

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

United States Court of Appeals
Fifth Circuit

FILED

April 5, 2010

Lyle W. Cayce
Clerk

No. 09-50251

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

VICTOR MANUEL MENDOZA,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
(08-CR-754)

Before REAVLEY, JOLLY, and OWEN, Circuit Judges.

PER CURIAM:*

Victor Manuel Mendoza appeals the denial of his motion to correct sentence pursuant to FED. R. CRIM. P. 35(a). This court must examine the basis of its jurisdiction sua sponte if necessary. *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). The notice of appeal in a criminal case must be filed within 14 days after the entry of the judgment or order being appealed. FED. R. APP. P. 4(b)(1)(A). Upon a finding of good cause or excusable neglect, the district court may extend that time “for a period not to exceed 30 days from the

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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expiration of the time otherwise prescribed by this Rule 4(b).” FED. R. APP. P. (b)(4). The Government has not waived the issue whether Mendoza timely filed his notice of appeal. *See United States v. Martinez*, 496 F.3d 387, 388-89 (5th Cir. 2007). Mendoza did not notice his appeal within 14 days after entry of the order denying his Rule 35(a) motion. Consequently, he filed a motion for extension of time in which to file his notice of appeal. The district court denied the motion for extension of time as moot, having determined that Mendoza’s notice of appeal was timely pursuant to the provision governing appeals from civil cases where the United States is a party, FED. R. APP. P. 4(a)(1)(B). However, a ruling on a Rule 35 motion is considered part of the original criminal proceeding. *See United States v. De Los Reyes*, 842 F.2d 755, 757 (5th Cir. 1988). Accordingly, an appeal from a ruling on such a motion must be taken within the time delay set forth in FED. R. APP. P. 4(b). *Id.* The district court thus erred when it determined that Mendoza’s notice of appeal was timely. *See id.* Accordingly, IT IS ORDERED THAT the district court’s order denying as moot the motion for extension of time is vacated and the case is remanded to the district court for the limited purpose of determining whether Mendoza is entitled to an extension of time in which to file his notice of appeal based upon excusable neglect or good cause.

ORDER VACATED; LIMITED REMAND.