

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION**

UNITED STATES OF AMERICA)	
)	
v.)	1:06-CR-3-TLS
)	
DAMONE T. ABERNATHY)	
)	
)	
DAMONE T. ABERNATHY)	
)	
v.)	1:13-cv-150-TLS
)	
UNITED STATES OF AMERICA)	

OPINION AND ORDER

This matter is before the Court on Defendant/Petitioner Damone T. Abernathy’s Letter [1:13-cv-150, ECF No. 8; 1:06-CR-3, ECF No. 116] filed on July 21, 2014. The Defendant/Petitioner asks the Court to resend his notice of appeal to the Seventh Circuit Court of Appeals in an effort to proceed with his case. As discussed below, this case is closed.

On September 23, 2013, this Court issued an Opinion and Order [1:13-cv-150, ECF No. 1; 1:06-CR-3, ECF No. 104] denying the Defendant/Petitioner’s Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody [1:06-CR-3, ECF No. 98] because it was untimely. On January 28, 2014, the Defendant/Petitioner filed a Notice of Appeal [1:13-cv-150, ECF No. 3; 1:06-CR-3, ECF No. 106] seeking review of the Court’s Order. The Seventh Circuit Court of Appeals, before Circuit Judges William J. Bauer, Joel M. Flaum, and John Daniel Tinder, issued an Order [1:13-cv-150, ECF No. 9; 1:06-CR-3, ECF No. 117] on May 27, 2014, dismissing the Defendant/Petitioners appeal for lack of jurisdiction because the notice of appeal was untimely. In that Order, the Court of Appeals noted that the notice of appeal

was filed over two months late and that the district court had not granted an extension of the appeal period, pursuant to Federal Rule of Appellate Procedure 4(a)(5). Rule 4(a)(5)(A) provides that “the district court may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.” Rule 4(a) requires that a notice of appeal in a civil case in which the United States is a party be filed in the district court within 60 days of the entry of judgment or order appealed.

Here, the Defendant/Petitioner’s notice of appeal, filed on January 28, 2014, came 127 days after judgment was entered. This exceeds both the time to file an appeal pursuant to Rule 4(a) and the potential 30-day extension pursuant to Rule 4(a)(5) upon a properly made motion. After the Court of Appeals’ May 27, 2014, Order, the Defendant/Petitioner filed a Letter [1:13-cv-150, ECF No. 7; 1:06-CR-3, ECF No. 114] on June 30, 2014, requesting an extension of the time period to file a notice of appeal, an apparent effort to cure the defect that caused his appeal to be dismissed. This request was filed over 6 months late and is untimely. The Court of Appeals has already dismissed the Defendant/Petitioner’s appeal for being untimely. As such, this case is closed.

For the foregoing reasons, the Defendant/Petitioner is REMINDED that his untimely Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody has been denied, that his untimely appeal has been dismissed, and that his case is closed.

SO ORDERED on July 23, 2014.

s/ Theresa L. Springmann
THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT