

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40564
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDREA EMEARY SIMMONS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:96-CR-67-2

August 6, 2001

Before JOLLY, DAVIS and BENAVIDES, Circuit Judges.

PER CURIAM:*

This court must examine the basis of its own jurisdiction sua sponte if necessary. See Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). A timely notice of appeal is a mandatory precondition to the exercise of appellate jurisdiction. See United States v. Merrifield, 764 F.2d 436, 437 (5th Cir. 1985). Because Simmons' appeal is from the denial of a motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, she was required to file her notice of appeal within 10 days of the entry of the district court's order. See Fed. R.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

App. P. 4(b)(1)(A). The district court's order denying Simmons' motion for new trial was entered on April 28, 2000. Simmons did not file her notice of appeal until May 15, 2000, 17 days later. Thus, Simmons' notice of appeal is untimely.

The district court, however, may grant an additional 30 days in which to file a notice of appeal "upon a finding of excusable neglect or good cause." See Fed. R. App. P. 4(b)(4). An untimely notice of appeal filed within the 30-day period is customarily treated by this court in criminal cases as a motion for a determination whether the defendant is entitled to an extension of time to appeal. See United States v. Golding, 739 F.2d 183, 184 (5th Cir. 1984); see also United States v. Alvarez, 210 F.3d 309, 310 (5th Cir. 2000). Because Simmons filed her notice of appeal within the 30-day period, we remand this case to the district court for a determination whether Simmons' untimely filing of the notice of appeal was due to excusable neglect or good cause.

REMANDED.