

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10524
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GABRIEL HUERTA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:95-CR-76-1-C

November 7, 2002

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:*

On appeal from the denial of a "Motion Under Rule of Lenity," filed by Gabriel Huerta, federal prisoner No. 38965-115, we remanded to the district court for a determination whether the belated filing of the notice of appeal was due to excusable neglect or good cause. United States v. Huerta, No. 05-10524 (5th Cir. June 4, 2002). The district court having found that the late filing should be excused, the Government now moves this

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

court to dismiss the appeal for lack of subject matter jurisdiction and, in the alternative, requests an extension of time to file its appellate brief.

Huerta argues that the district court erred by failing to construe his motion as sounding under § 2255. He does not challenge the district court's holding that the rule of lenity does not provide a jurisdictional basis for the district court to grant relief, and he does not suggest any other statutory basis for jurisdiction. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993); FED. R. APP. P. 28(a)(9)(A).

Huerta's motion is facially time-barred under § 2255 and he did not timely present any evidence to the district court relevant to a whether a motion for § 2255 relief might be deemed timely under 28 U.S.C. § 2255(4). Accordingly, the Government's motion for an extension of time is denied as moot and the appeal is dismissed.

APPEAL DISMISSED; MOTION FOR EXTENSION OF TIME DENIED AS MOOT.