

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-4319  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JOE E. FRYAR,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Western District of Louisiana  
USDC No. 1: CR87-60027-01 Sec. "O"  
- - - - -

March 18, 1993

Before KING, HIGGINBOTHAM, AND DAVIS, Circuit Judges.

PER CURIAM:\*

The district court was without jurisdiction to consider Fryar's Rule 35(b) motion because Fryar failed to file the motion on time. Under the version of Fed. R. Crim. P. 35 applicable to a defendant who committed an offense prior to November 1, 1987, "[t]he court may reduce a sentence within 120 days after . . . entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction." See United States v. United States District Court, 509 F.2d 1352, 1354 (9th Cir.), cert. denied, 421 U.S. 962

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

(1975). The Supreme Court denied Fryar's writ of certiorari on April 22, 1991. Fryar v. United States, 111 S.Ct. 1635 (1991). Fryar filed his Rule 35(b) motion on August 21, 1991. The time that elapsed between these two dates is 121 days, making Fryar's motion one day late. Under Fed. R. Crim. P. 45(b), a court may not extend the 120-day period for taking action under Rule 35. United States v. United States District Court, 509 F.2d at 1354. Since the rule is a mandatory one, the district court had no discretion to hear or power to change Fryar's sentence. Id.; see United States v. Kranzthor, 614 F.2d 981, 982 (5th Cir. 1980).

The district court was without jurisdiction to entertain the tardy Rule 35(b) motion. Therefore, the denial of the motion is AFFIRMED.