

1 **FOR PUBLICATION**

CLERK OF COURT
SUPERIOR COURT

2014 AUG -7 PM 4: 21

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4 **IN THE SUPERIOR COURT**
FOR THE
5 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

BY: 
DEPUTY CLERK OF COURT

6 **COMMONWEALTH OF THE**
NORTHERN MARIANA ISLANDS,

) **CRIM. CASE NO. 14-0019**

7 **Plaintiff,**

8 **v.**

) **ORDER DENYING DEFENDANT'S**
) **MOTION FOR EXTENSION OF TIME**
) **TO FILE AN APPEAL DUE TO DEFENSE**
) **ATTORNEY'S MISREADING THE**
) **PLAIN LANGUAGE OF THE RULES**

9 **HU JIE FANG,**

10 **Defendant.**

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12 This matter was heard on August 6, 2014 at 9:00 a.m. in Courtroom 220A. Defendant Hu Jie
13 Fang was present and represented by Assistant Public Defender Matthew Meyer. The
14 Commonwealth was represented by Assistant Attorney General Margo Badawy.

15 Defendant Fang was sentenced in this case on June 18, 2014. On June 19, 2014 Defendant
16 filed a Motion for Stay of Execution of Sentence pending appeal. The motion was set for hearing on
17 August 6, 2014. The Commonwealth filed an opposition to the Motion for Stay of Execution of
18 Sentence on June 24, 2014. Defendant filed a second motion requesting an immediate stay of
19 sentence pending appeal on July 3, 2014. On July 24, 2014, Defendant filed a notice of appeal, but
20 the notice was rejected as untimely. Later that day, Defendant filed the instant Motion for Extension
21 of Time to File an Appeal.

22 Based on a review of the filings, oral argument, and applicable law, the Court denies
23 Defendant's motion for an extension of time to file an appeal.

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1 The NMI Supreme Court Rules govern the timeline for filing an appeal. Generally, the
2 defendant must file within 30 days of judgment, or if the government appeals first, within 30 days
3 of the government’s appeal. NMI Sup. Ct. R. 4(b)(1)(A). However, if the defendant files certain
4 motions after judgment of conviction, then the defendant has 30 days from the entry of the order
5 disposing of the motion to file an appeal. NMI Sup. Ct. R. 4(b)(3)(A). The rule is explicit about
6 which motions under the Commonwealth Rules of Criminal Procedure qualify and lists the
7 following motions: “(i) For judgment of acquittal under Rule 29; (ii) For a new trial under Rule 33
8 . . . or (iii) For arrest of judgment under Rule 34.” NMI Sup. Ct. R. 4(b)(3)(A).

9 The Court may extend the time to file a notice of appeal “[u]pon a finding of excusable
10 neglect or good cause.” NMI Sup. C. R. 4(b)(4). Good cause for delayed filing is found “in
11 situations in which there is no fault – excusable or otherwise. In such situations, the need for an
12 extension is usually occasioned by something that is not within the control of the movant.” *United*
13 *States v. Cortez-Perez*, 317 Fed. Appx. 829, 830 (10th Cir. 2009).¹ The good cause determination is
14 within the trial court’s discretion. *See United States v. Myers*, 2014 U.S. Dist. LEXIS 60230 *7
15 (W.D.N.C. April 25, 2014).

16 In cases where there is fault or mistake on the part of the party who requires the extension,
17 the question is whether the delay is a result of excusable neglect. The CNMI Supreme Court, in
18 deciding whether to allow the late filing of an appellate brief, described the standard for excusable
19 neglect under NMI Supreme Court Rule 4(a)(5), which is the civil counterpart to Rule 4(b)(4):
20 “While ‘excusable neglect’ is a somewhat flexible concept, ‘inadvertence, ignorance of the rules, or
21 mistakes construing the rules do not usually constitute ‘excusable’ neglect.” *Owens v.*
22 *Commonwealth Health Ctr.*, 2011 MP 6 ¶ 18 (quoting *Pincay v. Andrews*, 351 F.3d 947, 950 (9th

23 ¹ The NMI Supreme Court Rules are patterned after the Federal Rules of Appellate Procedure, and as such, federal case
24 law interpreting those rules is instructive. *See Owens v. Commonwealth Health Ctr.*, 2011 MP 6 ¶¶ 16-18 (looking to
federal case law to interpret the excusable neglect standard in NMI Sup. Ct. R. 4(a)).

1 Cir. 2003)).² Similarly, the CNMI Superior Court considered the meaning of “excusable neglect” in
2 the context of Rule 60(b)(1) of the Commonwealth Rules of Civil Procedure and noted that
3 “[r]outine carelessness by counsel does not generally constitute excusable neglect.” *Palacios v.*
4 *Mendiola*, Small Claims No. 10-0157 (NMI Super. Ct. June 12, 2012) (Order Denying Motion to
5 Set Aside Default Judgment at 8).

6 The U.S. Supreme Court considered the meaning of “excusable neglect” in the federal
7 bankruptcy statute in *Pioneer Investment Services v. Brunswick Associates Limited Partnership*,
8 507 U.S. 380 (1993). There the U.S. Supreme Court stated that in deciding whether neglect is
9 excusable, “the determination is at bottom an equitable one, taking account of all relevant
10 circumstances surrounding the party’s omission.” *Id.* at 395. These relevant circumstances include:
11 (1) danger of prejudice to the other party; (2) length of delay; (3) impact of delay on judicial
12 proceedings; (4) reason for delay and whether it was within the control of the moving party; and (5)
13 whether the moving party acted in good faith. *Id.*

14 The federal courts vary in how strictly or liberally they construe the notion of “excusable
15 neglect” regarding an extension of time to file a notice of appeal. The Fifth and Seventh Circuits
16 have directed district courts to apply the approach articulated by the U.S. Supreme Court in *Pioneer*
17 when making the determination of whether a failure to timely file notice of appeal was due to
18 “excusable neglect,” even in criminal cases. *See, e.g., United States v. Clark*, 51 F.3d 42, 44 (5th
19 Cir. 1995); *and United States v. Hooper*, 9 F.3d 257, 259 (2nd Cir. 1993). Many other federal courts
20 have applied the *Pioneer* factors in civil cases concerning extension of time for appeal. *See, e.g.,*
21 *Pincay v. Andrews*, 389 F.3d 853, 855-56 (9th Cir. 2004) (“Pincay II”).

22
23 ² This Ninth Circuit decision was later reheard en banc. *Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004) (Pincay II). In
24 Pincay I, the Ninth Circuit reversed the district court’s decision that it was excusable neglect for an attorney to rely on
the assistance of a paralegal who entered the wrong date. In Pincay II, the Ninth Circuit granted en banc
reconsideration, went against the earlier panel decision, and affirmed the district court’s decision that such a mistake
was excusable neglect.

1 Generally, federal courts have found that “excusable neglect” is meant to be narrowly
2 construed, and that ignorance of the law or rules is not excusable neglect. *See, e.g., United States v.*
3 *Tait*, 1992 U.S. App. LEXIS 11752 *6 (7th Cir. May 14, 1992); *Kyle v. Campbell Soup Co.*, 28
4 F.3d 928 (9th Cir. 1994); *and United States v. Madrid*, 633 F.3d 122, 1227-28 (10th Cir. 2011).
5 Even so, the equitable principles underlying Rule 4(b) allow for an exception to the general rule if
6 the circumstances so require. For example, the Seventh Circuit stated that a trial court may find
7 excusable neglect “when the tardy movant bungles the job due to a plausible misconstruction—not
8 mere ignorance.” *See Tait*, 1992 U.S. App. LEXIS 11752 at *7. Similarly, the Ninth Circuit stated,
9 “We recognize that a lawyer’s failure to read an applicable rule is one of the least compelling
10 excuses that can be offered; yet the nature of the contextual analysis and balancing of the factors
11 adopted in *Pioneer* counsel against the creation of any rigid rule.” *Pincay II*, 389 F.3d at 859. In
12 another example, in *United States v. Brown*, the Seventh Circuit affirmed the district court’s
13 excusable neglect finding where the defendant’s appointed attorney confused the state rules with the
14 federal rules when calculating time, the defendant was his only client in federal court, and the
15 notice of appeal was filed one day late due to the time miscalculation. 133 F.3d 993 (7th Cir. 1998).

16 In this case, the delayed filing is due to defense counsel’s mistake in construing the NMI
17 Supreme Court Rules. Defense counsel explained that in reading NMI Supreme Court Rule 4(b)(3),
18 he believed the time for filing a notice of appeal would be thirty days after the disposition of the
19 Motion for Stay of Execution of Sentence. A motion for a stay of execution of sentence is governed
20 by Rule 38 of the Commonwealth Rules of Criminal Procedure. NMI R. Crim. P. 38; *and* NMI Sup.
21 Ct. R. 8(c). A motion under Rule 38 of the Commonwealth Rules of Criminal Procedure is not one
22 of the motions listed under NMI Supreme Court Rule 4(b)(3) that extends the time for filing a
23 notice of appeal. Defense counsel explains that he believed the Motion for Stay of Execution of
24 Sentence fell under a Rule 34 motion for arrest of judgment. However, such an interpretation is not

1 plausible. A motion for arrest of judgment under Rule 34 is filed in situations where “the court was
2 without jurisdiction of the offense charged.” NMI R. Crim. P. 34. No such argument was advanced
3 in Defendant’s Rule 38 Motion for Stay of Execution of Sentence.

4 The Court finds that here there is no good cause for missing the deadline to file a notice of
5 appeal, because this situation does not involve any elements outside the control of defense counsel.
6 *See Cortez-Perez*, 317 Fed. Appx. at 830; *also Myers*, 2014 U.S. Dist. LEXIS 60230 at *7 (finding
7 good cause where defendant’s failure to file was outside of his control because he did not receive a
8 copy of the judgment). The Court is not convinced that good cause for missing a deadline exists any
9 time the moving party’s attorney makes a mistake due to no fault of the party. *Cf. Owens*, 2011 MP
10 6 ¶¶ 20-22; *also Madrid*, 633 F.3d at 1227-28 (dismissing defendant’s criminal appeal due to
11 counsel’s mistake about deadline to file appeal).

12 Nor does the Court find that this situation involved excusable neglect. The mistake in this
13 case was not one of plausible misconstruction, but went against the plain language of the rules.
14 Reviewing the circumstances of the case, the Court finds that defense counsel acted in good faith.
15 There is no indication that the delay here would prejudice the Commonwealth, and the request for
16 extension was filed within 30 days of the expiration of the first deadline for filing the notice of
17 appeal. However, the Court finds that these factors are outweighed by the other relevant
18 circumstances: there was no reason not to file the notice of appeal at the same time as, or shortly
19 after, the original motion was filed; and counsel’s reason for not filing was a lack of familiarity with
20 the established rules.³ The Court is also concerned that granting an extension in a situation such as
21 this one will open the door to an extension in practically every case.

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23
24 ³ In addition to the plain language of the NMI Supreme Court Rules, the NMI Supreme Court set forth the procedure for
filing a motion for stay of execution of judgment in *Commonwealth v. Martinez*, 4 NMI 18 ¶ 10 (1993):
(1) upon imposition of sentence, a notice of appeal should immediately be filed;

1 Accordingly, the Court denies Defendant's Motion for an Extension of Time to File an
2 Appeal. Such a ruling makes the other two motions moot, as they were conditioned on Defendant
3 filing an appeal.

4 **IT IS SO ORDERED** this 7th day of August, 2014.



8 JOSEPH N. CAMACHO
9 Associate Judge

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- 21 (2) the motion for stay of sentence pending appeal should be filed simultaneously or immediately
22 after filing of the notice of appeal;
23 (3) the court should allow the opposing party to respond in writing, and should then set an expedited
24 hearing;
 (4) if, after the hearing, the judge denies the motion, the judge should expeditiously issue a written
 order setting forth the reason(s) for the denial; and
 (5) the defendant may then renew the motion for stay with the Supreme Court, attaching the trial
 court's order.