

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-50159  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOEL MATA-GOMEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. DR-99-CR-592-1  
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December 13, 2000

Before DAVIS, STEWART, and PARKER, Circuit Judges.

PER CURIAM:\*

In this direct criminal appeal, Joel Mata-Gomez ("Mata") argues that the district court abused its discretion in denying his motion for extension of time to file an untimely notice of appeal based on his "excusable neglect," pursuant to FED. R. APP. P. 4(b)(4). Mata argues that his attorney's having mistakenly relied on the counting rule of FED. R. CRIM. P. 45(a), rather than the appropriate rule, FED. R. APP. P. 26, amounted to "excusable neglect."

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Rule 4(b)(1)(A)(i), FED. R. APP. P., provides that a notice of appeal must be filed in a criminal case within ten days of entry of judgment. It is not disputed that Mata filed his notice of appeal three days late.

"[A] misconstruction of the rules--especially when their language is plain--will rarely satisfy the 'excusable neglect' standard." Halicki v. Louisiana Casino Cruises, Inc., 151 F.3d 465, 469 (5th Cir. 1998) (applying nearly identical excusable-neglect rule of FED. R. APP. P. 4(a)(5) in civil appeal). If "the rule at issue is unambiguous, a district court's determination that the neglect was inexcusable is virtually unassailable." Id. at 470. In a case almost identical to this one, this court opined that FED. R. APP. P. 4(a)(1)(B) and the counting rule of FED. R. APP. P. 26(a) were "unambiguous." United States v. Clark, 51 F.3d 42, 44 (5th Cir. 1995). Accordingly, the district court did not abuse its discretion in determining that Mata had made no showing of excusable neglect.

APPEAL DISMISSED.