

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

No. 19-50140

United States Court of Appeals
Fifth Circuit

FILED

July 25, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DARYL MACIAS PENA,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:17-CR-211-1

Before HAYNES, GRAVES, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Daryl Macias Pena, federal prisoner # 94475-380, pleaded guilty to possession with intent to distribute a quantity of heroin and five grams or more of actual methamphetamine. The district court's judgment was entered on February 21, 2018. Nearly a year later, Pena filed his pro se notice of appeal and a motion seeking authorization to file an out-of-time appeal. Because the notice of appeal was filed well beyond the time for appealing and the time for extending the appeal deadline, *see* FED. R. APP. P. 4(b)(1)(A), (b)(4), the district

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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court denied Pena authorization. Pena now moves this court for the appointment of counsel on appeal.

If an appeal “is frivolous and entirely without merit,” we can dismiss the appeal during consideration of an interlocutory motion. 5TH CIR. R. 42.2. Although the time limit for appealing in a criminal case is not jurisdictional, *United States v. Martinez*, 496 F.3d 387, 388-89 (5th Cir. 2007), a defendant is not entitled to have his untimeliness disregarded, *United States v. Leijano-Cruz*, 473 F.3d 571, 574 (5th Cir. 2006). Where, as here, the district court enforces an inflexible claim processing rule, we may not reverse that decision unless the defendant shows that the district court erred, “[i]rrespective of whether the government noted the untimeliness in the district court.” *Id.*

Pena makes no argument here that the appeal is timely or that his untimeliness should be disregarded. Furthermore, there is no indication in the record that there is a nonfrivolous basis for making such arguments. *See Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 715 (2019).

Pena’s appeal is frivolous because it is untimely. *See United States v. Pesina-Rodriguez*, 825 F.3d 787, 788 (5th Cir. 2016). Accordingly, the appeal is DISMISSED, *see* 5TH CIR. R. 42.2, and the motion for the appointment of counsel is DENIED.