

June 15, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 05-50010  
Summary Calendar

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BEN LEE BASEY

Defendant - Appellant

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:85-CR-116-3  
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Before KING, WIENER and DeMOSS, Circuit Judges.

PER CURIAM:\*

Ben Lee Basey, federal prisoner # 34146-080, appeals the district court's dismissal of his motion to reduce his sentence pursuant to FED. R. CRIM. P. 35(a). We agree with Basey that the district court erred in construing Basey's Rule 35(a) motion as a 28 U.S.C. § 2255 motion and dismissing it as successive. A Rule 35(a) motion is considered to be part of the original criminal proceeding, rather than a collateral attack on the sentence. See

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

United States v. Scott, 672 F.2d 454, 456 n.3 (5th Cir. 1982);  
United States v. Shillingford, 586 F.2d 372, 375 (5th Cir. 1978).

Basey is also correct that, because his offense was committed prior to November 1, 1987, the version of Rule 35 in effect at that time applies to him, a point that the Government concedes. See United States v. Pineda, 988 F.2d 22, 23 n.2 (5th Cir. 1993). Under that version of the rule, a district court "may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." FED. R. CRIM. P. 35(a) (1982) (emphasis added).

For the foregoing reasons, the judgment of the district court is vacated, and this matter is remanded for further proceedings consistent with this opinion. See In re Argo Fin., Inc., 337 F.3d 516, 525 (5th Cir. 2003). We express no view regarding the merits of the claims Basey seeks to raise via his Rule 35 motion.

VACATED AND REMANDED.