

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

No. 14-20258
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

July 8, 2015

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE LUIS PENA-GARZA, also known as Jose Luis Pena, also known as Jose Luis Pena-Garcia, also known as Gabriel Artemio Garza, also known as Jose Louis Pena, also known as Gabriel Garza, also known as Gabriel A. Garza, also known as Jose Luis Garza Pena, also known as Jose Luis Pena Garza,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:13-CR-585-1

Before DAVIS, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Jose Luis Pena-Garza pleaded guilty to an indictment charging him with illegal reentry into the United States following previous deportation. He was sentenced to a within-guidelines sentence of 25 months of imprisonment. For the first time on appeal, Pena-Garza asserts that

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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the district court plainly erred in determining his criminal history score by assessing points for a 2011 intoxication assault conviction. The government contends that Pena-Garza's appeal should be dismissed because his notice of appeal was untimely.

Federal Rule of Appellate Procedure 4(b)(1)(A)'s time limit for filing a timely notice of appeal "is mandatory, but not jurisdictional, because it does not derive from a statute," and may be waived. *United States v. Martinez*, 496 F.3d 387, 388 (5th Cir. 2007) (following reasoning in *Bowles v. Russell*, 551 U.S. 205, 211-13 (2007)). There is no waiver in the instant case. Moreover, a defendant does not have a right to have the untimeliness of his notice of appeal disregarded. *United States v. Leijano-Cruz*, 473 F.3d 571, 574 (5th Cir. 2006). Given these circumstances, the instant appeal is DISMISSED as frivolous based on the untimeliness of the notice of appeal. *See* 5th Cir. R. 42.2.