

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

No. 14-41268
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

August 6, 2015

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

EDGAR HERNANDEZ-GOMEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before REAVLEY, SMITH, and HAYNES, Circuit Judges.

PER CURIAM:

Edgar Hernandez-Gomez (Hernandez) pleaded guilty to possession with the intent to distribute heroin. He appeals, arguing that the district court erred when it attributed 10 to 30 kilograms of heroin to him for sentencing purposes. The Government has filed a motion to dismiss the appeal as untimely.

In a criminal case, an incarcerated defendant generally has 14 days from the entry of the judgment on the docket to file a notice of appeal, or to deposit such in his institution's mail system. *See* FED. R. APP. P. 4(b)(1)(A)(i), (b)(6), (c)(1). Hernandez's notice of appeal was not filed or submitted in a timely

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manner, nor was it filed within the permissible extension period of Rule 4(b)(4)(B).

The time limit set forth in Rule 4(b)(1)(A) is mandatory, but it is not jurisdictional. *United States v. Martinez*, 496 F.3d 387, 388-89 (5th Cir. 2007) (citing *Bowles v. Russell*, 551 U.S. 205, 207-14 (2007)). Thus, the requirements of Rule 4(b)(1)(A) may be waived. Hernandez argues that the Government did so by waiting until he filed his initial brief to file a motion to dismiss the appeal. We conclude that a motion to dismiss filed with or before the Government's first substantive filing (usually, its opening brief) is timely. *See United States v. Sealed Appellant*, 304 F. App'x 282, 284 (5th Cir. 2008). Thus, we conclude that the Government did not waive the timeliness objection. *See id.*; *Martinez*, 496 F.3d at 389.

Accordingly, the Government's motion is GRANTED and the appeal is DISMISSED.