

IN THE UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff/Appellee, -vs- VINCENT JULIAN HUDSON, Defendant/Appellant.	CR-06-50066-TUC-FRZ District of Arizona
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ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES MAGISTRATE JUDGE
FOR THE DISTRICT OF ARIZONA

FILED PURSUANT TO LOCAL RULE 1.15

**APPELLANT'S MOTION TO DISMISS
GOVERNMENT'S CROSS APPEAL**

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MOTION TO DISMISS GOVERNMENT'S CROSS APPEAL

I. Introduction.

On May 22, 2007, Appellant Vincent Julian Hudson filed a notice of appeal from the judgment of the U.S. Magistrate, which was entered on May 15, 2007.

On August 6, 2007, about 83 days after the magistrates order and 76 days after the filing of this notice of appeal by Mr. Hudson, the Government has filed a cross appeal. *Answering Memorandum and Cross Appeal*, dated 08/06/07, Title page & pp. 5, 21. The Government states that it “appeals the [magistrate’s] dismissal of Allegation D” of the petition to revoke, *id.* at 5, which is a challenge to the magistrate’s “finding that the defendant had not violated allegation D in the petition to revoke,” *id.* at 7, 21, and asks as relief that the “defendant should be found to be in violation of condition 1,” *id.* at 25.

However, the Government itself concedes that it has never even filed a notice of appeal. *Answering Memorandum and Cross Appeal*, dated 08/06/07, p. 21. The Government argues “that this is not dispositive,” citing a case that says “failure to cross-appeal a sentencing error does not constitute waiver of the [party’s] right to contest that [sentencing] error at resentencing.” *Id.* at 21.

Mr. Hudson moves this Court to dismiss the Government’s cross appeal not only as untimely but also as without statutory basis, thus depriving this Court of jurisdiction and/or the ability to consider its challenges. In this regard, the Court

should also strike that part of its *Answering Memorandum* that containing the Government's cross appeal, including but not limited to: part IV.C. (Issues Presented), *id.* at 2; part V.B. (Statement of Facts relating to violation of conditions), *id.* at 5-6; part VI.¶3 (Summary of Arguments relating to allegation D), *id.* at 7; part VII.C., *id.* at 21-25; and VIII. (Conclusion), sentences 3 & 4, *id.* at 26.

Finally, it is requested that Mr. Hudson's time for filing a brief in answer to the government's cross-appeal be stayed until such time as the Court rules on this instant motion to dismiss the government's cross appeal. By analogy, Ninth Circuit Rule 27-11(a)(1) provides for an automatic stay of any further briefing schedule whenever a motion to dismiss appeal is filed. Although a separate motion to set briefing schedule is also being filed with this Court to give Mr. Hudson the same period for filing an answering brief that would be provided by local rule 1.15(b)(4) for an answering memorandum and FRAP 28.1 for an answer on a cross appeal, Mr. Hudson asks the Court herein to fully stay that briefing until this motion to dismiss government's appeal is ruled upon.

**II. The Government's cross appeal is untimely,
thus precluding consideration of it by this Court.**

Appeals from magistrate judges to district court judges are governed by Fed.R.Crim.P. 58(g)(2). The government is allowed to file such appeal only as

provided by subsection (g)(2)(A).¹ Charles Alan Wright, FEDERAL PRACTICE & PROCEDURE, 3B Fed. Prac. & Proc. Crim.3d § 917 (updated 2007); *U.S. v. Hazelton*, 279 F.Supp.2d 710, 713 (E.D.Va. 2003). That subsection states as follows:

(A) Interlocutory Appeals. Either party may appeal an order of a magistrate judge to a district judge within 10 days of its entry if a district judge's order could similarly be appealed.

Therefore, when the government files an appeal of a magistrate order, it must be filed within ten (10) days of the order being appealed.² 3B Fed. Prac. & Proc. Crim.3d § 917.

A timely notice of appeal under Rule 58(g)(2) is required “to preserve [the] right to [have the appeal from a magistrate order] be heard in this Court.” *U.S. v. Sanchez*, 258 F.Supp.2d 650, 658 (S.D.Tex. 2003); *U.S. v. Ziegler*, 831 F.Supp. 771, 773

¹ Subsection (g)(2)(B) is reserved only for defendants. *Hazelton*, 279 F.Supp.2d at 713. It is explicit in this limitation, providing: “(B) Appeal from a Conviction or Sentence. A *defendant* may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 10 days of its entry (emphasis added). *Id.* at 713.

² Subsection g(2)(A), providing for the government to file interlocutory appeals from non-final orders of a magistrate judge, may invoke the provisions of 18 U.S.C. § 3731, which concerns appeals from district courts to the courts of appeal. *See Hazelton*, 279 F.Supp.2d at 713. (finding that the scope of appeal under Rule 58(g)(2) is the same as the scope of appeal under 18 U.S.C. § 3731). However, since Rule 58(g)(2)(A) is more specific – directed to appeals of interlocutory appeals from magistrate orders – its 10-day limit for filing the notice of appeal would govern instead of the 30-day limit provided by 18 U.S.C. § 3731.

(N.D.Cal. 1993) (government avoided dismissal of its appeal because excluding legal holidays and weekends, its notice was timely filed within 10 days).

The Ninth Circuit Court of Appeals recently held that the failure to file a timely notice of appeal as required by a rule of procedure presents a *mandatory bar* to consideration of the appeal when, as here, the opposing party objects to the untimely appeal. In *U.S. v. Sadler*, 480 F.3d 932 (9th Cir. 2007), the Ninth Circuit, following the Supreme Court case of *Eberhart v. U.S.*, 126 S. Ct. (Oct. 31, 2005)), held that although the 10-day notice of appeal filing deadline under FRAP 4(b) for a criminal appeal is not “jurisdictional,” it nevertheless is “a claim-processing rule[]” that is “mandatory if invoked by a[n opposing] party but forfeitable if not invoked.” *Id.* at 939, 942. Thus, while failure to meet the appeal-filing deadline does not deprive the court of jurisdiction, it absolutely bars appeal if the opposing party timely objects. *Id.*

Similarly, in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), the Supreme Court held that a statute-based appeal deadline (there, a civil habeas appeal) absolutely bars appeal because such a deadline provided in statute by Congress is jurisdictional. The Supreme Court noted the *Sadler* case with approval, pointing out that the Ninth Circuit’s ruling was based on the deadline being “not grounded in a statute.” *Id.* at 2365 n.3.

Thus, the rules recently confirmed by both the Ninth Circuit and the Supreme Court quite clearly establish that the government’s cross appeal of the magistrate’s

order in this case is absolutely and mandatorily barred from consideration because Mr. Hudson objects to its untimely filing of the appeal. Even if the government's appeal could somehow be said to be governed by the statute, i.e., 18 U.S.C. § 3731, by reference through Rule 58(g)(2)(A), its appeal would still be barred, in an even more absolute way – as lacking jurisdiction, because it is far beyond the statutory deadline for filing of the appeal.³

The government essentially concedes that its appeal is barred. It acknowledges that it never even filed a notice of appeal, much less a timely one. *Answering Memorandum*, p.21. It then acknowledges that because of this failure, it would have no right to litigate any appeal in this Court, but would only be able to preserve a sentencing argument if the case were to be remanded for resentencing. *Id.* (citing *U.S. v. Garcia-Guizar*, 234 F.3d 483, 490 (9th Cir. 2000)). Thus, the government itself concedes that it may not litigate in this Court any aspect of the magistrate's orders it did not timely appeal, but is left to try to litigate those issues before the magistrate *if* the case is remanded for resentencing and *if* the issues concern sentencing. *But see, infra*, § III, noting that the government's appeal is not of the magistrate's sentencing order, but of her order finding Mr. Hudson not guilty of violating condition 1).

³ The time for the government's appeal would begin to run, not upon the filing of Mr. Hudson's appeal on May 22, 2007, but rather as of the date of any order appealed, i.e., May 15, 2007, because Rule 58(g)(2)(A) explicitly provides that the 10 days runs from entry of the order and not from the date of any appeal by the defendant.

III. The Government's cross appeal is not even permitted by law, under any statute or rule.

The government's appeal should be dismissed also because it is not permitted by any statute or rule. As the government's answering brief makes crystal clear, it is appealing from the magistrate's finding that Mr. Hudson is not guilty of violating condition number 1, which was alleged to be violated in the petition as allegation D. It's own heading for its cross appeal is entitled as follows:

C. THE MAGISTRATE JUDGE ERRED BY FINDING THAT THE DEFENDANT HAD NOT VIOLATED ALLEGATION D IN THE PETITION TO REVOKE BECAUSE THAT IS NOT SUPPORTED BY THE RECORD.

Government's Answering Memorandum and Cross Appeal 21.

However, under Rule 58(g)(2)(A), the government is not permitted to appeal a magistrate judge's substantive factual findings on a defendant's guilt or innocence of an alleged violation of supervision. Only a defendant is permitted to appeal such final findings of conviction and sentence, under Rule 58(g)(2)(B). The government is specifically limited to appealing interlocutory orders of the type that could be appealed if made by a district court judge under 18 U.S.C. § 3731. *See Hazelton*, 279 F.Supp.2d at 713. (finding that the scope of appeal under Rule 58(g)(2)() is the same as the scope of appeal under § 3731); 3B Fed. Prac. & Proc. Crim.3d § 917. As the *Hazelton* court noted,

Appeals from a district judge's order are governed by 18 U.S.C. § 3731, which outlines the limited range of circumstances under which the government may appeal a decision of a district court in a criminal case. These circumstances are limited to “a decision, judgment or order” dismissing an indictment or information, granting a new trial, suppressing or excluding evidence, requiring the return of seized property, granting the release of a defendant on bond, or revoking or changing the conditions of bond. 18 U.S.C. § 3731.

Hazelton, 279 F.Supp.2d at 713. Here, in Mr. Hudson’s case, the magistrate’s order making a factual finding that he did not violate condition number 1 of his supervision is not appealable because, as in *Hazelton*, the “order at issue in this appeal does not qualify as an appealable order under § 3731 because it does not fit within any of the circumstances listed in § 3731.” *Id.*

Therefore, the government’s cross appeal must be dismissed on the separate basis that the Court is without jurisdiction to hear it, because the government is not authorized by any statute or rule to file and litigate such an appeal. Moreover, although it need not be resolved by this Court concerning this appeal or motion to dismiss, as noted above, the government is not entitled to reserve litigation of the issue on remand because it is not a sentencing issue as in *Garcia-Guizar*, but rather a substantive issue dealing with Mr. Hudson’s not be found in violation of his supervision as set forth in allegation D.

IV. The Briefing schedule for Appellant’s answer to the Government’s cross should be stayed pending decision of this motion.

As already discussed above in the Introduction, Mr. Hudson asks this Court to stay any briefing by him concerning the government's cross-appeal. Ordinarily, by analogy under FRAP 28.1, a defendant would have additional time (30 days) within which to respond to a cross appeal – i.e., the same amount of time the government is given to file an answering brief to the defendant's appeal. Pursuant to Local Rule 1.15(b)(4), the time period for an answering memorandum is 20 days. Mr. Hudson is filing a separate motion to set the briefing schedule to allow him that additional amount of time for responding the merits of the government's cross appeal. However, Mr. Hudson requests the Court to follow the rule set by the Ninth Circuit for the filing of motions to dismiss appeals: that rule automatically stays the schedule for any additional briefing upon filing of the motion to dismiss appeal, until after the Court rules upon the motion to dismiss. Therefore, the Court is respectfully requested to enter an order staying the response time for Mr. Hudson to file an answering brief to stay the government's cross appeal until after briefing of this motion is completed and an order on it is issued.

V. Conclusion.

For the reasons set forth above, Mr. Hudson requests this Court to dismiss the government's cross appeal, to strike all matters in its *Answering Memorandum and Cross Appeal* that relate to that cross appeal, and to stay the time for Mr. Hudson to file an answering brief to respond to the government's cross appeal until after the Court rules on this motion to dismiss.

Respectfully submitted: August 20, 2007.

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IX. CERTIFICATE OF FILING AND SERVICE

Pursuant to Local Rule 1.15, undersigned counsel certifies that on **August 20th, 2007**, notice of the following memorandum was electronically mailed to:

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