

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-20603
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WILLIAM MCCATTY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 89 0200)

August 1, 1995

Before HIGGINBOTHAM, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:¹

Appellant McCatty appeals the district court's denial of his motion for reduction of sentence. The Government concedes that he is entitled to this relief and the record shows it as well. We therefore reverse and remand, albeit with reluctance since this is the second time this matter has had to be remanded.

Following our first remand, the district court reduced the term of supervised release imposed. Thereafter Appellant, proceeding pro se, moved for reduction of sentence pursuant to 18

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S.C. § 3582(c)(2). The district court denied the motion ruling that motions to reduce sentence are governed by Federal Rule of Criminal Procedure 35 and must be made by the Government within seven days of the sentencing. Appellant timely moved to reconsider pointing out that his motion was properly brought under § 3582(c)(2) not Rule 35. The district court denied the motion without comment.

Appellant then moved the district court to proceed on appeal in forma pauperis. The district court denied this motion stating that Appellant's original motion was made under 28 U.S.C. 2255, was properly denied and, therefore, his appeal was not taken in good faith. Appellant then moved this Court for pauper status and we granted his right to proceed as such.

Appellant asks this Court for remand to the district court so that it may properly consider his motion on its merits. A motion under § 3582(c)(2) is the proper vehicle by which to seek the relief at issue here. United States v. Pardue, 36 F.3d 429, 430 (5th Cir. 1994). The Government concedes the point and joins in Appellant's request for remand.

REVERSED and REMANDED.