

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2784
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES OSCAR COOPER,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(CR-H-90-403-1)

(October 12, 1994)

Before POLITZ, Chief Judge, DUHÉ and BENAVIDES, Circuit Judges.

PER CURIAM:*

James Oscar Cooper appeals the denial of his pro se motion for new trial which invokes Fed. R. Crim. P. 33. The district court denied the motion as not being in the interest of justice.

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Concluding that the filing should have been deemed an application for relief under 28 U.S.C. § 2255, we vacate and remand for consideration as such.

Cooper was convicted by a jury of one count of conspiracy to distribute cocaine and to maintain a place to use and distribute cocaine and cocaine base¹, six counts of use of a firearm during a drug-trafficking crime², and ten counts of maintaining a place to distribute and use cocaine base.³ He was sentenced to thirty years imprisonment. We affirmed.⁴

More than two years post-verdict Cooper's pro se filing seeks relief asserting, inter alia, due process violations and ineffective assistance of counsel. As this essentially is a challenge to the constitutionality of his convictions, our "review of the merits of [Cooper's] claim is not circumscribed by the label attached"⁵ but is to be treated as a submission under section 2255.⁶

¹ 21 U.S.C. § 846.

² 18 U.S.C. § 924(c)(1).

³ 18 U.S.C. § 856.

⁴**United States v. Cooper**, 966 F.2d 936 (5th Cir.), cert. denied, 113 S.Ct. 481 (1992).

⁵**United States v. Santora**, 711 F.2d 41, 42 n.1 (5th Cir. 1983).

⁶See **United States v. Stumpf**, 900 F.2d 842 (5th Cir.1990), where the court allowed an untimely Rule 35(a) motion to be considered timely under the time limits applicable to 28 U.S.C. § 2255, given the motion's true nature as a collateral attack on Stumpf's conviction. See also **United States v. Holy Bear**, 624 F.2d 853 (8th Cir.1980) (noting that an untimely Rule 33 motion alleging ineffectiveness of counsel could be examined under § 2255), and **United States v. Schmidt**, 760 F.2d 828 (7th Cir.1985) (untimely Rule 33 motion challenging stipulations of accused

Considered as the appeal of a petition for that collateral relief, Cooper's appeal is timely.⁷

Whereas the district court was without jurisdiction to consider Cooper's motion for relief under the cited Rule 33, the court has jurisdiction to consider the pleading under section 2255.⁸ We might merely dismiss this appeal or affirm the district court's disposition, in either instance reserving to Cooper the right to file a section 2255 petition. Neither properly would serve the interest of judicial economy. Rather, we deem it more appropriate to VACATE and REMAND in order that the district court may review Cooper's requested relief under the aegis of 28 U.S.C. § 2255.

could be considered under § 2255).

⁷Fed. R. App. P. 4(b).

⁸**United States v. DiBernardo**, 880 F.2d 1216 (11th Cir. 1989).