

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GRAHAM ROGER-LEE DE-LUIS-CONTI,)
)
 Petitioner,)
 v.)
 M. S. EVANS, Warden,)
)
 Respondent.)
 _____)

No. C 05-2245 SBA (pr)

**ORDER GRANTING PETITIONER'S
MOTION FOR AN EXTENSION OF
TIME TO FILE A NOTICE OF APPEAL**

Petitioner, a state prisoner, filed a petition for a writ of habeas corpus challenging his 2000 conviction in the Napa County Superior Court.

In an Order dated August 5, 2008, the Court denied the petition on the merits.

Petitioner filed a notice of appeal on September 5, 2008¹ as well as multiple applications for a certificate of appealability (COA), which the Court construed as a single request for a COA.

Thereafter, the Court found that the notice of appeal was timely filed, and issued an Order granting in part and denying in part the request for a COA, stating:

Petitioner filed a **timely** notice of appeal as well as multiple applications for a certificate of appealability (COA) (docket nos. 31, 34, 35), which the Court will construe as a single request for a COA. The Court GRANTS in part and DENIES in part Petitioner's request for a COA.

(Sept. 15, 2009 Order at 1 (emphasis added).)

Before the Court is an Order from the Ninth Circuit Court of Appeals, which has construed Petitioner's notice of appeal to include a motion for an extension of time to file a notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5). The Ninth Circuit has remanded Petitioner's case to this Court for the limited purpose of allowing it to rule on Petitioner's motion for an extension of time. The Ninth Circuit states that Petitioner has not demonstrated that his notice of

¹ The Court applies the "mailbox rule" to deem the notice of appeal filed on September 5, 2008, the date it was signed. See Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir. 2001), vacated and remanded on other grounds by Carey v. Saffold, 122 S. Ct. 2134 (2002) (A federal or state habeas petition is deemed filed on the date the prisoner submits it to prison authorities for filing, rather than the date it is received by the courts -- this is known as "the mailbox rule.")

1 appeal was "filed or delivered to prison officials within 30 days from the entry of the August 5, 2008
2 judgment." (Ninth Cir. Order at 1.) Respondent has filed an opposition to the late notice of appeal,
3 and Petitioner has filed a response to the opposition.

4 **DISCUSSION**

5 Relief from the deadline for a timely notice of appeal may be obtained by a motion in the
6 district court under Rule 4(a)(5) (motion for an extension of time). Rule 4(a)(5) allows a motion for
7 an extension of time if the party requests it within thirty days of the expiration of the time to file the
8 notice and shows excusable neglect or good cause. See Fed. R. App. P. 4(a)(5).

9 In the instant case, as mentioned above, this Court previously found that Petitioner's notice of
10 appeal was timely filed when it issued its Order ruling on his request for a COA. (Sept. 15, 2009
11 Order at 1.) Because the Ninth Circuit has remanded this action to this Court for the limited purpose
12 of ruling on the pending motion for an extension of time, this Court shall now: (1) again review
13 whether Petitioner's notice of appeal was timely filed; and (2) rule on whether to grant or deny his
14 motion for an extension of time to file a notice of appeal.

15 As mentioned above, Petitioner filed the notice of appeal on September 5, 2008. Respondent
16 argues that Petitioner had "until Thursday, September 4, 2008, to deposit the notice of appeal with
17 the institution for filing." (Opp'n at 3.) Petitioner filed his notice of appeal thirty-one days after the
18 August 5, 2008 judgment was entered; therefore, it appears that Respondent's argument has merit.
19 Thus, Petitioner must show excusable neglect or good cause under Rule 4(a)(5) for the one-day
20 delay.
21

22 The United States Supreme Court has held that "neglect" encompasses faultless omissions
23 and omissions caused by carelessness, and that the determination whether neglect was "excusable" is
24 an equitable one, taking account of all relevant circumstances surrounding a party's omission.
25 Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 388, 392, 395 (1993)
26 (addressing phrase "excusable neglect" in Rule 6(b) of the Federal Rules of Civil Procedure). In
27 evaluating whether neglect is excusable under Rule 4(a)(5), a district court must consider the four
28 factors established by the United States Supreme Court in Pioneer: "(1) the danger of prejudice to

1 the non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the
2 reason for the delay, including whether it was within the reasonable control of the movant, and (4)
3 whether the moving party's conduct was in good faith." Pincay v. Andrews, 389 F.3d 853, 855 (9th
4 Cir. 2004) (en banc) (citing Pioneer, 507 U.S. at 395). The weighing of Pioneer's equitable factors is
5 left to the discretion of the district court "in every case." Id. at 860.

6 Although "inadvertence, ignorance of the rules, or mistakes construing the rules do not
7 usually constitute 'excusable' neglect," Pioneer, 507 U.S. at 392, the Ninth Circuit has held that
8 there is no rigid legal rule against late filings attributable to any particular type of negligence, such
9 as delegating an obligation to know a rule to a non-lawyer or failure to read or understand an
10 unambiguous federal rule, such as the rule governing time to appeal. Pincay, 389 F.3d at 858-60.
11 Thus, in Pincay, the Ninth Circuit held that the district court did not abuse its discretion in finding
12 excusable neglect where the attorney missed the deadline to appeal because he had delegated that
13 responsibility to a paralegal who, in turn, miscalendared the deadline. Id. The Ninth Circuit has
14 found the Pioneer factors applicable in habeas corpus cases. Mendez v. Knowles, 556 F.3d 757, 765
15 (9th Cir. 2009).

16 Given the above principles, the failure of Petitioner to meet the thirty-day filing deadline to
17 file the notice of appeal by a mere **one day** constitutes excusable neglect. First, there is no evidence
18 or claim that allowing Petitioner a one-day extension of time to file the notice of appeal will result in
19 any prejudice to Respondent. Second, the one-day delay is minimal and there is no showing of any
20 negative impact on any judicial proceedings from such delay. Third, the delay was presumably the
21 result of the carelessness and neglect of Petitioner, who is a pro se prisoner, in determining the
22 proper filing deadline. Finally, there is no evidence that Petitioner's delay in filing was the result of
23 bad faith. Accordingly, a balancing of these factors militates in favor of finding excusable neglect
24 and granting Petitioner's motion for an extension of time to file a notice of appeal. Cf. Mendez, 556
25 F.3d at 765-67 (finding excusable neglect where attorney mailed notice of appeal two days before
26 deadline, and it arrived day after deadline). Moreover, as to the discretion of this Court in analyzing
27 what constitutes excusable neglect, there is no evidence indicating a lack of diligence on behalf of
28 Petitioner. Lastly, the likelihood of injustice if the motion for an extension of time to file a notice of

1 appeal is denied is not negligible; therefore, it weighs in favor of allowing such an extension.

2 Accordingly, Petitioner's motion for an extension of time to file a notice of appeal is
3 GRANTED. Because the September 5, 2008 filing date is one day after the deadline, the Court
4 GRANTS a one-day extension of time for Petitioner to file a notice of appeal. Based on this Court's
5 decision, Petitioner's notice of appeal is considered to be timely filed.

6 The Clerk of the Court shall send a copy of this Order to the Ninth Circuit.

7 IT IS SO ORDERED.

8 Dated: 1/18/11


SAUNDRA BROWN ARMSTRONG
United States District Judge

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DE-LUIS-CONTI,

Plaintiff,

v.

DIRECTOR OF CALIFORNIA DEPARTMENT
OF CORRECTIONS et al,

Defendant.

Case Number: CV05-02245 SBA

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on January 19, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Graham Roger-Lee De-Luis-Conti T21195
Corcoran State Prison
P.O. Box 5242
Corcoran, CA 93212

Dated: January 19, 2011

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk