

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 24, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BENJAMIN FRESQUEZ,

Defendant - Appellant.

No. 18-1463
(D.C. No. 1:07-CR-00403-MSK-2)
(D. Colo.)

ORDER

Before **BACHARACH**, **McHUGH**, and **MORITZ**, Circuit Judges.

This matter is before the court on the government's motion to dismiss and the response filed thereto. The government argues that the appeal should be dismissed because the notice of appeal is untimely.

The district court denied the defendant's 18 U.S.C. § 3582(c)(2) motion in an order entered on October 29, 2018. The defendant filed his notice of appeal on November 28, 2018, thirty days later.

Under Fed. R. App. P. 4(b)(1)(A) the time to appeal from the denial of a § 3582 motion is 14 days . *See United States v. Green*, 625 F. App'x 901 (10th Cir. 2015) (the time requirements of Fed. R. App. P. 4(b)(1)(A) apply to a § 3582 proceeding as it is a continuation of the prior criminal proceeding) (citing to *United States v. Espinosa-Talamantes*, 319 F.3d 1245, 1246 (10th Cir. 2003)).

Rule 4(b)(1)(A) is an “inflexible claim-processing rule[], which unlike a jurisdictional rule, may be forfeited if not properly raised by the government.” *United States v. Garduno*, 506 F.3d 1287, 1291 (10th Cir. 2007) (internal quotation omitted). However, here, “[b]ecause the government timely objected to [the defendant’s] late notice of appeal, this court is bound to dismiss the appeal.” *Id.* at 1292.

The government’s motion to dismiss is **GRANTED** and this appeal is **DISMISSED**. A copy of this order shall stand as and for the mandate of the court.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in cursive script, appearing to read "Ellen Rich Reiter".

by: Ellen Rich Reiter
Jurisdictional Attorney