

**FILED**

February 10, 2004

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 03-20107  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEPHEN MICHAEL JOHNSTON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. H-02-CR-142-4  
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Before JOLLY, WIENER, and CLEMENT, Circuit Judges.

PER CURIAM:\*

Stephen Michael Johnston appeals his conviction following his guilty plea to possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The Government's motion to strike Johnston's brief is DENIED.

Johnston was entitled to an extension of time in which to file an appeal because his lawyer's failure to file a timely appeal upon Johnston's request to do so constituted "excusable neglect" under FED. R. APP. P. 4(b)(4). See United States v.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Clark, 191 F.3d 845, 846 (5th Cir. 1999); Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). Thus, Johnston's notice of appeal, filed on January 10, 2003, is timely based in excusable neglect.

Johnston's guilty plea was knowing and voluntary. See United States v. Vonn, 122 S. Ct. 1043, 1046 (2002). Johnston has either waived the remaining issues he raises on appeal by virtue of his valid guilty plea (see United States v. Cothran, 302 F.3d 279, 285-86 (5th Cir. 2002); United States v. Glinsey, 209 F.3d 386, 392 (5th Cir. 2000)), or has abandoned them by failing to brief them adequately. See United States v. Torres-Augilar, 352 F.3d 934, 936 n.2 (5th Cir. 2003).

Counsel is WARNED that filing frivolous appeals invites the imposition of sanctions. See United States v. Gaitan, 171 F.3d 222, 224 (5th Cir. 1999).

AFFIRMED.