

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LADMARALD CATES,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
HONORABLE J.P. STADTMUELLER

BRIEF FOR THE UNITED STATES AS APPELLEE

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

Defendant's jurisdictional summary is not complete and correct. See Fed. R. App. P. 28(a)(4) and Cir. R. 28. Defendant was charged with violations of federal law under 18 U.S.C. 242 and 18 U.S.C. 924(c)(1)(A).¹ R. 1 at 1-2.² The district

¹ Defendant's summary omitted reference to 18 U.S.C. 924(c)(1)(A), which was an additional basis underlying the district court's jurisdiction.

² "R. _" refers to documents filed in the district court by docket number. "_
(continued...)

court had jurisdiction under 18 U.S.C. 3231 and entered judgment on July 30, 2012. Appx. 1. Defendant timely filed a notice of appeal on August 13, 2012. R. 58. This court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Did the district court abuse its discretion when it denied counsel's motion, filed more than five months after trial, to extend the long-expired 14-day deadline for filing post-conviction motions?

STATEMENT OF THE CASE

Ladmarald Cates, a Milwaukee police officer, was indicted under 18 U.S.C. 242 and 18 U.S.C. 924(c)(1)(A) after he responded to a 911 call, entered the victim's home, and raped her in her bathroom. R. 1 at 1-2; Jan. 9 Tr. 37, 54-65. After a three-day trial, a jury convicted him of deprivation of rights under 18 U.S.C. 242 and acquitted him of the use of a firearm during a crime of violence under 18 U.S.C. 924(c)(1)(A). R. 1 at 1-2; R. 22 at 1-2. The jury found that Cates committed "aggravated sexual abuse." R. 22 at 2.

Sentencing was set for April 11. On that day, at defendant's request, the

(...continued)

Tr. _" refers to the date and pages in the trial transcript. "Br. _" refers to pages in defendant's opening brief. "Appx. _" refers to pages in the appendix attached to defendant's brief. The paper copies of defendant's appendix served on the United States do not show page numbers, but defendant gives page numbers in a table of contents. The electronic version of the appendix does show page numbers.

court delayed sentencing in order to appoint new counsel. New counsel was appointed on April 27, retroactive to April 23. Appx. 9; R. 37. Two months after his appointment and five months after the two-week deadline for filing post-verdict motions under Federal Rules of Criminal Procedure 29 and 33, new counsel requested an extension of time for filing post-conviction motions. Appx. 12, 21. The court denied the motion, finding there was no excusable neglect that would permit the filing of belated motions. Appx. 28.

On July 30, the court sentenced Cates to 288 months in prison, a sentence 72 months below the minimum guidelines sentence. Appx. 2; July 30 Tr. 14. Defendant filed a notice of appeal on August 13, 2012. R. 58.

STATEMENT OF FACTS

1. Cates' Response To Lemons' 911 Call For Help

On July 16, 2010, Iema Lemons, a nineteen-year-old mother of two, had a fight with a neighbor. Jan. 9 Tr. 34, 36. The neighbor punched her in the eye, leaving a welt. Jan. 9 Tr. 44. She grabbed Lemons' hair, pulling out some of her hair extensions, and Lemons retreated to her house. Jan. 9 Tr. 37, 44-45. The neighbor, with a friend, began to kick on Lemons' doors and throw bricks and bottles at her house, breaking eight to ten windows. Lemons called 911. Jan. 9 Tr. 37. Officers Ladmarald Cates, a thirteen-year veteran of the Milwaukee Police

Department, and his partner Alvin Hannah arrived 15 to 20 minutes later, a little after 1:00 in the afternoon. Jan. 9 Tr. 37-38, 84.

Lemons recognized Cates. Jan. 9 Tr. 38. About a year earlier, he had pulled her over in a traffic stop. Jan. 9 Tr. 38. He had not given Lemons a ticket but left her his phone number. Jan. 9 Tr. 38-39. He “thought [Lemons] was cute and he wanted [her] to call him.” Jan. 9 Tr. 39. Cates pulled Lemons over again several months later, gave her a ticket, and asked her why she had not called him. Jan. 9 Tr. 39, 126.

When the police arrived on July 16, Cates suggested Lemons get her children out of the house because of the broken glass. Jan. 9 Tr. 40. A relative came and picked up the children. Jan. 9 Tr. 41, 142. Officer Hannah arrested Lemons’ fifteen-year-old brother, LaQuan Lemons, saying he was missing from a group home. Jan. 9 Tr. 41, 80. Hannah took LaQuan to his squad car. Jan. 9 Tr. 41. Lemons, who had guardianship of LaQuan, protested and called her social worker. Jan. 9 Tr. 42-43. She was not able to reach the social worker and began looking for the paperwork she needed to prove she was LaQuan’s guardian. Jan. 9 Tr. 43. Lemons asked her boyfriend, Jermaine Ford, to go to the store to buy her some cigarettes. Jan. 9 Tr. 43-44, 87; Jan. 10 Tr. 237-238. Lemons was left alone with Cates.

Cates and Lemons walked around her apartment as she showed him the damage to her windows. Jan. 9 Tr. 50. Lemons was wearing a tank top and pajama bottoms. Jan. 9 Tr. 44. Cates remarked on the tattoo on Lemons' lower back, which said "Miss Wet Wet." Jan. 9 Tr. 49. He asked her what it meant and said, "How wet does it really get?" Jan. 9 Tr. 49. Lemons said she did not want to discuss the tattoo. Jan. 9 Tr. 49.

When Ford returned from the store, Cates sent him back to buy Cates and his partner some bottled water. Jan. 9 Tr. 52; Jan. 10 Tr. 238-239. He rebuffed Lemons' offer of cold water from the refrigerator. Jan. 9 Tr. 52. He gave Ford some money and told him to keep the change. Jan. 9 Tr. 52. After Ford left, Cates suggested he and Lemons go into the bathroom to look at the broken window. Jan. 9 Tr. 53. As they were walking towards the bathroom, he told Lemons "his dick was getting hard because" he could see she "didn't have any panties on." Jan. 9 Tr. 54.

2. *Cates' Rape Of Lemons*

When she got to the bathroom, Lemons bent down to retrieve a brick which had been thrown through the window. Jan. 9 Tr. 54. She turned around and saw Cates "with his pants open and his penis was out." Jan. 9 Tr. 54. Cates told Lemons repeatedly to "Suck [his] dick." Jan. 9 Tr. 55. She did not answer, and she believed the statement to be "a demand" that she "give him oral sex." Jan. 9

Tr. 55. Lemons complied, because she was “scared.” Jan. 9 Tr. 56. She explained, “he[’s] the police. And he had a gun.” Jan. 9 Tr. 56. “[W]hen you call for help who do you call? The police. You have to listen to what the police say.” Jan. 9 Tr. 56. Lemons, who is five-foot-one and 110 pounds, felt she could not defy Cates, who is about six-foot-one and 175 pounds. Jan. 9 Tr. 56; Jan. 10 Tr. 470.

While Lemons had Cates’ penis in her mouth, he grabbed her hair and pulled on her head. Jan. 9 Tr. 58. He put his hand in her pajamas and put his fingers in her vagina. Jan. 9 Tr. 58-59. After two or three minutes, Cates said he “want[ed] some pussy.” Jan. 9 Tr. 59. She looked at him and he repeated the demand “louder and meaner.” Jan. 9 Tr. 98. Lemons felt this was a “demand,” not a question, and she “let him do what he was gonna do.” Jan. 9 Tr. 59-60. She asked Cates to put on a condom. Jan. 9 Tr. 60. He ignored the request. Jan. 9 Tr. 60. He grabbed Lemons’ neck, squeezed it hard, pulled Lemons’ pants down and bent her over the sink. Jan. 9 Tr. 61-62. He “jabbed” himself inside Lemons. Jan. 9 Tr. 61. She did not ask him to stop because she was afraid he would have “probably gotten more aggressive.” Jan. 9 Tr. 130. She “felt like he was ripping [her].” Jan. 9 Tr. 64. She felt dizzy and in pain. Jan. 9 Tr. 64. Afterwards, Lemons left the bathroom feeling sick. Jan. 9 Tr. 65. She vomited. Jan. 9 Tr. 65.

3. *Lemons' Arrest And Report Of The Rape*

Lemons left the house and saw a friend, Candice Velez, standing about two houses away. Jan. 9 Tr. 67-68, 131. She ran to her friend and, "crying hard," told her about the rape. Jan. 9 Tr. 68, 131. Cates saw what she had done, pulled her away from Velez, and told her to "stop saying things about [him.]" Jan. 9 Tr. 134. At some point, Lemons also told her friend Kristi Brooks about the rape. Jan. 9 Tr. 71, 137-138, 152. Brooks said Lemons appeared "shook up" and "mad, angry, sad, all at once." Jan. 9 Tr. 153-154.

Lemons managed to reach LaQuan's social worker by phone and she gave the phone to Officer Hannah. Jan. 9 Tr. 67. Hannah spoke with the social worker and, afterwards, released LaQuan. Jan. 9 Tr. 67. Lemons did not tell Hannah about the rape because she did not "trust" him. Jan. 9 Tr. 68.

Lemons then caught sight of the people who had broken her windows, and got into an argument with Hannah when he refused to arrest them. Jan. 9 Tr. 68, 110. Hannah claimed Lemons could not have seen who broke her windows because she had blinds. Jan. 9 Tr. 110. LaQuan joined the argument and shouted insults at Hannah. Jan. 9 Tr. 69, 111. Hannah tried to arrest LaQuan, and grabbed him by his neck. Jan. 9 Tr. 69-70. Lemons shouted at Hannah and moved towards him, and Cates grabbed her. Jan. 9 Tr. 111-112. By some accounts, Lemons

kicked Hannah. Jan. 9 Tr. 70; Jan. 10 Tr. 394.³ Eventually, some 15 more officers arrived and arrested Lemons, Velez, and Brooks. Jan. 9 Tr. 70-71. Lemons told the officers she had been raped and asked to go to a hospital. Jan. 9 Tr. 71. The officers did not take her claim seriously and at least one told her she was lying. Jan. 9 Tr. 72; Jan. 10 Tr. 275, 416. At the station, Brooks told Cates she would “tell[] the judge on him,” and he laughed at her. Jan. 9 Tr. 156.

Police put Lemons in an interview room and handcuffed her to the table. Jan. 9 Tr. 73. Cates came in and asked the officer in the room to leave. Jan. 9 Tr. 73. When he was alone with Lemons, he told her she “better not say” that he had raped her. Jan. 9 Tr. 73-74. Cates told Lemons “nothing [would] happen to him, he’ll only get suspended” and he had “partners that[] [were] going to take care of [Lemons]” if she persisted in her accusations. Jan. 9 Tr. 74. He promised that if she “didn’t tell on him” he would help her and her kids move to a new house. Jan. 9 Tr. 114. Lemons did not want to upset Cates, so she told him, untruthfully, that she planned to blame the rape on Officer Hannah. Jan. 9 Tr. 74, 114-115.

Lemons did not tell the officer who interviewed her about the rape because she assumed the officers were friends. Jan. 9 Tr. 75, see also Jan. 10 Tr. 418. When asked, “So you didn’t have any problems with any police officers?” she said

³ Lemons denied she kicked Hannah and was not charged in relation to the incident. Jan. 9 Tr. 77, 112.

“No.” Jan. 10 Tr. 419. At some point Lemons complained she needed to go to the hospital because she had a headache and she thought she was bleeding from the earlier fight. Jan. 10 Tr. at 286, 421. Back in her cell she felt ill and vomited. Jan. 9 Tr. 75-76. A jail worker approached and said, “That’s the one saying she was raped.” Jan. 10 Tr. 419. Lemons started “screaming” repeatedly “that motherf’r raped me, that motherf’r raped me.” Jan. 10 Tr. 420. Jailers called officers from the Professional Performance Division to investigate. Jan. 10 Tr. 421.

4. *Lemons’ Injuries And Distress*

Within a few hours Lemons was taken to the hospital and examined by a nurse specializing in sexual assault treatment. Jan. 9 Tr. 76, 77; Jan. 10 Tr. 302-304. The nurse observed that Lemons seemed upset. Jan. 10 Tr. 306. She “curled up in a ball” on the couch and was “shaking back and forth.” Jan. 10 Tr. 306. Lemons told the nurse that Cates had coerced her into having oral sex and that he vaginally raped her. Jan. 10 Tr. 311-313, 316-317. She said that she had vaginal pain, pain in her neck, a headache, and nausea. Jan. 10 Tr. 313. The nurse observed areas of swelling on Lemons’ neck. Jan. 10 Tr. 321.

A police detective, Reginald Thompson, also interviewed Lemons that day. He observed that she was “crying” and “distraught.” Jan. 9 Tr. 177. Lemons told Thompson about the rape, explaining she complied with Cates’ demands because she was afraid. Jan. 9 Tr. 191.

After the rape, Ford noticed changes in Lemons and in their relationship. She was anxious and she avoided the back of the house. Jan. 10 Tr. 242. She cried often. Jan. 10 Tr. 242. Ford found he “couldn’t even touch her” or “be around her.” Jan. 10 Tr. 242. Lemons eventually broke up with Ford because, she claimed, he could not protect her. Jan. 9 Tr. 235, 244.

5. *Cates’ Statements To Police*

The evening of the rape Detective Thompson also interviewed Cates. Jan. 9 Tr. 176-177. He recorded the discussions, and portions were played at trial. Jan. 9 Tr. 182. Thompson asked Cates to describe his interaction with Lemons. Jan. 9 Tr. 182. Cates recounted the events of the night, but did not mention the sexual contact with Lemons. Jan. 9 Tr. 182; Jan. 10 Tr. 489-490. At some point he claimed he had had sex with Lemons a year ago. Jan. 9 Tr. 183; Jan. 10 Tr. 491. When asked, Cates denied any sexual contact in Lemons’ bathroom. Jan. 9 Tr. 182. Thompson asked Cates if he would submit to DNA collection, and Cates said he “wasn’t comfortable” with that. Jan. 9 Tr. 182. There was a break in the interview, and when it resumed Cates changed his story, admitting Lemons had touched his penis but asserting that the two did not have vaginal or oral sex on July 16. Jan. 10 Tr. 490. Thompson asked Cates to turn over his uniform pants and he complied. Jan. 9 Tr. 186. Later analysis revealed Lemons’ DNA on Cates’ pants and boxer shorts. Jan. 10 Tr. 327.

The next day, Cates called Thompson and asked to “clear up some things” from the interview. Jan. 9 Tr. 187. Cates admitted to having oral and vaginal sex with Lemons on July 16, and said that she had initiated the sex. Jan. 9 Tr. 188-190; Jan. 10 Tr. 490. He admitted that he had not told the truth when he had claimed he and Lemons had sex on a prior occasion. Jan. 9 Tr. 184-185.

6. *The Trial*

At trial, Cates testified that he and Lemons had consensual oral sex for two or three minutes at the back of the house, stopping because they feared someone would come into the house. Jan. 10 Tr. 438-440. After Ford went to the store to get Cates something to drink, the two had oral sex again. Jan. 10 Tr. 444. They were interrupted after three or four minutes when they heard someone coming. Jan. 10 Tr. 445. A few minutes later Cates went into the bathroom to use the toilet. Jan. 10 Tr. 449. Lemons came up behind him and began performing oral sex in the hallway. Jan. 10 Tr. 449-450. Cates asked to have vaginal sex, Lemons agreed, and the two had sex in the bathroom with Lemons bending over the sink. Jan. 10 Tr. 450-451. Cates insisted he never ordered or forced Lemons to have sex. Jan. 10 Tr. 444, 451.

Cates also claimed that he went into Lemons’ interrogation room at the police station “to calm her down,” and because he had heard she was making a rape allegation against Hannah. Jan. 10 Tr. 463-464. He told her not to make

allegations against Hannah and to “just tell * * * the truth.” Jan. 10 Tr. 465. Cates admitted at trial that he lied to Detective Thompson, agreeing his statements were “filled with a lot of lies.” Jan. 10 Tr. 467.

On January 11, the jury found Cates guilty on count one, deprivation of rights under color of law in violation of 18 U.S.C. 242. R. 1 at 1-2; R. 22 at 1-2; Jan. 11 Tr. 6. It found there was no bodily injury to Lemons and that Cates’ actions included aggravated sexual assault. Jan. 11 Tr. 6. It found Cates not guilty on count two, using a firearm in relation to a crime of violence in violation of a 18 U.S.C. 924(c)(1)(A). Jan. 11 Tr. 6; R. 1 at 2. That same day, the court set defendant’s sentencing for April 11, 2012. The court held a bond hearing one week after trial and ordered defendant detained. R. 31.

7. *Cates’ Change Of Counsel And Delay Of Sentencing*

At some point before the date set for sentencing, defendant became dissatisfied with his counsel. Appx. 7-8. Counsel for the United States learned of the situation and wrote the court on March 27, asking that the court look into the matter and resolve it before defendant’s April 11 sentencing hearing. As counsel for the United States explained, he had been assigned an out-of-town detail and would have to travel from Washington to Milwaukee to attend the hearing. Appx. 7. If the hearing were postponed on that date, it would require additional time and travel at government expense. There was no response to the letter.

On the day of sentencing, April 11, 2012, defendant told the court he was indeed dissatisfied with the services of Bridget Boyle, whom he had retained to represent him at trial, and that he did not wish to retain her partner Gerald Boyle, who had offered to represent Cates at sentencing. Appx. 9, 24.⁴ The court stayed the case and new counsel was appointed nunc pro tunc on April 27, with the order retroactive to April 23. Appx. 9; R. 37. More than a month later, on May 31, the court set Cates' sentencing for June 29. R. 38. Four days later, the United States' attorney notified the court of a scheduling conflict and requested that the Friday hearing be postponed three days until the following Monday, July 2. Appx. 10. Counsel also explained that he would be in Milwaukee on that day, so the change would save the government the expense of travel from Washington. Appx. 10. Defendant's counsel did not object to the change and the court acceded to the United States' request. Appx. 10; R. 40.

8. *Counsel's Request For An Extension To File Post-Verdict Motions*

A few days before sentencing, on June 27, defense counsel filed a motion requesting a continuance of sentencing and an extension of time to file post-conviction motions. The extension request came some 168 days after the expiration of the 14-day time limit imposed under Federal Rules of Criminal

⁴ Bridget Boyle had apparently suffered health problems and professional problems, and had been hospitalized and disciplined by this Court. Appx. 24.

Procedure 29(c)(1) and 33(b)(2). Appx. 12. Counsel did not explain how much time he was requesting. He also requested time to obtain a transcript of the trial. Appx. 12, 18. Counsel requested that his delay be considered “excusable neglect” under Federal Rule of Criminal Procedure 45. Appx. 12. He did not give any reason for waiting some two months after his appointment to request the extension, nor did he specify any circumstances which would explain prior counsel’s failure, during the three months following trial, to file such motions. Appx. 12, 14-15.

The United States did not object to a stay allowing defense counsel to obtain a transcript and otherwise prepare for sentencing. R. 44. However, the United States objected to an extension of time for filing post-conviction motions. R. 46.

The court denied the motion to file belated post-conviction motions. Appx. 28. The court determined that defendant had requested an extension in good faith, but that the circumstances did not constitute “excusable neglect” under Federal Rule of Criminal Procedure 45(b)(1)(B). Appx. 25-28. The court noted that some six months had passed beyond the date of conviction, and time and money was wasted in delays. Appx. 26. Even assuming defendant received poor representation immediately following trial, the court concluded, there was no reason for current counsel to wait two months before requesting an extension. Appx. 27. Further delay would require the court, the court’s staff, and the attorneys to reacquaint themselves with the relevant documents. Appx. 26. The

government would be prejudiced because of the additional time and expense its attorneys would incur. Appx. 27. In conclusion, the court also pointed out that there “was more than ample evidence of the defendant’s guilt at trial” and a belated Rule 29 motion would not affect an appeal because Cates’ sufficiency argument likely would be futile under any standard of review. Appx. 28.

The court granted defendant’s motion to delay sentencing and sentenced Cates on July 30. July 30 Tr. 1-2; R. 45; Appx. 1. Cates’ recommended sentence under the guidelines was 360 months to life. July 30 Tr. 9. The court sentenced Cates to 24 years in prison, 6 years below the bottom of the guideline range. July 30 Tr. 34.

SUMMARY OF ARGUMENT

Where a party requests an extension of time to file post-conviction motions after the time for filing has passed, a court may extend the time only if the delay was due to excusable neglect. In considering whether neglect was excusable, a court considers the reason for the delay (including whether it was within the movant’s reasonable control), the length of the delay, prejudice to the nonmoving party and judicial efficiency, and the movant’s good faith. In this case, defendant did not even offer a reason to justify the delay. He recounted that he had spent time on defendant’s case, but a busy schedule cannot justify the failure to promptly request an extension. Accordingly, the court properly found that there was no

reason to excuse counsel's belated request for an extension. The extensive delay of two months after replacement counsel's appointment, the court rightly concluded, was reasonably within his control. The court further found that the belated filing would threaten efficient judicial administration of the case and that United States would be prejudiced by the delay, through added time, travel, and expense. The court did not abuse its discretion in concluding that counsel's good faith did not outweigh these significant concerns.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION, FILED MORE THAN FIVE MONTHS LATE, TO EXTEND THE TIME FOR FILING POST-VERDICT MOTIONS

A. Standard Of Review

This court reviews the district court's refusal to extend time to file post-conviction motions for abuse of discretion. *United States v. Ghilarducci*, 480 F.3d 542, 550 (7th Cir.), cert. denied, 552 U.S. 866 (2007). It affords "wide latitude" to the district court's underlying findings regarding excusable neglect. *Files v. City of Rockford*, 440 F.2d 811, 816 (7th Cir. 1971). "Matters of trial management are for the district judge," and an appellate court's "occasions for intervention are rare." *Northern Indiana Pub. Serv. Co. v. Carbon Cnty. Coal Co.*, 799 F.2d 265, 269 (7th Cir. 1986). This court has explained that the "real question" is "not whether we would have found ... excusable neglect but rather whether we should

second-guess the trial judge’s decision.” *United States v. Brown*, 133 F.3d 993, 996 (7th Cir.) (alteration in original; citation omitted), cert. denied, 523 U.S. 1131 (1998).

B. The District Court Properly Concluded There Was No Excusable Neglect In Counsel’s Significant Delay

Defendant’s sole argument on appeal is that the district court abused its discretion in denying him leave to file his post-conviction motions five months after conviction and two months after his appointment as substitute counsel. His arguments have no merit.⁵ Post-conviction motions under Rules 29 and 33 must be filed within 14 days following judgment. Fed. R. Crim. P. 29(c)(1) and 33(b)(2). The Federal Rules of Criminal Procedure provide that once the time for filing expires a court may extend the time only “if the party failed to act because of excusable neglect.” Fed. R. Crim. P. 45(b)(1)(B).⁶ “The test as to what constitutes

⁵ Defendant incorrectly suggests that the district court’s denial of his motion for an extension has precluded him from raising appropriate appellate issues. Br. 12. This is not the case. Nothing prevented defendant from offering a sufficiency argument or presenting other alleged trial errors.

⁶ Since the Rules’ 2005 amendments, Rule 45(b)(1)(B) applies to post-conviction motions such as those filed under Fed. R. Crim. P. 29 and 33. See *United States v. Munoz*, 605 F.3d 359, 367 (6th Cir. 2010), cert. denied, 131 S. Ct. 1813 (2011); Fed. R. Crim. P. 45, Advisory Committee Notes, 2005 Amendments (“The defendant is still required to file motions under Rules 29, 33, and 34 within the * * * period specified in those rules,” but “under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, (continued...)

excusable neglect is an ‘equitable one,’ taking account of ‘all relevant circumstances surrounding the party’s omission.’” *Brown*, 133 F.3d at 996 (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993)).

Excusable neglect is “far from a toothless standard.” *Abuelyaman v. Illinois State Univ.*, 667 F.3d 800, 808 (7th Cir. 2011). This Court has interpreted “excusable neglect” narrowly.⁷ For example in *United States v. Guy*, 140 F.3d 735, 736 (7th Cir. 1998), this Court reversed a district court’s extension of time for filing an appeal where experienced counsel had carelessly misread the rule, had wrongly concluded that intermediate Saturdays and Sundays were excluded from the count, and had miscalculated the time. “If his neglect is excused,” this Court explained, “the word ‘excusable’ is read out of” the rule. *Ibid.* Cf. *United States v. Ford*, 627 F.2d 807, 809-811 (7th Cir. 1980) (holding it would be an abuse of

(...continued)

the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.”).

⁷ The “excusable neglect” standard is the same in criminal and civil proceedings. This court has applied the Supreme Court’s *Pioneer Investment* standard in the criminal context. *Brown*, 133 F.3d at 996. In *United States v. Dumas*, 94 F.3d 286, 289 (7th Cir. 1996), cert. denied, 520 U.S. 1105 (1997), for example, this Court noted that the same standard of “excusable neglect” applied in late-filed criminal or civil appeals.

discretion to deny an extension where a pro se litigant timely delivered a notice of appeal to prison officials and they delayed sending it to the court).

In deciding whether there is excusable neglect, a court should consider (1) “the reason for the delay, including whether it was within the reasonable control of the movant,” (2) “the length of the delay,” (3) “the danger of prejudice” to the nonmoving party, and the delay’s “potential impact on judicial proceedings,” and (4) “whether the movant acted in good faith.” *Pioneer Inv. Servs. Co.*, 507 U.S. at 395; see also *Munoz*, 605 F.3d at 367 (applying the *Pioneer Investment* standard to a tardy post-verdict motion). Here, the district court properly evaluated the circumstances and found no excusable neglect.

1. *The Delay Was Within Counsel’s Control, And Defendant Offered No Explanation To Justify It*

The court found no good reason for replacement counsel’s lengthy delay; indeed, counsel did not explain and does not now explain why he waited two months to file for an extension. He did not say whether unusual personal or professional difficulties diverted him from the case. He certainly did not describe any circumstances that rendered filing a prompt request for an extension outside of his control.

Counsel merely noted, in passing, that he spent “an extended amount of time” reviewing Cates’ case. Appx. 21. A busy schedule is not generally an excuse. *Sherman v. Quinn*, 668 F.3d 421, 426 (7th Cir. 2012). “Excusable

neglect’ requires something more than a simple failure to meet the deadline due to a busy schedule.” *Dumas*, 94 F.3d at 289. Indeed only extraordinary circumstances would explain why counsel could not at least promptly request an extension. *Keeton v. Morningstar, Inc.*, 667 F.3d 877, 883 (7th Cir. 2012) (holding counsel’s broken arm did not excuse failure to file a summary judgment response, as a counsel must show “that his illness was of such a magnitude that he could not, at a minimum, request an extension of time”); *Harrington v. City of Chicago*, 433 F.3d 542, 547-548 (7th Cir. 2006) (court properly found lack of excusable neglect under Federal Rule of Civil Procedure 60(b)(1) because death of counsel’s father and sister did not excuse his noncompliance with discovery deadlines where he could have advised the court and sought an accommodation).

The district court in this case acknowledged that new counsel needed some time, perhaps, to become familiar with the record. Nevertheless, it reasonably found “no excuse for Mr. Coffey waiting two months after being appointed to file a motion for extension.” Appx. 27. Cf. *Munoz*, 605 F.3d at 369 (approving court’s allowance of a belated Rule 33 motion where successor counsel requested an extension five days after appointment). In making such judgments, “a district judge is in the best position to know how long a diligent successor counsel would require to research and prepare a new-trial motion under the circumstances presented by any given case.” *Munoz*, 605 F.3d at 372.

2. *The Months-Long Delay Weighs Against A Finding Of Excusable Neglect*

The court found the length of defendant's delay to be significant. Appx. 26. Five months is an enormous delay in light of the two-week time limit for filing post-verdict motions. Even considering counsel's appointment after the deadlines had passed, the court found no excuse for counsel's waiting two months – until five days before sentencing – to request more time. Given the short deadline for post-conviction motions, the court noted it “c[ould] not envision why the defendant's motion was not brought” at least within a month of counsel's taking over the case. Appx. 27.

3. *The Court Correctly Found The Delay Threatened Judicial Efficiency And Would Prejudice The United States*

Before granting a belated request, a court should consider “potential impact on judicial proceedings” and “the interests of efficient judicial administration.” See *Pioneer Inv. Servs. Co.*, 507 U.S. at 395, 398. Here, the court found that the lengthy delay endangered judicial efficiency. The belated request would waste judicial resources, as “the Court, its staff, and the involved attorneys” would have “to reacquaint themselves with those documents and the totality of this matter.” Appx. 26.

The court also found the late filing would prejudice the United States, requiring additional expense, long-distance travel, and additional time spent

reviewing the record to become reacquainted with the case. Appx. 26. As this court has explained in applying Rule 45 in the context of a late notice of appeal, “[a]nalysis of the circumstances * * * involves the consideration of several factors, the most important of which are the degree to which the [nonmoving party] is prejudiced and the good faith of the [movant].” *Abuelyaman*, 667 F.3d at 808 (approving an extension where counsel mistakenly thought timely electronic filing had been accomplished, a notice of appeal was filed six days late, and nonmovant suffered no prejudice).

Defendant mistakenly suggests that this court should consider the harm he endured when the motion was denied. He claims that he needed the time “to determine the appropriate post-verdict steps to take.” Br. 11. But prejudice to defendant is not a factor in the *Pioneer Investment* analysis. Furthermore, defendant does not explain the arguments he would have made in his post-conviction motions. Indeed, given the overwhelming evidence of Cates’ guilt, the motions would have been futile. Evidence at trial included Lemons’ testimony, DNA evidence, and testimony and recordings showing Cates’ shifting account of events during the investigation – including his eventual admission of sexual contact.⁸ Cates testified under oath and the jury rejected his description of events.

⁸ Defendant also claims the extension would have allowed him “to respond to factual issues found within the Presentence Investigation Report.” Br. 11.

(continued...)

4. *The District Court Did Not Abuse Its Discretion In Concluding That Defendant's Good Faith Alone Does Not Justify A Lengthy Extension*

The district court did find that the defendant acted in good faith in filing his motion. However, the court reasonably concluded that “the fact that it was filed in good faith cannot overcome the remaining factors, all of which weigh against a finding of excusable neglect.” Appx. 27. Indeed, counsel cites no case where good faith alone justified a finding of excusable neglect.

(...continued)

However, the district court *granted* defendant's unopposed request for an adjournment of sentencing. R. 44; R. 45. Sentencing was delayed for nearly a month, defendant sought no further extensions, and sentencing took place more than three months after counsel's appointment.

CONCLUSION

This court should affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 6000 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ April J. Anderson
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Date: January 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2013, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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