**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**August 15, 2012**

**Elisabeth A. Shumaker**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SILVESTRE LOPEZ MULGADO,

Defendant - Appellant.

No. 12-8044
(D.C. No. 2:08-CV-00046-WFD)

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SILVESTRE LOPEZ MULGADO,

Defendant - Appellant.

No. 12-8051
(D.C. No. 2:08-CV-00046-ABJ)

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**ORDER**

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Before **KELLY**, **LUCERO**, and **HARTZ**, Circuit Judges.

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These are appeals from district court orders denying the defendant's motion to vacate his sentence under 28 U.S.C. § 2255 and his motion to re-open the time to appeal under Fed. R. App. P. 4(a)(6). We dismiss the appeal from the first order because it is untimely and deny a certificate of appealability as to the second.

The district court entered its order denying the defendant's § 2255 motion on March 31, 2011. However, because no separate Fed. R. Civ. P. 58 judgment was entered, the judgment is deemed entered 150 days later – here, Monday, August 29, 2011. *See* Fed. R. Civ. P. 58(c)(2)(B) (if a separate judgment is required and is not entered, judgment is deemed entered 150 days from the entry of the order); *United States v. Torres*, 282 F.3d 1241, 1243-44 (10th Cir. 2002) (a Rule 58 separate judgment is required in § 2255 proceedings).

Over nine months later, on June 7, 2012, the defendant filed his notice of appeal. This is appeal no. 12-8044.

On the same day, the defendant also filed a pleading entitled "Motion for District Court to Reset Time to Petition Court of Appeals for the Tenth Circuit for a Certificate of Appealability," in which he stated that he did not receive a copy of the district court order denying his § 2255 motion.

The district court construed the defendant's motion as one asking the court to reopen the time to appeal pursuant to Fed. R. App. P. 4(a)(6). On June 22, 2012, the district court denied the motion. The court found that the record supported the defendant's claim that he had not received the court's order within the time set out in Rule 4(a)(6), but that his motion was filed too late. The defendant appeals that order in appeal no. 12-8051.

Fed. R. App. P. 4(a)(6) allows the district court to reopen the time to appeal when a party did not receive notification of the district court judgment within 21 days of entry and a motion is filed within 180 days of the entry or within 14 days of receipt of such

notice, whichever is earlier. *See also* 28 U.S.C. § 2107(c). Here the motion was filed on June 7, 2012, well beyond the 180 days from August 29, 2011, the date the judgment is deemed entered under Rule 58(c)(2)(B).

"[N]othing within Rule 4(a)(6) indicates it is permissive or that its limitations may be waived for equitable reasons. The 180-day limitation which governs this case is specific and unequivocal." *Clark v. Lavallie*, 204 F.2d 1038, 1040 (10th Cir. 2000). "The essence of Rule 4(a)(6) is finality of judgment. While application of that concept infrequently may work misfortune, it is an overriding principle which demands enforcement without distinction between counseled and uncounseled cases." *Id.* at 1041. *See also* Fed. R. App. P. 26(b) ("the court may not enlarge the time for filing a notice of appeal ... except as specifically provided by law.").

Accordingly, because the district court did not have authority to reopen the time to appeal, the court did not abuse its discretion in denying the defendant's motion. *See Portly-El v. Milyard*, 365 Fed. Appx. 912, 916 (10th Cir. 2010) (unpublished) (adopting the abuse of discretion standard in reviewing the district court's grant of a Rule 4(a)(6) motion (citing to *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994))).

The notice of appeal in no. 12-8044 was filed almost one year after the order denying § 2255 relief was deemed entered, well beyond the 60 days required under Fed. R. App. P. 4(a)(1)(B). *See also* 28 U.S.C. § 2107(b). A timely notice of appeal is both mandatory and jurisdictional. *Browder v. Director, Department of Corrections*, 434 U.S. 257, 264 (1978). Accordingly, appeal no. 12-8044 is dismissed.

Appeal no. 12-8051, the appeal from the district court order denying the Rule 4(a)(6) motion, was timely filed. However, in order to appeal from this order, the defendant needs a certificate of appealability ("COA"). *See United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008) (appeal of a procedural ruling in a § 2255 proceeding requires a COA). To obtain a COA, the defendant must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 329 U.S. 473, 478 (2000). As discussed above the district court correctly denied the defendant's Rule 4(a)(6) motion. Accordingly, COA is denied.

Appeal no. 12-8044 is **DISMISSED** for lack of appellate jurisdiction. COA is **DENIED** in appeal no. 12-8051 and that appeal is **DISMISSED**. The defendant's request to proceed *in forma pauperis* in both appeals is **GRANTED**.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

Ellen Rich Reiter

by: Ellen Rich Reiter
Jurisdictional Attorney