

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 13-40828
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

April 9, 2014

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LARUE JOHNSON, also known as Juggy,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:09-CR-641-1

Before OWEN, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:*

In June 2010, Larue Johnson, federal prisoner # 64812-279, was convicted by guilty plea for possession with intent to distribute 92.4 grams of cocaine base and was sentenced to 120 months of imprisonment and five years of supervised release. He now requests leave to proceed in forma pauperis (IFP) from the district court's denial of his 18 U.S.C. § 3582(c)(2) motion, in which he sought a sentence reduction pursuant to the Fair Sentencing Act of

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 13-40828

2010 (FSA). By moving to proceed IFP, Johnson challenges the district court's implicit certification that the appeal was not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997).

The Government has filed a motion to dismiss this appeal due to Johnson's failure to file a timely notice of appeal or, in the alternative, to grant it a 10-day extension to file an appellate brief. The record supports the Government's contention. Johnson's notice of appeal was filed after the expiration of the time for filing a timely notice of appeal and beyond the time during which the district court could have extended the time for filing a notice of appeal. *See* FED. R. APP. P. 4(b)(1)(A)(i), (b)(4). We therefore dismiss this appeal as untimely. *See id.*; *see also United States v. Garcia-Cabrera*, 472 F. App'x 340, 341 (5th Cir. 2012)(dismissing sentencing appeal as untimely).¹

The Government's motion to dismiss is GRANTED, and the appeal is DISMISSED as untimely. All other motions are DENIED.

¹Mindful that the time to appeal is not jurisdictional in a criminal case, we note that even if we pretermitted the issue of whether Johnson filed a timely notice of appeal and addressed the merits of the case, his appeal would fail. *See United States v. Martinez*, 496 F.3d 387, 389 (5th Cir. 2007). As Johnson was sentenced before the FSA's effective date to the statutory minimum of 120 months of imprisonment, he was not eligible for a § 3582(c)(2) reduction. *See United States v. Kelly*, 716 F.3d 180, 181 (5th Cir.), *cert. denied*, 134 S. Ct. 439 (2013). Accordingly, Johnson cannot present a nonfrivolous issue, and the appeal would have to be dismissed as frivolous. *See Baugh*, 117 F.3d at 202 n.24; *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983); 5TH CIR. R. 42.2.