IN THE
**SUPREME COURT**
OF THE
**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,**
Plaintiff/Appellee,
**v.**
**VINCENTE LIMES LANIYO,**
Defendant/Appellant.

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**SUPREME COURT NO. 2010-SCC-0007-CRM**
SUPERIOR COURT NO. 07-162C

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**Cite as: 2012 MP 1**

Decided February 9, 2012

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Edward Buckingham, Attorney General, Benjamin Petersburg, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff/Appellee.
Judy Torres, Torres Brothers, LLC, Saipan, MP, for Defendant/Appellant.
BEFORE: ALEXANDRO C. CASTRO, Acting Chief Justice; JESUS C. BORJA, Justice Pro Tem; HERBERT D. SOLL, Justice Pro Tem.

CASTRO, J.:

¶ 1 Vincente Limes Laniyo ("Laniyo") appeals a trial court order denying his motion for reconsideration of his sentence ("Rule 35(b) motion"). He argues that the "imposition of the sentence" under NMI Rule of Criminal Procedure 35(b) ("Rule 35(b)") refers to the written entry of judgment rather than the oral statement of the sentence, and that the trial court thus erred when it denied his motion as untimely. Laniyo alternatively argues that, if his motion was untimely, the trial court erred by refusing to grant him *nunc pro tunc* relief. Laniyo also argues that he was denied effective assistance of counsel. We hold that the imposition of the sentence occurs at the

oral statement of the sentence rather than at the entry of the written judgment, and that Laniyo's Rule 35(b) motion was therefore untimely. We also hold that the trial court did not abuse its discretion when it denied Laniyo *nunc pro tunc* relief. We further hold that Laniyo was not denied effective assistance of counsel. We accordingly AFFIRM the trial court's denial of Laniyo's Rule 35(b) motion.

**I**

¶ 2 On August 26, 2007, Laniyo assaulted his wife Emiliana C. Laniyo ("Emiliana"). Emiliana sustained numerous cuts and puncture wounds on her arms, legs, and back. Her injuries were so severe that the trial court "wonder[ed] how she even survived the ordeal." *Commonwealth v. Laniyo*, No. 07-162C (NMI Super. Ct. Jan. 20, 2009) (Sentence and Commitment Order at 3). On June 18, 2008, Laniyo pled guilty to one count of Aggravated Assault and Battery. He requested a sentence of not more than forty months in prison but both the Commonwealth and the Office of Adult Probation requested the maximum sentence of ten years' imprisonment without the possibility of parole. *Id.* at 4. On January 14, 2009, the trial court held a sentencing hearing. At the sentencing hearing, Laniyo presented favorable testimony from both Emiliana and from his second cousin, a former Department of Corrections officer. Despite the offered testimony, the trial court orally pronounced the maximum sentence of ten years' imprisonment without the possibility of parole.

¶ 3 Six days later, on January 20, 2009, the trial court issued a written Sentence and Commitment Order ("Sentencing Order") sentencing Laniyo to imprisonment for ten years without the possibility of parole. The Sentencing Order emphasized the severity of the assault on Emiliana and Laniyo's history of domestic violence. *Id.* at 4-5. It also noted that Laniyo's good behavior while in custody "does not outweigh the risk [he] poses on the victim." *Id.* at 5. On May 18, 2010, Laniyo filed a motion for reconsideration of his sentence pursuant to NMI Rule of Criminal Procedure 35(b). At the time the Rule 35(b) motion was filed, 124 days had passed since the trial court's January 14, 2009, oral pronouncement of the sentence, but only 118 days had passed since the January 20, 2009, Sentencing Order. The Rule 35(b) motion asked the trial court to reconsider and reduce Laniyo's sentence, and it specifically asked the trial court to grant the possibility of parole.

¶ 4 On February 4, 2010, the trial court issued an order denying Laniyo's Rule 35(b) motion. Rule 35(b) states in relevant part, "[a] motion to reduce a sentence may be made, or the court may reduce a sentence without motion, *within 120 days after the sentence is imposed . . . .*" NMI R. Crim. P. 35(b) (emphasis added). The trial court reasoned that Laniyo's sentence was "imposed" on January 14, 2009, when the sentence was orally pronounced. Raising the issue of jurisdiction

*sua sponte*, the trial court found that, because Laniyo's Rule 35(b) motion was filed 124 days after the oral pronouncement of the sentence, four days past the 120-day filing period for Rule 35(b) motions, it lacked jurisdiction to adjudicate Laniyo's motion.[1] On February 19, 2010, Laniyo filed a timely notice of appeal.

**II**

¶ 5 "The Supreme Court has appellate jurisdiction over judgments and orders from the Superior Court of the Commonwealth." 1 CMC § 3102(a).

**III**

*A. Rule 35(b) Imposition of a Sentence*

¶ 6 Rule 35(b) states in relevant part: "Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed . . . ." NMI R. Crim. P. 35(b). "Because the Commonwealth Rules of Criminal Procedure are patterned after the Federal Rules of Criminal Procedure, this Court has long held that it is appropriate to consult . . . the federal rules when interpreting the Commonwealth Rules of Criminal Procedure." *Commonwealth v. Attao*, 2005 MP 8 ¶ 9 n.7 (citing *Commonwealth v. Jai Hoon Yoo*, 2004 MP 5 ¶ 8 n.1). To interpret the meaning of the sentence "imposed" in Rule 35(b), it is thus appropriate to begin with an examination of the Federal Rules of Criminal Procedure.

¶ 7 The original Federal Rule of Criminal Procedure 35 ("Federal Rule 35") referred to the imposition of the sentence both in Federal Rule of Criminal Procedure 35(b) ("Federal Rule 35(b)") and in Federal Rule of Criminal Procedure 35(c) ("Federal Rule 35(c)"). The former Federal Rule 35(b) was identical to our Rule 35(b) and referred to the sentence "imposed." *Commonwealth v. Ramangmau*, 1996 MP 17 ¶ 4 n.2 (noting that Rule 35(b) is identical to Federal Rule 35(b) as it was prior to its modification in 1987). The former Federal Rule 35(c) stated: "The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." *United States v. Aguirre*, 214 F.3d 1122, 1125 (9th Cir. 2000) (quoting former Federal Rule 35(c)).

¶ 8 A circuit split arose as to the meaning of both the sentence "imposed" in Federal Rule 35(b) and the "imposition of sentence" in Federal Rule 35(c). *See* Fed. R. Crim. P. 35 (notes of the Advisory Committee on the Federal Rules of Criminal Procedure ("Advisory Committee")). The issue confronting the circuits was precisely the issue presented by this appeal: Whether the

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[1] Laniyo correctly points out that the trial court waited over seven months to adjudicate the Rule 35(b) motion. This issue is discussed further *infra*.

sentence imposed was the oral pronouncement of the sentence or the written entry of judgment stating the sentence. *Id*. "The majority view was that the term meant the oral announcement of the sentence and the minority view was that it meant the entry of the judgment."[2] *Id.* The Advisory Committee agreed with the majority of the circuits and amended Federal Rule 35 in 2004 to make it explicit that the sentence was the oral sentence. *Id.* The current Federal Rule 35(c) states: "As used in this rule, 'sentencing' means the oral announcement of the sentence." Fed. R. Crim. P. 35(c) (emphasis added).

¶ 9 The amended Federal Rule 35(c) is strong persuasive authority in support of the Commonwealth's proposed interpretation of Rule 35(b). *See Commonwealth v. Attao*, 2005 MP 8 ¶ 9 & n.7 (relying wholly on federal authority when interpreting NMI Rule of Criminal Procedure 11, and noting that the court "find[s] interpretations of Rule 11 of the Federal Rules of Criminal Procedure helpful in the instant matter."). Not only did the majority of United States circuits conclude that the sentence imposed under Federal Rule 35 was the oral sentence, but the current Federal Rule 35(c) expressly defines the sentence as the oral sentence.[3]

¶ 10 Having discussed the comparable Federal Rule, we turn now to our own Rules of Criminal Procedure. Both NMI Rule of Criminal Procedure 32 ("Rule 32") and NMI Rule of Criminal Procedure 43 ("Rule 43") reference the imposition of the sentence, and both Rules are thus relevant to the interpretation of Rule 35(b). Rule 32 is titled "Sentence and Judgment." It states in relevant part:

> (a) Sentence.
> (1) *Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall*:
> (A) determine that the defendant and his/her counsel have had the opportunity to read and discuss any presentence investigation report . . . .
> (B) afford counsel an opportunity to speak on behalf of the

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[2] For the majority view, *see Aguirre*, 214 F.3d at 1125; *United States v. Morrison*, 204 F.3d 1091, 1093-94 (11th Cir. 2000); *United States v. Gonzalez*, 163 F.3d 255, 263-64 (5th Cir. 1998); *United States v. Layman*, 116 F.3d 105, 110 (4th Cir. 1997), *cert. denied*, 522 U.S. 1107 (1998); *United States v. Abreu-Cabrera*, 64 F.3d 67, 73-74 (2d Cir. 1995); *United States v. Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994); *United States v. Navarro-Espinosa*, 30 F.3d 1169, 1170 (9th Cir. 1994); *United States v. Villano*, 86 F.2d 1448, 1453 (10th Cir. 1987).

[3] Note that there is no Rule 35(c) in the Commonwealth, because Rule 35 has not followed the amendments to Federal Rule 35. Federal Rule 35 was substantially amended in 1987 and has been amended multiple times since. The Commonwealth has not adopted the 1987 amendments or any subsequent amendments. Rule 35 remains identical to the pre-1987 Federal Rule 35. *See Commonwealth v. Ramangmau*, 1996 MP 17 n.2 ("Title 6, section 4114 of the Commonwealth Code is identical to Commonwealth Rule of Criminal Procedure 35(b), and Fed. R. of Crim. P. 35(b) prior to its modification in 1987.").

> defendant; and
> (C) address the defendant personally and ask him/her if he/she wishes to make a statement. . . .
> (2) Notification of Right to Appeal. *After imposing sentence* in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his/her right to appeal . . . .
> (b) Judgment.
> (1) In General. *A judgment of conviction shall set forth* the plea, the verdict or findings, and the adjudication *and sentence*. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk
> . . . .

NMI R. Crim. P. 32 (emphasis added). Because Rule 32 discusses the "imposition of sentence" separately from the "judgment," the plain language of Rule 32 indicates that imposition of the sentence is distinct from the issuance of the written judgment. It follows that the imposition of the sentence must be the oral pronouncement. Moreover, the court only has the opportunity to "afford counsel an opportunity to speak," to "address the defendant personally" and to "advise the defendant of his/her right to appeal" when the court orally pronounces the sentence. NMI R. Crim. P. 32(a)-(c). The court does not have those opportunities when it enters the written sentencing order, because the defendant is not physically present. Adopting Laniyo's interpretation of Rule 35(b) would thus render portions of Rule 32 "meaningless" and contravene accepted canons of statutory interpretation. *Faisao v. Tenorio*, 4 NMI 260, 265 (1995) ("One statutory provision should not be construed to make another provision [either] inconsistent or meaningless.") (quoting *In re Estate of Rofag*, 2 NMI 18, 29 (1991)).

¶ 11 Interpreting the sentence imposed as the written sentence creates a similar problem with regards to Rule 43. Rule 43 provides in relevant part: "Presence Required. The defendant shall be present at arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of the sentence, except as otherwise required by this rule." NMI R. Crim. P. 43(a). Under Laniyo's interpretation of Rule 35(b), Rule 43(a) would require the defendant to do the physically impossible and be present at the Court's entry of the written judgment. *See Villano*, 816 F.2d at 1452 (noting that a defendant is physically present only at the oral pronouncement of the sentence and not at the entry of the written order stating the sentence).

¶ 12 Having examined both the Federal Rules of Criminal Procedure and the NMI Rules of Criminal Procedure, we now turn to Commonwealth case law. The Court has never explicitly interpreted the phrase "the sentence is imposed," either in the context of Rule 35(b) or otherwise. However, multiple Commonwealth decisions refer to the sentence "imposed" as the oral sentence.

*See Commonwealth v. Zhen*, 2002 MP 4 ¶ 43 (holding that defendant's sentence was properly "imposed" by the trial court, and stating that "[t]he trial court, at the sentencing hearing on February 14, 2000, orally provided several distinct reasons for the sentence imposed against Appellant . . . ."); *Commonwealth v. Santos*, 4 NMI 348, 351 (1996) (finding no conflict between an oral sentence and a written sentencing order, and stating "[t]he sentence in a . . . criminal case is the punishment imposed orally by a sentencing judge in a defendant's presence.") (quoting *Villano*, 816 F.2d at 1453). These decisions support our finding that the imposition of the sentence is the oral pronouncement rather than the written sentence.

¶ 13 Before concluding, it is necessary to address several arguments raised by Laniyo. Laniyo argues that due process requires a criminal defendant to receive both an oral and a written sentence. However, that argument is unresponsive to the issue on appeal. It is uncontested that the defendant must eventually receive both an oral and a written sentence. Neither is Laniyo's analogy to NMI Supreme Court Rule 4(b)(2), which addresses the time period for appeals, persuasive. Rule 35(b) addresses the correction of the sentence and does not comment on the time period for an appeal. It therefore makes no sense to argue, as Laniyo does, that Rule 35(b) should mimic NMI Supreme Court Rule 4(b)(2) and somehow "post-date" the Rule 35(b) motion to the date of the written judgment. Finally, as to Laniyo's argument that the trial court's seven month delay in adjudicating his Rule 35(b) motion entitles him to relief, Rule 35(b) now permits the trial court to adjudicate a Rule 35(b) motion even after the 120-day time period has lapsed. *See Commonwealth v. Aquino*, 2 CR 899, 900 (NMI Tr. Ct. 1986) ("A 1985 amendment to Rule 35(b) provides that the court shall determine the motion within a reasonable time. This has allowed the court to consider and decide a Rule 35(b) [sic] after the 120-day period."). Laniyo's argument is therefore unpersuasive.[4]

¶ 14 We must also briefly address the concerns raised by the dissent. The dissent first argues that we should hold the sentence imposed to be the written sentence because a contrary holding would inequitably deprive Laniyo of his day in court. In response to this argument, we emphasize that the trial court's failure to consider the merits of Laniyo's Rule 35(b) motion was not prejudicial. As is discussed *infra*, there is no reasonable probability that the trial court would have granted Laniyo's motion on its merits. Because the trial court's failure to consider the merits of

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[4] Laniyo has waived the related issue of whether he might have been entitled to relief under 6 CMC § 4414. A lengthy footnote in Laniyo's brief states in relevant part: "while Rule 35 allows a party to file a motion within 120 days after the sentence is imposed, 6 CMC § 4114 *requires* the Court to render a decision within 120 days. But because this difference is not essential to Mr. Laniyo's appeal, he *neither raises the issue nor challenges it.*" Appellant's Br. at 9 n.9 (emphasis added).

Laniyo's motion was not prejudicial, there is no inequity in holding the sentence imposed to be the oral sentence and affirming the trial court's denial of Laniyo's motion.

¶ 15 The dissent also states that our reliance on the 2004 amendment to Federal Rule 35(b) is misplaced. The dissent's assertion that we are not bound by the Federal Rules of Criminal Procedure is well-taken. However, the NMI Rules of Criminal Procedure are based upon their federal counterpart, and as a result the Court will principally look to the Federal Rules of Criminal Procedure when interpreting the NMI Rules of Criminal Procedure. *Commonwealth Dev. Auth. v. Camacho*, 2010 MP 19 ¶ 16 ("[W]hen interpreting our rules of . . . procedure, which are patterned after the federal rules, we will principally look to federal interpretation for guidance."). It is thus appropriate for this Court to rely upon Federal Rule 35, and specifically upon the 2004 amendment, when interpreting Rule 35.

¶ 16 We emphasize that we do not rely solely or even principally on the 2004 amendment in reaching our conclusion. We first examine the entirety of the Federal Rules of Criminal Procedure to determine how those rules might assist us in our own interpretation. We then examine our own rules of criminal procedure to determine if Laniyo's proposed interpretation of Rule 35 is reasonable. Lastly, we analyze our own case law and find that our case law supports the Commonwealth's interpretation of Rule 35(b) rather than Laniyo's. Only after analyzing these three sources of authority, in addition to the 2004 amendment, do we conclude that the trial court's interpretation of Rule 35(b) was correct. In light of the foregoing, we affirm the trial court's interpretation of Rule 35(b). A sentence is imposed and the 120-day time period stated in Rule 35(b) begins to run upon the oral pronouncement of a sentence by the trial court.

*B. Nunc Pro Tunc Relief*

¶ 17 We now turn to Laniyo's argument that the trial court erred when it refused to grant him *nunc pro tunc* relief. *Nunc pro tunc* literally means "now for then." *In Sik Chang v. Norita*, 2006 MP 2 ¶ 20 (quoting Black's Law Dictionary 1069 (6th ed. 1990)). It is an equitable remedy that refers to "the power of a court to make after the fact modifications in certain instances." *In Sik Chang*, 2006 MP 2 ¶ 20; *Azize v. Bureau of Citizenship & Immigration Servs.*, 594 F.3d 86, 93 (2d Cir. 2010) ("the grant of relief nunc pro tunc is an equitable remedy."). While "*nunc pro tunc* is a somewhat loose concept" and "is used somewhat differently by different courts in different contexts," the Court nevertheless has only "limited power" to retroactively alter the record through *nunc pro tunc* relief. *In Sik Chang*, 2006 MP 2 ¶¶ 20-21 (quoting *Fierro*, 217 F.3d 1, 4-5

(1st Cir. 2000)).[5] Because *nunc pro tunc* is an equitable remedy, the applicable standard of review is for an abuse of discretion. *Pangelinan v. Itaman*, 4 NMI 114, 117 (1994). A trial court abuses its discretion "when the decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Midsea Indus., Inc. v. HK Eng'g. Ltd.*, 1998 Guam 14 ¶ 4.

¶ 18 A number of courts have recognized that the *nunc pro tunc* doctrine cannot be used to circumvent jurisdictional time limits[6] and have thus denied *nunc pro tunc* relief to parties who seek orders or motions outside of jurisdictional limits. *See Carlisle v. United States*, 517 U.S. 416, 421 (1996), *superceded by statute as recognized in United States v. Maricle*, 2010 U.S. Dist. LEXIS 105931 *6 (E.D. Ky. Oct. 4, 2010) (holding that the court lacks authority to grant a motion filed one day late, even on the assumption that it should have been filed earlier and that the delay did not cause prejudice.).[7] Courts reason that allowing *nunc pro tunc* relief from jurisdictional time limits would "demolish" the Rules of Criminal Procedure. *See United States v. Hirsch*, 207 F.3d 928, 930-31 (7th Cir. 2000) ("Treating as done whatever should have been done would demolish the Rules' timetables . . . .").

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[5] The Commonwealth has never applied the *nunc pro tunc* doctrine to Rule 35. *In Sik Chang* is the only Commonwealth case to discuss the *nunc pro tunc* doctrine, and that case addresses a *nunc pro tunc* judgment entered by the trial court. Because there is no dispositive Commonwealth written law, it is necessary to consult the common law as expressed in the Restatements. 7 CMC § 3401. The Restatements are silent as to the *nunc pro tunc* doctrine, and we therefore rely upon the common law of the fifty U.S. states.

[6] A time period in a statute or rule may be either "jurisdictional" or "non-jurisdictional." *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008) (stating that most statutory time limits are treated as affirmative defenses subject to rules of forfeiture and waiver, but that some statutory time limits which seek to "achieve a broader system-related goal" are "jurisdictional" and absolute, forbidding the court from considering whether "equitable considerations warrant extending [the] limitations period"); *Kontrick v. Ryan*, 540 U.S. 443, 447-48 (2004), *overruled in part on other grounds as stated in Kay v. Sec'y of Health & Human Serv.*, 80 Fed. Cl. 601 (Fed. Cl. 2008) (holding that bankruptcy rule's time prescription was not "jurisdictional" and thus could not be invoked to upset an adjudication on the merits). When a time period is jurisdictional, the court generally lacks jurisdiction to adjudicate outside of that time period. *See John R. Sand & Gravel Co.*, 552 U.S. at 134.

[7] *See also Hirsch*, 207 F.3d at 930-31 (questioning the district court's potential use of its inherent powers to treat late notice of appeal as timely filed, and noting that such an approach was contrary to the Federal Rules of Appellate Procedure); *Matos v. Sec'y of the Dep't of Health & Human Servs.*, 35 F.3d 1549, 1553 (Fed. Cir. 1994) ("The jurisdictional defect in this case cannot be cured by a *nunc pro tunc* order, because such an order cannot change the fact that petitioner failed to seek dismissal of his state court civil action within two years . . . and before judgment."); *In re Mother Tucker's Food Experience (Canada), Inc.*, 925 F.2d 1402, 1404-05 (Fed. Cir. 1991) (holding that failure to comply with statutory requirements is not curable *nunc pro tunc*); *Santiago v. Newburgh Enlarged City Sch. Dist.*, 434 F. Supp. 2d 193, 197 (S.D.N.Y. 2006) (observing that court is without power to deem a late-filed claim timely *nunc pro tunc* where statute of limitations has expired).

¶ 19 The 120-day time period in Rule 35(b) is jurisdictional. *See, e.g., United States v. Duarte-Penaloza*, 202 F. Supp. 2d 1370, 1372 (N. D. Ga. 2002) (discussing the one-year deadline in the amended Federal Rule 35(b) and stating, "[u]nder the law of the Eleventh Circuit, this one year deadline is jurisdictional; the district court is powerless to adjudicate the merits of an untimely Rule 35(b) motion."); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993) (stating that 7-day time limit under former Federal Rule 35(c) is jurisdictional; "if no motion is made within the seven-day period, none can be made thereafter."). The *nunc pro tunc* doctrine thus is generally not applicable to a party who files an untimely Rule 35(b) motion.

¶ 20 Here, the trial court denied Laniyo's *nunc pro tunc* argument in a single paragraph. It stated:

> Defendant argues that in the event this Court concludes the time of oral pronouncement begins the 120 day period in Com. R. Cr. P. 35(b), this Court should exercise its discretion to enter *nunc pro tunc* relief. In support of this argument, Defendant cites to federal caselaw [sic] that recognizes Rule 35's time limitations as jurisdictional, but "must be applied in a manner that is consistent with the Due Process Clause . . . ." *United States v. Duarte-Penaloza, supra*. However, those cases are distinguishable because they involve situations when the government inadvertently fails to file a timely Rule 35(b) motion, not when a defendant fails to do so.

*Commonwealth v. Laniyo*, No. 07-162C (NMI Super. Ct. Feb. 4, 2009) (Order Denying Defendant's Motion for Reconsideration for Lack of Jurisdiction at 4).

¶ 21 Applying the abuse of discretion standard to the trial court's denial of *nunc pro tunc* relief, the trial court did not make any errors of law. It correctly recognized the jurisdictional nature of Rule 35(b) when it stated that: "Defendant cites to federal caselaw [sic] that recognizes Rule 35's time limitations as jurisdictional, but 'must be applied in a manner that is consistent with the Due Process Clause . . . .'" *Commonwealth v. Laniyo*, No. 07-162C (NMI Super. Ct. Feb. 4, 2009) (Order Denying Defendant's Motion for Reconsideration for Lack of Jurisdiction at 4). In addition, the trial court's finding that *Duarte-Penaloza* was distinguishable was not error. In *Duarte-Penaloza*, the defendant entered into a guilty plea after a plea agreement promised him a reduced sentence in exchange for assisting law enforcement. 202 F. Supp. 2d. at 1372. However, the government inadvertently missed the deadline for filing a motion for reconsideration of the defendant's sentence. *Id.* As a result, the government was unable to uphold the plea agreement. *Id.* The *Duarte-Penaloza* court granted *nunc pro tunc* relief and allowed the motion to be filed late. *Id.* Here, in contrast to *Duarte-Penaloza*, there is no plea agreement at issue and thus no risk that due process will be impinged by a denial of Laniyo's Rule 35(b) motion. Because the trial

court made no error of law and its findings of fact are not clearly erroneous,[8] we hold that the trial court did not abuse its discretion when it denied Laniyo *nunc pro tunc* relief.

*C. Ineffective Assistance of Counsel*

¶ 22 Finally, we consider Laniyo's argument that he was denied effective assistance of counsel. Under the two-prong standard articulated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a defendant alleging ineffective assistance of counsel must prove both: (1) that his counsel's performance was deficient; and (2) that the deficient performance was prejudicial. Per *Strickland*, an attorney's performance is prejudicial if "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *Commonwealth v. Shimabukuro*, 2008 MP 10 ¶ 11 (quoting *Strickland*, 466 U.S. at 694).

¶ 23 The second prong of *Strickland* is dispositive in this case. Laniyo's claim of prejudice turns upon whether there is a reasonable probability that, but for his attorney's late filing of the Rule 35(b) motion, the trial court would have granted his Rule 35(b) motion. Laniyo alleges that certain additional facts in his Rule 35 motion that were not before the trial court at the sentencing hearing would have persuaded the court to reconsider its sentence and grant him parole. These facts are: (1) Emiliana's continued contacts with Laniyo; (2) the fact that Emiliana has not commenced divorce proceedings; and (3) the fact that Emiliana still wishes to live together as husband and wife. Appellant's Opening Br. at 12.

¶ 24 Determining if these additional facts would have persuaded the trial court, we examine the trial court's findings of fact at the sentencing hearing. The trial court found that Laniyo beat Emiliana with his hands, a machete, a BB gun, and a small dagger. *Commonwealth v. Laniyo*, No. 07-162C (NMI Super. Ct. Jan. 20, 2009) (Sentence and Commitment Order at 3). It further observed that, looking at the photos from the night of the attack, "one wonder[s] how [Emiliana] even survived the ordeal." *Id.* The trial court also stated that Laniyo's good behavior while in custody "does not outweigh the risk [he] poses on the victim" and that Laniyo "needs to be incapacitated for a substantial amount of time to protect the victim . . . ." *Id.* at 4-5. Moreover, the trial court noted that Laniyo has pled guilty to assault and battery against Emiliana on three prior occasions and that Emiliana has forgiven him each time. *Id.* at 3.

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[8] Neither of the parties assert that the trial court's factual findings with respect to *nunc pro tunc* relief were clearly erroneous.

¶ 25 Considering the trial court's findings, there is no reasonable probability that it would have been persuaded to grant Laniyo's Rule 35(b) motion on its merits. The trial court acknowledged Emiliana's desire to reconcile with Laniyo as part of the pattern of abuse. It was also aware that Emiliana would be at significant risk if Laniyo were granted the possibility of parole. Accordingly, because there is no reasonable probability that Laniyo's Rule 35 motion would have been granted on its merits, there was no prejudice to Laniyo under the second prong of *Strickland*. Laniyo's ineffective assistance of counsel claim is denied.

**IV**

¶ 26 In light of the foregoing, the trial court's denial of Laniyo's Rule 35(b) motion is AFFIRMED.

SO ORDERED this 9th day of February, 2012.

/s/_____
ALEXANDRO C. CASTRO
Acting Chief Justice

/s/_____
JESUS C. BORJA
Justice Pro Tem

SOLL , J., concurring in part and dissenting in part:

¶ 27 I respectfully dissent from section III.A of the majority's opinion in this case. I write separately to express my belief that equity demands that we interpret the sentence "imposed" in Rule 35(b) as the written rather than the oral sentence, and allow the trial court to consider the merits of Laniyo's Rule 35(b) motion.

¶ 28 As a general rule, the NMI Rules of Criminal Procedure should be fairly and liberally construed. NMI R. Crim. P. 2 ("These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."). Here, construing the

sentence "imposed" as the written sentence is warranted because this matter implicates the equitable right of a criminal defendant to be heard. *Crane v. Kentucky.*, 476 U.S. 683, 690 (1986) (stating that the opportunity to be heard is an essential component of procedural fairness; holding that competent, reliable evidence of defendant's innocence could not be excluded) (citation omitted); *see also Duarte-Penaloza,* 202 F. Supp. 2d at 1372 (allowing criminal defendant to file untimely motion for reconsideration of sentence when government's error inequitably deprived defendant of opportunity to file motion). Under the majority's strict construction of Rule 35(b), Laniyo is unfairly deprived of his day in court. He will be imprisoned until the year 2017 without any opportunity for a reduction of his sentence, simply because his counsel interpreted an ambiguous court rule and filed a Rule 35(b) motion four days late.

¶ 29 The majority emphasizes that, prior to the 2004 amendment to Federal Rule 35, the majority of courts interpreted the sentence imposed as the oral sentence. However, the Commonwealth is not bound by interpretations of the Federal Rules of Criminal Procedure. Moreover, prior to the amendment, a substantial minority of courts held that the sentence imposed under Federal Rule 35 was the written rather than the oral sentence. *See, e.g., United States v. Wisch*, 275 F.3d 620, 626 (7th Cir. 2001) ("[W]e have held that the imposition of a sentence occurs on the date the judgment is entered by the clerk of court.") (citations omitted); *United States v. Clay*, 37 F.3d 338, 340 (7th Cir. 1994) ("The date of 'imposition of the sentence' from which the seven days runs signifies the date judgment enters rather than the date sentence is orally pronounced . . . .") (citations omitted); *Morillo*, 8 F.3d at 869 n.8 ("We think it is likely that when the two dates differ, th[e] phrase 'imposition of a sentence' signifies the date judgment enters, rather than the date sentence is orally pronounced.") (citations omitted).

¶ 30 The majority also relies heavily upon the 2004 amendment itself. However, the Commonwealth Supreme Court has not chosen to adopt that amendment, nor is there any indication that it contemplated doing so. The majority's reliance on the amendment is thus misplaced. In light of the authority above, I believe the Court erred in finding the sentence imposed under Rule 35 to be the oral sentence and in affirming the trial court's denial of Laniyo's Rule 35(b) motion.

For these reasons I respectfully concur in part and dissent in part.

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Dated this 9th day of February, 2012.

/s/_____
HERBERT D. SOLL
Justice Pro Tem