

November 3, 2003

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 02-30838  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PHILLIP K. SIAS,

Defendant-Appellant.

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Appeals from the United States District Court  
for the Western District of Louisiana  
USDC No. 99-CR-60034-1

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Before GARWOOD, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

PER CURIAM:\*

Philip K. Sias, federal prisoner # 10304-035, was convicted of using and carrying a firearm during the commission of a violent crime, in violation of 18 U.S.C. § 924, and this court affirmed his conviction and sentence. *United States v. Sias*, 227 F.3d 244 (5th Cir. Sept. 8, 2000). Sias now appeals the July 23, 2002, denial of his 18 U.S.C. § 3582(c)(2) motion filed July 16, 2002. After we

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 R. 47.5 the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

remanded to the district court for a finding (to be returned to this court) on the timeliness of the notice of appeal from the July 23, 2002 order, Fed. R. App. P. 26 was amended to provide additional days for a notice of appeal. We need not decide whether it is "just and practicable" to apply the new rule to the instant case. See FED. R. APP. P., ORDER OF APRIL 29, 2002. Regardless of the timeliness of the notice of appeal, Sias's appeal is dismissed because it is frivolous. See *United States v. Alvarez*, 210 F.3d 309, 310 (5th Cir. 2000).

Sias argues that (1) his plea agreement may have been breached by the court's decision to upwardly depart in arriving at his sentence and (2) the court failed to give notice of and justification for its upward departure. These arguments are not cognizable in an 18 U.S.C. § 3582(c)(2) motion as that motion is used only to raise an issue of the retroactive application of a subsequently lowered sentencing range. See *United States v. Shaw*, 30 F.3d 26, 29 (5th Cir. 1994). Sias also argues that Amendment 598 to the Sentencing Guidelines provides for a reduction in his sentence. Amendment 598 (effective November 1, 2000) is not listed in U.S.S.G. § 1B1.10 and therefore may not be applied retroactively on Sias's motion. See *United States v. Drath*, 89 F.3d 216, 218 (5th Cir. 1996).

Sias's appeal is frivolous because it lacks an arguable basis in law or fact. See *McCoy v. Court of Appeals of Wisconsin Dist.*

1, 486 U.S. 429, 439-40 & n.10 (1985). Accordingly, the appeal is  
DISMISSED. See 5TH CIR. R. 42.2.