

May 26, 2010

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
JOSE LUIS MACIAS,
Defendant - Appellant.

No. 09-5172
(N.D. Oklahoma)
(D.C. No. 4:05-CR-00075-JHP-1)

ORDER OF DISMISSAL

Before **HARTZ**, **ANDERSON**, and **TYMKOVICH**, Circuit Judges.

On September 14, 2009, Jose Luis Macias, a federal prisoner proceeding pro se, filed a motion in the United States District Court for the Northern District of Oklahoma, requesting the court to vacate its prior order requiring restitution in connection with his 2006 conviction and sentence. The district court denied the motion on September 17, 2009. Mr. Macias's motion for reconsideration, filed on October 13, 2009, was denied on November 25, 2009. He filed his notice of appeal on December 14, 2009.

We dismiss the appeal as untimely. Under Fed. R. App. P. 4(b)(1)(A)(i), a defendant in a criminal case has 14 days from entry of an order to file a notice of appeal. Mr. Macias's notice of appeal was filed more than 14 days after the entry of the order denying his motion for reconsideration. Even if the motion for

reconsideration tolled the 14-day period for appealing the order denying his original motion, *see Fed. R. App. P.* 4(b)(3), the notice of appeal would still be untimely as an appeal from that order. (The notice of appeal would also be untimely under the 10-day limit set by the version of *Fed. R. App. P.* 4(b) in effect before December 1, 2009.) We note that Mr. Macias's notice of appeal contained no certificate of service or any indication of use of a prison legal-mail system, so the prisoner-mailbox rule can afford him no relief. *See Fed. R. App. P.* 4(c).

Although the government can forfeit an objection to timeliness, it has raised the issue in this case and we must enforce Rule 4(b). *See United States v. Garduño*, 506 F.3d 1287, 1292 (10th Cir. 2007).

We DISMISS the appeal as untimely. Because there is no apparent reason why the government's brief was sealed, it will be unsealed unless the government submits a motion (which may be under seal) seeking sealing (or partial sealing) within 10 days of the filing of this Order. Appellant's motion to proceed *in forma pauperis* is denied.

ENTERED FOR THE COURT

Harris L Hartz
Circuit Judge