

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 10-00162-12-CR-W-FJG
)	
ANTAR H. ROBERTS,)	
)	
Defendant.)	

**GOVERNMENT’S RESPONSE TO DEFENDANT’S
MOTION TO FILE NOTICE OF APPEAL OUT OF TIME**

The United States of America, by United States Attorney Beth Phillips, and Assistant United States Attorney, Lajuana M. Counts, both for the Western District of Missouri, hereby files the following suggestions in opposition to defendant Antar H. Roberts’ “Motion for Extension of Time to File Notice of Appeal For Excusable Neglect.” (D.E. 597.) This Court should not rule on Roberts’ motion for an extension of time to file a notice of appeal for excusable neglect because Roberts’ appeal is currently before the Eighth Circuit Court of Appeals and that court has jurisdiction over this matter. The Government has filed a motion to dismiss Roberts’ appeal in the Eighth Circuit Court of Appeals, because his notice of appeal was untimely filed. The Government further anticipates that the Eighth Circuit will remand Roberts’ case to district court for a ruling under Fed. R. App. 4.

I. Statement of Facts

A superseding multi-defendant indictment was filed on May 26, 2010, in the Western District of Missouri, charging Roberts in Count One with conspiracy to distribute five

kilograms or more of cocaine, and 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and 846. (D.E. 2.) On October 18, 2010, before the Honorable Fernando J. Gaitan, Jr., Chief District Judge for the Western District of Missouri, Roberts entered a plea of guilty to a Class B felony, “the lesser included charge of Count One of the Indictment charging him with a violation of 21 U.S.C. § 841(a)((1) and (b)(1)(B), that is, conspiracy to distribute 500 grams or more of mixture or substance containing cocaine and five (5) grams or more of a mixture or substance containing cocaine base.” (D.E. 235, Plea Agrmt. ¶ 2.) A detailed factual basis for the guilty plea was contained in the plea agreement. (D.E. 235, Plea Agrmt. ¶ 3.) In the plea agreement Roberts also agreed to waive his appellate and post-conviction rights, except on limited grounds. (D.E. 235, Plea Agrmt. ¶ 15.)

On November 21, 2011, Roberts appeared before the district court and was sentenced to 151 months of imprisonment, 8 years of supervised release, no fine, and the \$100 mandatory special assessment. (D.E. 527, 528.) The judgment and commitment order was entered on November 22, 2011. (D.E. 528.)

On December 29, 2011, 37 days later, Roberts filed a *pro se* letter, which the district court construed as a notice of appeal, and the case was transmitted to the Eighth Circuit Court of Appeals and docketed as Case No. 12-1057. (D.E. 575, 576, 581.) Roberts did not seek an extension of time to file his notice of appeal from the district court as provided for in Rule 4(b)(4) of the Federal Rules of Appellate Procedure.

The Eighth Circuit issued a letter dated January 11, 2012, informing appointed appellate counsel, Lisa Nouri, that the “notice of appeal [Roberts filed] which has been submitted does not appear to have been timely filed.” The letter further noted that, under Rule 4 of the Federal Rules of Appellate Procedure, a motion may be filed with the district court within 30 days after expiration of the 14-day timely filing period, requesting the district court to rule on whether the defendant has shown “excusable neglect for the late filing,” and that the motion may be ruled on “only by a district judge.” Appointed counsel then subsequently filed a “Motion for Extension of time to File Notice of Appeal for Excusable Neglect” in the district court on January 23, 2012. (D.E. 597.)

II. Discussion

Roberts’ notice of appeal was untimely filed, and today, the Government filed a motion to dismiss the appeal in the Eighth Circuit. Because Roberts’ case is already before the Eighth Circuit Court of Appeals, this Court is divested of jurisdiction to rule on Roberts’ motion for extension of time to file a notice of appeal. Unless and until the Eighth Circuit remands this case back to district court, this Court should not rule on Roberts’ motion. If a remand occurs, the Government requests a hearing for this Court to make a determination of whether Roberts can show excusable neglect for not filing a timely notice of appeal.

III. Conclusion

Based on the above, the Government respectfully requests this Court to deny Roberts' motion for extension of time to file a notice of appeal.

Respectfully submitted,

BETH PHILLIPS
United States Attorney

By */s/ Lajuana M. Counts*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on February 8, 2012, to the CM-ECF system of the United States District Court for the Western District of Missouri. A copy will be served on participants in the case by the CM/ECF system or by U.S. Mail, postage prepaid.

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/s/ Lajuana M. Counts
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