3d Cir. 2000); U.S. v. Clark, 51 F.3d 42 (5th Cir. 1995).
Compare U.S. v. Brown, 133 F.3d 993 (7th Cir. 1998) (inexperienced counsel excused for mis-reliance on state rule), with U.S. v. Guy, 140 F.3d 735 (7th Cir. 1998) (experienced lawyer not excused).

42 McCarty v. Astrue, 528 F.3d 541 (7th Cir. 2008).

43 Advanced Estimating System, Inc. v. Riney, 130 F.3d 996 (11th Cir. 1997); Cange v. Stotler and Co.,

913 F.2d 1204 (7th Cir. 1990).

The court may be more lenient with a pro se appellant. Whitfield v. Howard, 852 F.3d 656, 660–61 (7th Cir. 2017) (extension allowed when pro se failed to understand that second post-judgment motion did not suspend appeal period).

44 Weinstock v. Cleary, Gottlieb, Steen & Hamilton, 16 F.3d 501 (2d Cir. 1994). The rule counsel ignored has since changed, but the case still illustrates the type of neglect not regarded as excusable.

45 Prizevoits v. Indiana Bell Telephone Co., 76 F.3d 132, 134 (7th Cir. 1996).

46 Eastman v. First Data Corp., 736 F.3d 675 (3d Cir. 2013).

47 Silivanich v. Celebrity Cruises, Inc., 333 F.3d 355, 367-70 (2d Cir. 2003), cert. denied, 540 U.S. 1105, 124 S.Ct. 1047, 157 L.Ed.2d 890 (2004).

48 Peake v. First National Bank & Trust, 101 F.R.D. 544 (W.D.Mich. 1984).

49 Ragguette v. Premier Wines & Spirits, 691 F.3d 315, 328 (3d Cir. 2012).

50 Mirpuri v. ACT Mfg., Inc., 212 F.3d 624, 631 (1st Cir. 2000) (result turns on order's clarity); U.S. v. O'Neil, 709 F.2d 361 (5th Cir. 1983).

51 Mirpuri v. ACT Mfg., Inc., 212 F.3d 624, 631 (1st Cir. 2000).

52 Halicki v. Louisiana Casino Cruises, Inc., 151 F.3d 465 (5th Cir. 1998), cert. denied, 526 U.S. 1005, 119 S.Ct. 1143, 143 L.Ed.2d 210 (1999); Midwest Employers Casualty Co. v. Williams, 161 F.3d 877 (5th Cir. 1998); Kyle v. Campbell Soup Co., 28 F.3d 928 (9th Cir. 1994). With electronic service and filing, this would be less of a problem today, but the courts' reasoning could still apply.

53 Cannabis Action Network v. City of Gainesville, 231 F.3d 761 (11th Cir. 2000), reversed and remanded on other grounds, 534 U.S. 1110, 122 S.Ct. 914, 151 L.Ed.2d 881 (2002).

54 Dugan v. Missouri Neon & Plastic Advertising Co., 472 F.2d 944 (8th Cir. 1973).

55 Lorenzen v. Employees Retirement Plan of the Sperry and Hutchinson Co., Inc., 896 F.2d 228 (7th Cir. 1990). Under revised rules a post-judgment motion no longer nullifies a notice of appeal. This case still illustrates the court's willingness to excuse counsel's mistake when the law is unsettled.

56 Romero v. Peterson, 930 F.2d 1502 (10th Cir. 1991). The rules have since eliminated much of the confusion about clerical versus substantive motions, but the case still illustrates the principle.

57 Bishop v. Corsentino, 371 F.3d 1203 (10th Cir. 2004) (appellant should file notice of appeal first without filing fee and then request in forma pauperis approval).

58 Abuelyaman v. Illinois State University, 667 F.3d 800, 808 (7th Cir. 2011) (extension approved when party did not learn until several days later than attempted electronic filing of notice of appeal had failed).

59 Zipperer v. School Board of Seminole County, 111 F.3d 847 (11th Cir. 1997) (notice mailed six days before deadline); Tarabishi v. McAlester Regional Hospital, 951 F.2d 1558, 1563, n.3 (10th Cir. 1991),

cert. denied, 505 U.S. 1206, 112 S.Ct. 2996, 120 L.Ed.2d 872 (1992) (mailed notice normally would have arrived on time); Ramseur v. Beyer, 921 F.2d 504 (3d Cir. 1990) (notice mailed six days before deadline; clerk's office five miles away); Vogelsang v. Patterson Dental Co., 904 F.2d 427 (8th Cir. 1990); U.S. v. Twomey, 845 F.2d 1132 (1st Cir. 1988); Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (1980), motion granted, 633 F.2d 1210 (5th Cir. 1981).

60 U.S. v. Carson, 52 F.3d 1173, 1180 (2d Cir. 1995) (notice mailed during severe winter storm two business days before deadline).
See Chao Lin v. U.S. Attorney General., 677 F.3d 1043, 1046 (11th Cir. 2012) (inaccessibility of court due to inclement weather not applicable where party could file electronically).

61 Ticknor v. Choice Hotels International, Inc., 275 F.3d 1164 (9th Cir. 2002) (applied to late cost bill).

62 Reinsurance Co. of America, Inc. v. Administratia, 808 F.2d 1249 (7th Cir. 1987).

63 Thompson v. E.I. DuPont de Nemours & Co., Inc., 76 F.3d 530, 532 (4th Cir. 1996).

64 Before the Supreme Court's 1993 restatement of the excusable neglect standard, most circuits regarded it as inexcusable to rely on the mail for timely filing of a notice of appeal under any circumstances. See Vogelsang v. Patterson Dental Co., 904 F.2d 427 (8th Cir. 1990) and cases cited therein.
The Eighth Circuit has since questioned that view in light of the Supreme Court's ruling. Fink v. Union Central Life Ins. Co., 65 F.3d 722 (8th Cir. 1995).

65 Mendez v. Knowles, 556 F.3d 757, 766 (9th Cir.), cert. denied, 558 U.S. 999, 130 S.Ct. 509, 175 L.Ed.2d 362 (2009) (extension approved even though counsel only allowed two days for mail delivery).

66 Mayle v. State of Illinois, 956 F.3d 966, 968–69 (7th Cir. 2020).

67 Scarpa v. Murphy, 782 F.2d 300 (1st Cir. 1986).

68 State of Oregon v. Champion International Corp., 680 F.2d 1300 (9th Cir. 1982). The notice would have been timely if it had been mailed to the wrong federal court, 28 U.S.C. § 1631, but this notice was sent to state court.

69 See section 8:2.

70 In re San Juan Dupont Plaza Hotel Fire Litigation, 888 F.2d 940 (1st Cir. 1989).

71 City of Chanute, Kansas v. Williams Natural Gas Co., 31 F.3d 1041 (10th Cir. 1994).
But see Gochis v. Allstate Insurance Co., 16 F.3d 12 (1st Cir. 1994) (counsel did not explain failure to name 79 appellants).

72 Metropolitan Federal Bank v. W.R. Grace & Co., 999 F.2d 1257 (8th Cir. 1993).

73 Lackey v. Atlantic Richfield, 990 F.2d 202 (5th Cir. 1993) (no abuse of discretion in allowing extension where appellees not prejudiced); Reed v. Gardner, 986 F.2d 1122 (7th Cir.) (same), cert. denied, 510 U.S. 947, 114 S.Ct. 389, 126 L.Ed.2d 337 (1993); Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan, 947 F.2d 246 (7th Cir. 1991) (excusable neglect doubtful where notice designated appellants as "et al.," but extension approved because no prejudice to appellee).

74 Rivera v. Puerto Rico Telephone Co., 921 F.2d 393 (1st Cir. 1990); Pontarelli v. Stone, 930 F.2d 104 (1st Cir. 1991).

75 U.S. v. Dabney, 393 F.Supp. 529 (E.D.Pa. 1975). Whether illness qualifies as good cause depends on the degree of illness and availability of other personnel to help during counsel's absence. See Islamic Republic of Iran v. Boeing Co., 739 F.2d 464 (9th Cir. 1984), cert. denied, 470 U.S. 1053, 105 S.Ct. 1755, 84 L.Ed.2d 819 (1985).

76 Local Union No. 12004 v. Massachusetts, 377 F.3d 64 (1st Cir. 2004).

77 Jaburek v. Foxx, 813 F.3d 626, 630 (7th Cir. 2016).

78 Gibbons v. U.S., 317 F.3d 852 (8th Cir. 2003).

79 Meza v. Washington State Department of Social and Health Services, 683 F.2d 314 (9th Cir. 1982).

80 Nicholson v. City of Warren, 467 F.3d 525, 526 (6th Cir. 2006) (extension justifiably denied for pro se appellant who gave no details on duration of treatment).

81 U.S. v. Commonwealth of Virginia, 508 F.Supp. 187 (E.D.Va. 1981). See also Pratt v. McCarthy, 850 F.2d 590 (9th Cir. 1988); Alaska Limestone Corp. v. Hodel, 799 F.2d 1409 (9th Cir. 1986).

82 Marsh v. Richardson, 873 F.2d 129 (6th Cir. 1989).

83 Redfield v. Continental Casualty Corp., 818 F.2d 596 (7th Cir. 1987).

84 Sherman v. Quinn, 668 F.3d 421 (7th Cir. 2012).

85 U.S. v. Mitchell, 464 F.3d 1149 (10th Cir. 2006) (same result even though short delay caused no prejudice); U.S. v. Myers, 692 F.2d 861 (2d Cir. 1982).

86 Pinero Schroeder v. Federal Nat'l Mortgage Ass'n, 574 F.2d 1117 (1st Cir. 1978); Matter of Morrow, 564 F.2d 189 (5th Cir. 1977).
But see Pearson v. Gatto, 933 F.2d 521 (7th Cir. 1991), where counsel's mistake was excused because of over-commitment to court-appointed cases, many of them pro bono.

87 Chipperfield v. Posi-Seal International, 550 F.Supp. 1322 (D.R.I. 1982).

88 Bennett v. City of Holyoke, 362 F.3d 1, 5 (1st Cir. 2004).

89 In re Donnell, 639 F.2d 535 (9th Cir. 1981) (appeal from bankruptcy court to district court). The separate document requirement is discussed in section 7:3.

90 Brotherhood of Railway Carmen v. Chicago & North Western Transportation Co., 964 F.2d 684 (7th Cir. 1992).

91 Rodgers v. Watt, 722 F.2d 456 (9th Cir. 1983).

92 Redfield v. Continental Casualty Corp., 818 F.2d 596 (7th Cir. 1987).

93 Meek v. Metropolitan Dade County, 908 F.2d 1540 (11th Cir. 1990).

94 Bortugno v. Metro-North Commuter Railroad, 905 F.2d 674 (2d Cir. 1990).

95 Two-Way Media LLC v. AT&T, Inc., 782 F.3d 1311 (Fed. Cir. 2015).

96 See U.S. v. Gomez-Gomez, 643 F.3d 463, 472 (6th Cir. 2011) (no abuse of discretion in denying extension when defendant did not explain why needed research could not be completed in normal appeal period); Gibbons v. U.S., 317 F.3d 852 (8th Cir. 2003).

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