

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 94-41175  
Conference Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHNNY ROBINSON CORTEZ,

Defendant-Appellant.

- - - - -  
Appeal from the United States District Court  
for the Western District of Louisiana  
USDC No. 93\_CR-10010-01  
- - - - -

June 29, 1995

Before JONES, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

Johnny Robinson Cortez appeals the district court's denial of his "motion to annul fine imposed pursuant to 5E1.2(c)(3)." Cortez did not appeal directly his conviction and sentence, but filed the instant motion 10 months after the district court entered judgment of conviction. We affirm the district court's denial of the motion, not on its merits, but because the district court lacked jurisdiction to consider the motion. See Sojourner T. v. Edwards, 974 F.2d 27, 30 (5th Cir. 1992)(court may affirm

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

judgment on any basis supported by the record), cert. denied, 113 S. Ct. 1414 (1993).

The provisions for modification of a sentence under 18 U.S.C. § 3742 are available to a defendant only upon direct appeal of a sentence or conviction, and § 3742 does not permit a direct appeal beyond the period prescribed by Fed. R. App. P. 4(b). See United States v. Early, 27 F.3d 140, 142 (5th Cir.), cert. denied, 115 S. Ct. 600 (1994). Moreover, a guidelines sentence may be modified under 18 U.S.C. § 3573 or Fed. R. Crim. P. 35 only upon petition by the Government. 18 U.S.C. § 3573; Fed. R. Crim. P. 35(b); Early, 27 F.3d at 141. Cortez's motion also lies outside the scope of 28 U.S.C. § 2255 because a monetary fine is not a sufficient restraint on liberty to meet the "in custody" requirement of a § 2255 proceeding. See United States v. Segler, 37 F.3d 1131, 1136-37 (5th Cir. 1994). Accordingly, the judgment of the district court is AFFIRMED.