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RULE 35(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE: BALANCING THE INTERESTS UNDERLYING SENTENCE REDUCTION

INTRODUCTION

Generally, a trial court has no authority to affect the execution of a legal sentence beyond the term of court in which it is imposed. Rule 35(b) of the Federal Rules of Criminal Procedure provides an exception to the general rule by permitting a court to "reduce a sentence within 120 days after the sentence is imposed." Rule 45(b) of

The Rule provides:

The court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or 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 or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Id.

When addressing the issue of jurisdiction under Rule 35(b), this Note deals with the imposition of sentence as the event which commences the 120-day period. Revocation of probation and receipt by the court of a mandate of affirmance of judgment or dismissal of appeal also commence the time period under the Rule. Id.; see United States v. Braasch, 542 F.2d 442, 443-44 (7th Cir. 1976).

The remedy provided by Rule 35(b) presupposes a valid conviction, see Poole v. United States, 250 F.2d 396, 401 (D.C. Cir. 1957); Fed. R. Crim. P. 35(a), and a legally imposed sentence, see United States v. Malcolm, 432 F.2d 809, 814 (2d Cir. 1970); Fed. R. Crim. P. 35(a). A Rule 35(b) motion essentially is a "plea for leniency," Poole v. United States, 250 F.2d 396, 401 (D.C. Cir. 1957), and is totally within the discretion of the court. See, e.g., United States v. Kajevic, 711 F.2d 767, 771 (7th Cir. 1983); United States v. Smith, 650 F.2d 206, 209 (9th Cir. 1981); United States v. Colvin, 644 F.2d 703, 705 (8th Cir. 1981); United States v. Maynard, 485 F.2d 247, 248 (9th Cir. 1973); United States v. Jones, 444 F.2d 89, 90 (2d Cir. 1971); 8A J. Moore, Moore's Federal Practice ¶ 35.02[3] (2d ed. 1983). The motion may be summarily denied when the facts alleged do not indicate an illegal sentence or gross abuse of discretion by the sentencing court. United States v. Nerren, 613 F.2d 572, 573 (5th Cir. 1980). The scope of appellate review of district court action on Rule 35(b) motions is narrow. An appellate court rarely will reduce a sentence after a district court denial of such a motion. See McGee v. United States, 462 F.2d 243, 245 (2d Cir. 1973). A Rule 35(b) motion does not require a court hearing. United States v. Krueger, 454 F.2d 1154, 1155 (9th Cir. 1972).
the Federal Rules of Criminal Procedure\(^4\) prohibits a trial court from extending this 120-day period and thus makes the time restriction in Rule 35(b) jurisdictional.\(^5\) Rule 35(b) is also considered remedial, because it provides a validly convicted and legally sentenced defendant the right to seek a reduction of sentence\(^6\) and affords the trial judge a chance to reconsider the appropriateness of the original sentence.\(^7\) The potential for abuse under the Rule is limited by restricting trial court review to the fixed 120-day time period.\(^8\) These remedial and jurisdictional policies underlying Rule 35(b) conflict when deter-

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4. Fed. R. Crim. P. 45(b). Rule 45(b) states:
When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

Id.

5. Id.; e.g., United States v. Addonizio, 442 U.S. 178, 189 & n.17 (1979); United States v. Robinson, 361 U.S. 220, 222-23 (1960); United States v. Kajevic, 711 F.2d 767, 768 (7th Cir. 1983); United States v. DeMier, 671 F.2d 1200, 1205 (8th Cir. 1982); United States v. Counter, 661 F.2d 374, 376 (5th Cir. 1981); United States v. Inendino, 655 F.2d 106, 109 (7th Cir. 1981); United States v. Pollack, 655 F.2d 243, 246 (D.C. Cir. 1980); United States v. Gonzalez-Perez, 629 F.2d 1081, 1083 (5th Cir. 1980) (per curiam); United States v. Stollings, 516 F.2d 1287, 1288 (4th Cir. 1975); United States v. United States Dist. Ct., 509 F.2d 1352, 1354 (9th Cir.), cert. denied, 421 U.S. 962 (1975); United States v. Ellenbogen, 390 F.2d 537, 541 (2d Cir.), cert. denied, 393 U.S. 918 (1968); United States ex rel. Quinn v. Hunter, 162 F.2d 644, 647-48 (7th Cir. 1947).


7. United States v. Smith, 650 F.2d 206, 208 (9th Cir. 1981); United States v. Maynard, 485 F.2d 247, 248 (9th Cir. 1973); United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir.), cert. denied, 393 U.S. 918 (1968); see United States v. Mendoza, 565 F.2d 1285, 1290 (5th Cir.), rev’d on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam).

8. United States v. Smith, 650 F.2d 206, 208 (9th Cir. 1981); United States v. Gonzalez-Perez, 629 F.2d 1081, 1083 (5th Cir. 1980) (per curiam); United States v. Mendoza, 565 F.2d 1285, 1290 (5th Cir.), rev’d on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); United States v. Stollings, 516 F.2d 1287, 1289 (4th Cir. 1975); United States v. United States Dist. Ct., 509 F.2d 1352, 1356 & n.6 (9th Cir.), cert. denied, 421 U.S. 962 (1975).
mining whether the filing of a motion for reduction of sentence within the 120-day period satisfies the requirements of the Rule, or whether court action is required within the 120-day period.

Although the language of the provision appears to require court action within the time period, federal courts have disagreed on the issue. The majority of courts has interpreted Rule 35(b) liberally and has determined that filing a motion to reduce sentence within the 120-day period permits the trial court to retain jurisdiction over the case for a reasonable period beyond the time limit. Basing its analysis on the principle of statutory construction that a statute should be construed to avoid unreasonable or unintended consequences, the majority contends that requiring court action within the 120-day period leads to arbitrary and unfair results. In addition, Rule 2 of the

When Rule 35(b) was enacted in 1946, the Director of the Federal Bureau of Prisons stated:

I think that [Rule 35] is a very healthy rule to limit the court in its change of sentence to sixty days after the sentence was imposed. In the first place, it protects the judge from continual importunities while the man is in the institution. There is a rule to the effect that if the counsel for the defendant files a petition for a reduction of sentence and that petition is not acted upon, the judge can act on it any time, regardless of the expiration of the term of court, and that has resulted in a good deal of importunities to the judge. It amounts sometimes to a sort of bench parole, whereby the judge retains the authority to reduce the sentence after the man has been committed.

Institute Proceedings, supra note 6, at 228 (statement of Bennett, J.).

9. See supra note 3.

10. United States v. Krohn, 700 F.2d 1033, 1035, 1038 (5th Cir. 1983); United States v. DeMier, 671 F.2d 1200, 1205-06 (8th Cir. 1982); United States v. Smith, 650 F.2d 206, 209 (9th Cir. 1981); Government of Virgin Islands v. Gereau, 603 F.2d 438, 442 (3d Cir. 1979); United States v. Williams, 573 F.2d 527, 529 (8th Cir. 1978) (per curiam); United States v. Mendoza, 565 F.2d 1285, 1289-90 (5th Cir.), rev'd on other grounds, 581 F.2d 89, 90 (5th Cir. 1978) (en banc) (per curiam); United States v. Stollings, 516 F.2d 1287, 1289-90 (4th Cir. 1975); United States v. United States Dist. Ct., 509 F.2d 1352, 1356 (9th Cir.), cert. denied, 421 U.S. 982 (1975); United States v. Janiec, 505 F.2d 983, 985 n.32 (3d Cir. 1974), cert. denied, 420 U.S. 948 (1975); United States v. Polizzi, 500 F.2d 856, 856 n.73 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); Leyvas v. United States, 371 F.2d 714, 719 (9th Cir. 1967); Dodge v. Bennett, 335 F.2d 657, 659 (1st Cir. 1964) (dictum); see 8A J. Moore, supra note 3, ¶ 35.02[2](a)(i); 3 C. Wright, Federal Practice and Procedure § 587, at 407 (2d ed. 1982).

11. United States v. Mendoza, 565 F.2d 1285, 1288 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); see Church of the Holy Trinity v. United States, 143 U.S. 457, 460 (1892) ("If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."); Sotto v. Wainwright, 601 F.2d 184, 189 (5th Cir. 1979) (Rule 35(b) liberally construed so as to avoid unjust result), cert. denied, 445 U.S. 950 (1980); H. Black, Handbook on the Construction and Interpretation of the Laws § 29, at 66 (1911).

12. United States v. Krohn, 700 F.2d 1033, 1036 (5th Cir. 1983); see United States v. Williams, 573 F.2d 527, 528-29 (8th Cir. 1978) (per curiam); United States
Federal Rules of Criminal Procedure, which requires a "just determination of every criminal proceeding," indicates that a diligent defendant should not be denied the right to sentence review due to circumstances beyond his control. Consistent with this view, the Judicial Conference Advisory Committee on the Federal Rules of Criminal Procedure (Advisory Committee) recently has proposed an amendment to Rule 35(b) that would permit a trial court to retain jurisdiction for a reasonable period of time upon the filing of a motion within the 120-day period.

By contrast, a minority of courts has interpreted the provision more narrowly and has determined that the sentencing court must act within the 120-day period to meet the requirements of the Rule.

v. Mendoza, 565 F.2d 1285, 1287-89 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); United States v. Stollings, 516 F.2d 1287, 1288-89 (4th Cir. 1975).

13. Fed. R. Crim. P. 2. The rule provides:
These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Id.

14. Id.

15. See Sotto v. Wainwright, 601 F.2d 184, 189 (5th Cir. 1979) (quoting United States v. Mendoza, 565 F.2d 1285, 1287 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam)), cert. denied, 445 U.S. 950 (1980); United States v. Mendoza, 565 F.2d 1285, 1289-90 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam). The term "diligent defendant" is used in this Note to refer to the defendant who files well within the 120-day period, but whose motion is not acted upon by the court before the period has expired.

16. Fed. R. Crim. P. 35(b), 98 F.R.D. 381, 407 (1983) (Preliminary Draft of Proposed Amendment). In proposing the amendment to Rule 35(b), the Advisory Committee stated that its intention was to clarify any existing ambiguity in the Rule. Id. advisory committee note.

Under §§ 3771-3772 of title 18 of the United States Code, Congress authorizes the Supreme Court to prescribe rules of practice and procedure in criminal cases brought in the United States District Courts. 18 U.S.C. §§ 3771-3772 (1976). Rules promulgated under § 3771 deal with proceedings prior to or simultaneous with the verdict and take effect ninety days after being reported to Congress unless Congress chooses to reject them. 18 U.S.C. § 3771 (1976). Rules prescribed pursuant to § 3772 deal with proceedings after the verdict and take effect by order of the Supreme Court. 18 U.S.C. § 3772 (1976). The Advisory Committee is authorized to continually study "the operation and effect of the general rules of practice and procedure now or hereafter in use" in the particular field. 98 F.R.D. at 389. Recommendations of the Advisory Committee are submitted to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for evaluation. Id.

RULE 35(b) SENTENCE REDUCTION

Basing its analysis on the legislative history of Rule 35(b) and the Supreme Court's dicta in United States v. Addonizio,\textsuperscript{18} which appears to require court action within the 120-day period,\textsuperscript{19} the minority contends that such a "court action" rule is necessary to fulfill the true intent of the rule's drafters.\textsuperscript{20}

This Note examines the issue whether a court should retain jurisdiction under Rule 35(b) after 120 days if a motion is filed within that time. Part I discusses the historical background and legislative history of Rule 35(b) and contends that the drafters contemplated court action. Part II reviews the differing court interpretations of the time limitation and suggests that a strict interpretation requiring court action is consistent with the language and purpose of the statute and provides the necessary judicial protection for a diligent defendant. Part III examines the separation of powers issues raised by the majority position and suggests that the Advisory Committee's recommendation does not satisfy the jurisdictional policies upon which Rule 35(b) was based. The Note concludes that a motion-filing rule has merit, but should be limited by another statutory period in which a trial court must act in order to balance the two conflicting policies.

I. HISTORICAL BACKGROUND AND LEGISLATIVE HISTORY OF RULE 35(b)

Under traditional rules of statutory construction, when legislative intent can be discerned from the language of a statute, a court is required to apply the statute so as to fulfill that intent.\textsuperscript{21} This is true even though a particular court may view the statute as unwise or

\textsuperscript{18} 442 U.S. 178 (1979).
\textsuperscript{19} See id. at 189 ("Federal Rule Crim. Proc. 35 now authorizes district courts to reduce a sentence within 120 days after it is imposed or after it has been affirmed on appeal.").
unnecessary.\textsuperscript{22} If the application of the statute as written would lead to an unreasonable, unintended or absurd result, courts generally disregard the literal meaning of the words in interpreting the provision.\textsuperscript{23} In such a circumstance, a court must review the legislative history and purpose of the statute in order to determine the true intent of the drafters.\textsuperscript{24}

Courts generally agree that the plain meaning of Rule 35(b) requires court action within the 120-day period.\textsuperscript{25} Courts, however, disagree whether such a literal interpretation validly reflects the intent of the drafters or leads to an unreasonable result.\textsuperscript{26} An examination of Rule 35(b)'s legislative history and its common-law predecessor reveals that the appropriate interpretation of the Rule requires a more restrictive construction than a motion-filing rule provides.

\textbf{A. The Common-Law "Term-of-Court" Rule}

At common law, a court could alter its judgments only during the term of court in which they were rendered unless the proceeding for

\begin{multicite}
\textsuperscript{22} See United States v. Robinson, 361 U.S. 220, 229-30 (1960); Frankfurter, supra note 21, at 533 ("Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration.").


\textsuperscript{24} Compare United States v. Mendoza, 565 F.2d 1285, 1288-90 (5th Cir.) (unreasonable result could not have been intention of the drafters), \textit{rev'd on other grounds}, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam) with United States v.
an alteration had commenced during that term.\textsuperscript{27} Prior to the enactment of Rule 35(b), no other rule or statute authorized a district court to reduce a valid sentence at any time after the term during which it was imposed.\textsuperscript{28} The term-of-court rule therefore developed as an attempt to put a temporal limitation upon a court's interference in otherwise final judgments.\textsuperscript{29} The rule sought to prevent the judiciary from usurping the authority of the Parole Commission by limiting the time a court had to review judgments and thus assuring that judgments would become final and unalterable at a fixed point in time.\textsuperscript{30}

The term-of-court rule, however, was not without its problems. Blind adherence to the rule often resulted in arbitrary and unfair

\textsuperscript{27} United States v. Mayer, 235 U.S. 55, 67 (1914); United States v. Krohn, 700 F.2d 1033, 1036 n.8 (5th Cir. 1983); United States v. Stollings, 516 F.2d 1287, 1289 (4th Cir. 1975). One court, however, has suggested that the term-of-court rule limited the trial court to action within the term regardless of when the motion was filed. See United States v. Kajevic, 711 F.2d 767-69 (7th Cir. 1983).

\textsuperscript{28} United States ex rel. Quinn v. Hunter, 162 F.2d 644, 647 (7th Cir. 1947); Institute Proceedings, supra note 6, at 207 (statement of G. Dession, Advisory Committee member).

\textsuperscript{29} See Bronson v. Schulten, 104 U.S. 410, 415 (1881) ("after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them"); Ex parte Lange, 85 U.S. 163, 167-68, 18 Wall. 11, 11 (1873) ("there must, in the nature of the power thus exercised by the court, be in criminal cases some limit to it"); Sibbald v. United States, 37 U.S. 488, 492, 12 Pet. 340, 343 (1838) ("[N]o principle is better settled . . . than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered . . . from which it follows, that no change or modification can be made, which may substantially vary or affect it in any material thing."). At one time, a court could not grant probation to a defendant who had begun serving a term of imprisonment. See Affronti v. United States, 350 U.S. 79, 84 (1955); United States v. Murray, 275 U.S. 347, 358 (1928). In 1979, Rule 35(b) was amended to allow a court to grant probation after the commencement of a term of imprisonment. See United States v. Addonizio, 442 U.S. 178, 187-90 (1979).

\textsuperscript{30} United States v. Addonizio, 442 U.S. 178, 184-85 & n.11 (1979) (finality concept fosters confidence in judicial procedures and orderly court administration); see supra note 29. In United States v. Benz, 282 U.S. 304 (1931), the Supreme Court held that a reduction of sentence "alters the terms of the judgment . . . and is a judicial act as much as the imposition of the sentence." Id. at 311. Furthermore, it is not "a usurpation of the pardoning power of the executive." Id. This does not, however, address the question whether retaining control over a Rule 35(b) motion pending a possible early release by the Parole Commission is an infringement of the legislative delegation of early release determination to the executive branch. See infra notes 111-20 and accompanying text. The Supreme Court's holding that a judge has no enforceable sentencing expectations with regard to the actual release of a prisoner short of the statutory term suggests that the use of Rule 35(b) to achieve such a result may be in contravention of its proper meaning. United States v. Addonizio, 442 U.S. 178, 187-90 (1979).
consequences to a defendant.\textsuperscript{31} For example, a defendant sentenced at the beginning of a court's term had longer to prepare a motion to reduce sentence than did a defendant sentenced on the last day of the court term.\textsuperscript{32}

In order to mitigate these unfair consequences to the defendant, the Supreme Court adopted a rule that allowed district courts to retain control over their judgments beyond their respective court terms.\textsuperscript{33} Under the rule, a district court had up to 90 days beyond its term to change the conditions of a valid sentence.\textsuperscript{34} Each district court determined on a case-by-case basis whether to use the 90-day extension.\textsuperscript{35} As a result, the time for sentence review varied considerably between districts and between cases within a particular district.\textsuperscript{36}

This lack of consistency was much criticized. When the Federal Rules of Criminal Procedure were formulated, the term-of-court rule was eliminated as a time constraint in criminal proceedings.\textsuperscript{37} The drafters indicated, however, that in eliminating the term-of-court rule from criminal proceedings, they had no intention of substituting indefiniteness.\textsuperscript{38} For this reason, the drafters included fixed time periods for certain procedures under the new rules and made the time periods jurisdictional in nature.\textsuperscript{39}

\textbf{B. Legislative History of Rule 35(b)}

Sensitive to the inequities caused by the term-of-court rule and the continued need to limit the time within which a court could grant a

31. \textit{E.g.}, United States v. Mendoza, 565 F.2d 1285, 1289-90 (5th Cir.), \textit{rev'd on other grounds}, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); United States v. Stollings, 516 F.2d 1287, 1288 (4th Cir. 1975); \textit{see} Dodge v. Bennett, 335 F.2d 657, 658 (1st Cir. 1964) (dictum).

32. United States v. Mendoza, 565 F.2d 1285, 1290 (5th Cir.), \textit{rev'd on other grounds}, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); United States v. Stollings, 516 F.2d 1287, 1289 (4th Cir. 1975).

33. \textit{See} Institute Proceedings, \textit{supra} note 6, at 211, 225 (statements of Mr. Chapman and G. Dession, Advisory Committee members).

34. \textit{See id.}

35. \textit{See id.} at 225-26, 228 (statement of Holtzoff, J., Advisory Committee member).

36. \textit{See id.;} Fed. R. Crim. P. 45(c) advisory committee note.

37. Fed. R. Crim. P. 45(c), H.R. 12, 79th Cong., 1st Sess. 39 (1945). The rule stated that "the period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding." \textit{Id.}

38. United States v. Robinson, 361 U.S. 220, 226 (1960); United States v. Smith, 331 U.S. 469, 473-74 & n.2 (1947); Fed. R. Crim. P. 45(c) advisory committee note (specific time limitations substituted for term-of-court rule); Second Preliminary Draft, \textit{supra} note 6, at 132 (Committee Note).

39. Fed. R. Crim. P. 45(b) (court may not extend specific time periods appearing in Rule 35 unless so stated in that rule); Fed. R. Crim. P. 35 advisory committee
reduction of sentence, Congress enacted Rule 35(b) providing for a 60-day time limitation on court action.\textsuperscript{40} The drafters explained that the purpose of the 60-day rule was to replace the flexible term-of-court rule with a specific time limitation on court action.\textsuperscript{41} By doing so, several important objectives could be satisfied: such a requirement would limit the time within which a court could exercise control over its judgments,\textsuperscript{42} reduce the potential for court infringement on Parole Commission authority over release determinations,\textsuperscript{43} and eliminate the overloading of court dockets with superfluous Rule 35(b) motions.\textsuperscript{44}

Under this 60-day rule, the time within which a court could reduce a sentence was still limited. By imposing a fixed time period that commenced for each defendant when his sentence was imposed, however, the new rule avoided the arbitrary results caused by the common-law practice.\textsuperscript{45} Under Rule 35(b), no matter how long the term of court extended, a court lost control over a judgment once the statutory time period had passed.\textsuperscript{46} Each defendant, however, had the same 60 days in which to seek a reduction of sentence.\textsuperscript{47}
Rule 35(b) went through several drafts before it was enacted. A comparison of the initial draft and the enacted version suggests that the drafters intended the Rule to require court action within the 60-day period, rather than motion filing within that period. The First Preliminary Draft stated that “[t]he court may reduce a sentence without regard to whether the term of court at which the sentence was imposed has expired upon motion made within 60 days after sentence.” In all subsequent drafts and in its final form, however, the motion filing language was eliminated.

The elimination of the motion requirement from the Rule as enacted suggests that the drafters rejected linking the Rule to motion filing because motion filing would permit a court to delay action for an extended period and thus would not accomplish the objectives underlying the imposition of a time limitation on Rule 35(b) proceedings. Moreover, the Supreme Court, in other contexts, has stated that the appearance of a requirement in a draft of a statutory provision and its elimination in all subsequent drafts is almost conclusive proof that the drafters intended it to be absent in its enacted form.

48. Second Preliminary Draft, supra note 6, at 129; First Preliminary Draft, supra note 6, at 152; 5 L. Orfield, Criminal Procedure under the Federal Rules § 35:4, at 464-68 (1967).
49. First Preliminary Draft, supra note 6, at 134 (emphasis added).
50. See Fed. R. Crim. P. 35(b); Second Preliminary Draft, supra note 6, at 132; 5 L. Orfield, supra note 49, § 35:4, at 467.
51. See Institute Proceedings, supra note 6, at 207, 211, 224-25 (statement of G. Dession, Advisory Committee member). It was believed that such language would lead to unfettered discretion by trial courts. See United States v. Inendino, 655 F.2d 108, 109-10 (7th Cir. 1981); United States v. Gonzalez-Perez, 629 F.2d 1081, 1083 (5th Cir. 1980) (per curiam); United States v. Stollings, 516 F.2d 1287, 1289 (4th Cir. 1975); United States v. United States Dist. Ct., 509 F.2d 1352, 1356 (9th Cir.), cert. denied, 421 U.S. 962 (1975); Institute Proceedings, supra note 6, at 207 (statement of G. Dession, Advisory Committee member) (“[A] time limit of sixty days was imposed in order that there might be some limit in the event of a very extended term of the court.”). During the Institute Proceedings, in response to a question whether a court retained control over its judgments after the expiration of the 60 days, Professor Dession stated that “[t]he commentary of the second preliminary draft expressly mentioned that practice and pointed out that this Rule, the 60-day limit, would preclude that.” Id. at 225. Motion-filing language was also thought to lead to usurpation of the Parole Commission’s authority over release determination. See United States v. Addonizio, 442 U.S. 178, 189 n.15 (1979); Bradley v. United States, 410 U.S. 605, 611 n.6 (1973); United States v. Inendino, 655 F.2d 108, 109 (7th Cir. 1981); United States v. Smith, 650 F.2d 206, 208 (9th Cir. 1981); United States v. Stollings, 516 F.2d 1287, 1289 (4th Cir. 1975); Institute Proceedings, supra note 6, at 228 (statement of Bennett, J.) (time limitation of court action requirement guards against bench parole by sentencing court); 5 L. Orfield, supra note 49, § 35:4, at 465-66 (Parole Board is the proper authority from which to seek relief after affirmance on appeal).
Thus, the presence of a motion filing rule in the earlier draft and its elimination from enacted Rule 35(b) is strong evidence that the drafters intended jurisdiction to depend on court action within the prescribed time and not on a timely filed motion.

The 1966 amendment to Rule 35(b) further suggests that the drafters intended the time limitation to link the Rule to court action and not motion filing. The Rule was amended to increase the time limitation from 60 days to 120 days in order to permit a defendant a greater amount of time to collect and file the papers necessary to properly support a reduction in sentence plea. In explaining the reason for increasing the time period, an advisory committee note stated that "[t]he 60-day period is frequently too short to enable the defendant to obtain and file the evidence . . . [and] may result in the 60-day period passing before the court is able to consider the case." The language suggests that the Advisory Committee considered the time period to be linked to court action and not motion filing.

Even though the plain language of the Rule and some of the legislative history suggest that the time limitation should be applied to court action, the First Preliminary Draft also may be interpreted as demonstrating the original intent of the drafters to link the Rule to motion filing. While the motion filing language was later deleted, such a rule nonetheless is consistent with the policy of affording a trial court a reasonable amount of time to reduce a sentence that it had originally imposed. The 1966 amendment further suggests that the drafters were concerned with making the time constraints ample to avoid loss of jurisdiction due to lack of sufficient time within which to file a properly supported motion under Rule 35(b). In light of this concern, it would appear inconsistent to deny a defendant the remedy under Rule 35(b) on the basis of a court’s inability to review the motion within the allotted time. Moreover, the Advisory Committee’s

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55. Fed. R. Crim. P. 35 advisory committee note to 1966 amendment (emphasis added); United States v. Kajevic, 711 F.2d 767, 769 (7th Cir. 1983) (1966 amendment suggests drafters intended a court action rule); United States v. Mendoza, 565 F.2d 1285, 1287 (5th Cir.) ("The 1966 amendment . . . was accompanied by an Advisory Committee Note which . . . suggests that the 120 day period was intended as a limit upon the time within which the court may act."); rev’d on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam) (footnote omitted).
recent proposal to amend Rule 35(b) is expressly intended to conform "[the Rule's] language to the nonliteral interpretation which courts have already placed upon the rule."58 Thus, while it is arguable that the drafters originally intended to require court action within the prescribed time, revisionists now believe that a motion-filing rule should be sufficient for a court to retain jurisdiction.59 To clarify the inadequacy of the Advisory Committee's proposal, it is necessary to analyze the various court interpretations of Rule 35(b) and the policies upon which they are based.

II. CONFLICTING POLICY CONSIDERATIONS AND INTERPRETATIONS OF RULE 35(b)

When a court does not act within the 120-day time period, a literal application of the Rule results in a loss of the trial court's jurisdiction.60 This loss of jurisdiction may deprive certain defendants of relief under Rule 35(b) through no fault of their own.61 If a defendant files his Rule 35(b) motion beyond the 120-day period, or within the period but close to its expiration, loss of jurisdiction may be considered as much the fault of the defendant as of a strict interpretation.62 If a defendant files his motion papers well within the 120 days, however, and the court then fails to act on it before the 120 days pass, a strict interpretation of the Rule produces an inequitable result.63 In this instance, the supporters of a motion filing interpretation for Rule 35(b) argue that the remedial and jurisdictional policies underlying

59. See id.
61. United States v. Mendoza, 565 F.2d 1285, 1287 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); Dodge v. Bennett, 335 F.2d 657, 658 (1st Cir. 1964); see Leyvas v. United States, 371 F.2d 714, 719 (9th Cir. 1967).
62. United States v. Kajevic, 711 F.2d 767, 770 (7th Cir. 1983); United States v. Inendino, 655 F.2d 105, 110 (7th Cir. 1981); see United States v. Regan, 503 F.2d 234, 236-37 (8th Cir.), cert. denied, 420 U.S. 1006 (1974); United States v. Mehrten, 494 F.2d 1172, 1175-76 (5th Cir.), cert. denied, 419 U.S. 900 (1974). One court, however, has held that when a court or a governmental agent misleads the defendant or his attorney, a late filing will not deny the court jurisdiction to consider a Rule 35 motion. Government of the Virgin Islands v. Gereau, 603 F.2d 438, 442 (3d Cir. 1979).
63. United States v. Mendoza, 565 F.2d 1285, 1289 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); see United States v. Kajevic, 711 F.2d 767, 771 (7th Cir. 1983).
Rule 35(b) conflict significantly.\textsuperscript{64} Courts construing Rule 35(b) have differed over which policies should take precedence.\textsuperscript{65}

A. Remedial Policies Require a Liberal Construction—The Majority View

A majority of courts interpreting Rule 35(b) has determined that the objectives of the Rule are best served by a construction that permits the filing of a motion within the 120-day period to confer jurisdiction on the trial court.\textsuperscript{66} While the plain language of the Rule appears to require timely court action,\textsuperscript{67} these courts suggest that such a narrow construction would lead to an unreasonable interpretation inconsistent with the intent of the Rule.\textsuperscript{68} The remedial purpose of the Rule is to give the defendant "a second round before the sentencing judge"\textsuperscript{69} and to give the sentencing judge "an opportunity to reconsider the sentence in light of any further information about the defendant or the case."\textsuperscript{70} A strict construction requiring court action within the 120-day period often produces inequitable results and circumvents this stated purpose.\textsuperscript{71} For example, if a defendant files a motion for a reduction of sentence well within the 120-day period and the trial court fails to consider it within the allotted time, the defendant is deprived of the Rule 35(b) privilege through no fault of his own.\textsuperscript{72}

\textsuperscript{64} United States v. Mendoza, 565 F.2d 1285, 1290, 1294 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam).

\textsuperscript{65} Compare United States v. Kajevic, 711 F.2d 767, 771 (7th Cir. 1983) (dictum) (minority view) with United States v. Mendoza, 565 F.2d 1285, 1290 (5th Cir.) (majority view), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); and United States v. Stollings, 516 F.2d 1287, 1289-90 (4th Cir. 1975); and United States v. United States Dist. Ct., 509 F.2d 1352, 1356 (9th Cir.), cert. denied, 421 U.S. 962 (1975); and United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir.) cert. denied, 393 U.S. 918 (1969).

\textsuperscript{66} See supra note 10 and accompanying text.

\textsuperscript{67} See supra note 9 and accompanying text.

\textsuperscript{68} United States v. Mendoza, 565 F.2d 1285, 1289 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); United States v. Stollings, 516 F.2d 1287, 1288 (4th Cir. 1975); see United States v. United States Dist. Ct., 509 F. 2d 1352, 1356 (9th Cir.), cert. denied, 421 U.S. 962 (1975).

\textsuperscript{69} United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir.), cert. denied, 393 U.S. 918 (1968); see United States v. Rice, 671 F.2d 455, 459 (11th Cir. 1982).


\textsuperscript{71} See supra notes 62, 64, 69 and accompanying text.

\textsuperscript{72} United States v. Mendoza, 565 F.2d 1285, 1287, 1294 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); see Leyvas v. United States, 371 F.2d 714, 719 (9th Cir. 1967); see supra notes 62, 64 and accompanying text.
In addition, Rule 2 of the Federal Rules of Criminal Procedure provides that the rules "are intended to provide for the just determination of every criminal proceeding." A strict construction of Rule 35(b) may subvert the general purpose of the rules in that defendants may be unfairly deprived of the privilege of sentence review. Moreover, the Supreme Court, in other contexts, has determined that the Federal Rules of Criminal Procedure are not to be rigidly applied without considering the circumstances surrounding the specific situation.

The majority position, however, is not entirely sound. The diligent defendant need not be unfairly treated under a strict construction of the Rule. For example, even if a trial judge is unavailable or so overloaded that he is unable to consider the defendant's motion within the 120-day time period, courts have held that any judge within the particular court may be substituted for the sentencing judge. Moreover, even if a truly ill-intentioned judge purposely chose to delay decision on a timely motion until the 120-day period had passed, it does not necessarily follow that the defendant would be unfairly deprived of sentence review. Rule 35(b) motions are reviewable on appeal and reversible on a showing of gross abuse of judicial discretion. In addition, a trial judge bent upon such a course may accomplish the same result even under a liberal reading of the Rule by expressly denying the motion.

74. United States v. Mendoza, 565 F.2d 1285, 1286-87 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); United States v. Stollings, 516 F.2d 1287, 1288-89 (4th Cir. 1975).
75. Berman v. United States, 378 U.S. 530, 538 (1964) (Black, J., dissenting); United States v. Fallen, 378 U.S. 139, 144 (1964); see also United States v. Mendoza, 565 F.2d 1285, 1290 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); United States v. Rizzo, 362 F.2d 97, 99 (7th Cir. 1966); United States v. Claus, 5 F.R.D. 278, 280 (E.D.N.Y. 1946). But see 8 J. Moore, supra, note 3, § 2.02, at 1 n.1 (Rule 2 tends to be used as a "makeweight" by the courts).
76. E.g., United States v. Kajevic, 711 F.2d 767, 771 (7th Cir. 1983); United States v. Dobson, 609 F.2d 840, 843 n.1 (5th Cir.), cert. denied, 446 U.S. 955 (1980); Tully v. Scheu, 487 F. Supp. 404, 409 (D.N.J.), rev'd on other grounds, 637 F.2d 917 (3d Cir. 1980), cert. denied, 454 U.S. 854 (1981). In practice, however, this alternative may not protect the defendant in such circumstances because a substituted judge may give deference to the sentence originally imposed by the trial judge.
77. See United States v. Kajevic, 711 F.2d 767, 771 (7th Cir. 1983).
78. 28 U.S.C. § 1291 (1976); see United States v. Hetrick, 644 F.2d 752, 754-55 (9th Cir. 1980) (denials of reduction of sentence motions are reviewable); United States v. Kouwenhoven, 602 F.2d 234, 238 (9th Cir. 1979) (denial of reduction of sentence motion may be reversed on appeal for clear showing of abuse of discretion); United States v. Stumpf, 476 F.2d 945, 946 (4th Cir. 1973) (same); Taylor v. United States, 456 F.2d 1101, 1103 (5th Cir.) (same), cert. denied, 409 U.S. 856 (1972).
79. See United States v. Kajevic, 711 F.2d 767, 771 (7th Cir. 1983).
Reliance upon Rule 2 also may be misplaced. While the majority asserts that the diligent defendant faced with the situations above would be denied a "just determination" under a court action interpretation, the appellate process and the ability to substitute for the trial judge under Rule 35(b) are alternatives available to defendant.\textsuperscript{80} A "just determination of every criminal proceeding"\textsuperscript{81} thus may be possible even under a literal reading of Rule 35(b).

In addition, the second sentence of Rule 2 of the Federal Rules of Criminal Procedure instructs that the rules "shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."\textsuperscript{82} To read a timely motion requirement into Rule 35(b) may have the reverse effect. Court dockets could clog with extended court determinations of what constitutes a reasonable time beyond the 120-day period.\textsuperscript{83}

While these criticisms cannot be considered dispositive of the effectiveness of a motion-filing rule, the majority view nonetheless does not adequately balance the interests underlying Rule 35(b). Under a motion-filing rule, the jurisdictional policies underlying Rule 35(b) are neglected because a court is permitted to retain jurisdiction over a case for an extended period. The majority's reliance upon the remedial policies underlying Rule 35(b) therefore may be unjustified, considering the alternative jurisdictional policies upon which the Rule is based.

\textbf{B. Strict Construction and the Court Action Rule—the Minority View}

A minority of courts considering Rule 35(b) has determined that a strict construction requiring court action within the 120-day time period best satisfies the intent of the drafters.\textsuperscript{84} These courts base their analysis on the plain language of the provision and the Supreme Court's decision in \textit{United States v. Addonizio}.\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} Fed. R. Crim. P. 2.
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} See \textit{United States v. Mendoza}, 565 F.2d 1285, 1290 (5th Cir.), \textit{rev'd on other grounds}, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam); Institute Proceedings, \textit{supra} note 6, at 228 (statement of Bennett, J.). Moreover, under the majority view more cases would have to be heard on appeal to determine if a court acted within a "reasonable time." 565 F.2d at 1290-91; \textit{accord} \textit{United States v. Cole}, 588 F.2d 56, 60 (4th Cir.), \textit{cert. denied}, 441 U.S. 909 (1978).
\item \textsuperscript{85} 442 U.S. 178 (1979).
\end{itemize}
The Court in Addonizio addressed the issue whether a post-sentencing change in Parole Commission guidelines that frustrates the expectations of a sentencing judge is "sufficiently fundamental" to allow collateral relief under the federal habeas corpus provision. In Addonizio, the trial judge imposed a ten-year sentence based on an expectation that defendant's good behavior in prison would lead to an early release by the Parole Commission. Subsequent to the sentencing, the Parole Commission adopted new parole guidelines that effectively eliminated defendant's chances for early release. In reviewing the possibility for resentencing under the provision, the Court held that a judge has no enforceable expectations as to the actual date that a prisoner is to be released. In fact, a search for the "subjective intent of the judge at the time of sentencing" would undermine the legislature's decision to entrust early release determinations to the Parole Commission, which "is in the best position to determine when release is appropriate." In arriving at its decision, the Court stated:

The authority of sentencing judges to select precise release dates is narrowly limited: the judge may select an early parole eligibility date, but that guarantees only that the defendant will be considered at that time by the Parole Commission. And once a sentence has been imposed, the trial judge's authority to modify it is also circumscribed. Federal Rule Crim. Proc. 35 now authorizes district courts to reduce a sentence within 120 days after it is imposed. The time period, however, is jurisdictional and may not be extended.

The Court's discussion of Rule 35(b) is an integral part of the minority's rationale. If Rule 35(b)'s time limitation was meant to limit motion filing and not court action, the enforcement of a sentencing judge's expectation as to the release date of a convicted defendant would be possible under the Rule. Such a result would appear to be inconsistent with the Supreme Court's language in Addonizio.

Moreover, the Court in a series of cases spanning the life of Rule 35(b) has consistently interpreted similar time limitations, made jurisdictional by Rule 45(b), as limiting court action. For example, fol-

86. Id. at 185.
88. 442 U.S. at 180-81.
89. Id. at 182 & n.4.
90. Id. at 190.
91. Id. at 188.
92. Id. at 189.
93. Id. (footnotes omitted).
94. See United States v. Kajevic, 711 F.2d 767, 769-70 (7th Cir. 1983).
95. Id. at 770; see United States v. Addonizio, 442 U.S. 178, 190 (1979).
96. See, e.g., Berman v. United States, 378 U.S. 530, 530 (1964) (per curiam); United States v. Robinson, 361 U.S. 220, 226 (1960); United States v. Smith, 331
lowing the enactment of the Federal Rules of Criminal Procedure in 1947, the Court in United States v. Smith\(^7\) considered whether a federal district court has the authority to order a new trial on its own motion under Rule 33 after a judgment has been affirmed on appeal.\(^8\) Rule 33 permits a court to grant a defendant a new trial in the interests of justice and requires a defendant to file a motion for a new trial within five days of the verdict for requests on any other grounds.\(^9\) The Supreme Court agreed that a literal reading of Rule 33 made the five-day period applicable only to a defendant's motion and did not limit court action under the rule.\(^10\) It further acknowledged that if applied literally, a federal district court "would [have the] power . . . to grant new trials on its own motion . . . indefinitely."\(^11\) The Court held that such a construction would be unacceptable and therefore construed the rule so as to make the time limitation applicable to motions both by the court and defendant.\(^12\)

In United States v. Robinson,\(^13\) the Court held that the time limitation in Rule 37(a),\(^14\) which permitted a defendant to file an appeal within ten days after the entry of judgment, was jurisdictional and could not be enlarged.\(^15\) The Court thus reaffirmed its commitment to the limitation of a district court's power over its own judgments.\(^16\) In discussing Rule 37(a), the Court stated that the same circumscription of court action applied to Rule 35.\(^17\)

The case law cited by the minority, however, is questionable support for its position. Because Addonizio did not directly address the issue of jurisdiction under Rule 35(b), other courts have concluded that the Supreme Court was merely restating the proposition that Rule 35(b)'s time limitation is jurisdictional and was not attempting to require court action within the time period.\(^18\) The Advisory Committee's proposal is also intended "to remove any doubt which might arise from dictum in . . . Addonizio."\(^19\) A strict construction requiring

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98. Id. at 471; see Fed. R. Crim. P. 33, 327 U.S. 821, 855-56 (1946).
100. See Smith, 331 U.S. at 473-75.
101. Id. at 473-74.
102. Id. at 475.
105. Robinson, 361 U.S. at 224.
106. See id. at 225-26, 229.
107. Id. at 225-26.
108. United States v. Krohn, 700 F.2d 1033, 1036-38 (5th Cir. 1983); United States v. DeMier, 671 F.2d 1200, 1205-06 (8th Cir. 1982).
court action within the 120-day period therefore may not adequately provide a judge with additional time to review the motion and allow the defendant a proper chance for review.

III. A Proposal: Maintaining a Separation of Powers

The issue whether to link Rule 35(b)'s time limitation to court action or motion filing is based primarily on a choice between the Rule's remedial and jurisdictional policies. The majority's decision to link district court jurisdiction to timely motion filing appears to be inconsistent not only with the plain language of the rule, but also with the constitutional doctrine of separation of powers. Although the doctrine of separation of powers does not require absolute departmental autonomy, it does require that duties specifically delegated to one branch of government not be willfully usurped by another branch. Because Congress has determined that the Parole Commission is in the best position to determine whether a validly convicted defendant is ready for conditional release, permitting trial judges to systematically rule on timely filed reduction of sentence motions beyond the 120-day period may infringe on the Parole Commission's exercise of discretion and circumvent congressional intent. Because the Parole Commission is an executive agency, such an infringement would constitute a violation of the separation of powers doctrine.

110. United States v. Mendoza, 565 F.2d 1285, 1288-90 (5th Cir.), rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978) (en banc) (per curiam).
111. See Patsy v. Board of Regents, 457 U.S. 496, 501-02 (1982) (“a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent”); The Federalist, No. 78, at 396 (A. Hamilton) (G. Wills ed. 1982) (“It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.”): cf. Sotto v. Wainwright, 601 F.2d 184, 192 (5th Cir. 1979) (in construing a state rule similar to Rule 35(b) court stated that a tripartite scheme of government requires eventual ending of judicial power to reduce sentence and final vesting in executive branch), cert. denied., 445 U.S. 950 (1980).
113. See id. at 121-22 (1976); The Federalist, No. 78, at 393-94 (A. Hamilton) (G. Wills ed. 1982) at 393-94.
115. United States v. Kajevic, 711 F.2d 767, 770-72 (7th Cir. 1983); see United States v. Addonizio, 442 U.S. 178, 188-89 & nn.13 & 15 (1979) (dictum) (congressional intent was to delegate early release determination to the Parole Commission.).
117. The separation of powers doctrine guards against the unnecessary accumulation of power in a single governmental body, Chadha v. INS, 634 F.2d 408, 422 (9th Cir. 1980), aff'd, 103 S. Ct. 2764 (1983), and attempts to increase governmental efficiency by allocating specific duties to governmental departments which are best suited to perform those duties, id. at 423. Violation of the doctrine occurs when there is "an assumption by one branch of powers that are central or essential to the
addition, the majority's analysis of Rule 35(b) is arguably inconsistent with the Rule's plain language and the drafters' original intent and may infringe on the rule-making authority of Congress and the Supreme Court. The Supreme Court has stated that regardless of how admirable or desirable a particular legislative policy may be, a court may not implement such a policy by judicially changing the meaning of an otherwise unambiguous rule. The only appropriate method to implement such a policy is the rule-making and amendment process.

operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties," id. at 425, and is not required to further a legitimate governmental interest, id.


Congress has determined that the Parole Commission is in the best position to grant early release to a prisoner. United States v. Addonizio, 442 U.S. 178, 188-89 & n.14 (1979); United States v. Murray, 275 U.S. 347, 357 (1927). While Congress' delegation of early release determination to the Parole Commission does not usurp the power of the sentencing judge to designate the maximum and minimum periods of incarceration for defendants, Garcia v. Neagle, 660 F.2d 983, 988 (4th Cir. 1981), cert. denied, 102 S. Ct. 1023 (1982); Page v. United States Parole Comm'n, 651 F.2d 1083, 1085 (5th Cir. 1981) (per curiam), a sentencing court that attempts to set a specific parole date for a defendant does interfere with the functions of the Parole Commission, United States v. Mooney, 654 F.2d 482, 489 (7th Cir. 1981); Hawkins v. United States Parole Comm'n, 511 F. Supp. 460, 461 (E.D. Va. 1981), aff'd, 679 F.2d 881 (4th Cir. 1982). Permitting a trial judge to delay action on a Rule 35(b) motion after the expiration of the 120-day period, with the likely effect of assuming the function of the Parole Commission, is a misuse of the remedy. United States v. Kajevic, 711 F.2d 767, 772 (7th Cir. 1983). Such action would encroach upon the Commission's authority over early release determination.


120. United States v. Kajevic, 711 F.2d 767 (7th Cir. 1983); United States v. Mendoza, 585 F.2d 1285, 1295 (5th Cir.) (Wyzanski, J., concurring) ("We have no authority to legislate."); rev'd on other grounds, 581 F.2d 89 (5th Cir. 1978); United States v. Stollings, 516 F.2d 1287, 1290 (4th Cir. 1975) (Anderson, J., dissenting in part) ("While I agree with the remedial purpose underlying the majority's decision, it is my opinion that this should be brought about by an amendment to Rule 35 . . . and not through a ruling by a federal court.").
Because there are strong indications that the plain language of Rule 35(b)'s time limitation accurately reflects its true meaning, to permit an alternative judicial interpretation would be to condone judicial infringement on the legislative function. Congress and the Supreme Court therefore should respond to this continuing disagreement by amending the Rule to harmonize both sets of policies. While judicial discussion of Rule 35(b) has continued unabated since its adoption, few jurists or commentators have attempted to devise a method whereby court power over judgments of conviction may be limited without causing undue hardship to diligent defendants.

The Advisory Committee's proposal to amend Rule 35(b) merely adopts the majority analysis and does not adequately balance the various interests involved. While a motion filing rule does have merit because it adequately deals with the remedial interests underlying the Rule, it ignores the jurisdictional aspects of the Rule by leaving the time for court action dependent upon the trial court's determination of a "reasonable time." Such a standard would lead to extended court determinations which could vary among courts. The plain language of the Rule and its legislative history suggest that greater weight should be given to limiting the time for court determination.

Two alternative proposals appear to balance these interests. Under each of these proposals, it should be the responsibility of the defendant's attorney to see that the trial court acts, or if the court willfully refuses to act, to bring an appeal for abuse of discretion. Defendant's normal procedural safeguards and access to appellate review should assure him of a fair disposition of his case.

121. See supra notes 51-55, 84-107.
122. See supra notes 10, 17.
124. See 28 U.S.C. § 1291 (1976). A defendant may appeal the denial of a Rule 35(b) motion. United States v. Shillingford, 586 F.2d 372, 375 (5th Cir. 1978); 28 U.S.C. § 1291 (1976), however, the scope of review has been quite narrow. United States v. Kajovic, 711 F.2d 767, 771 (7th Cir. 1983); Government of Virgin Islands v. Gereau, 603 F.2d 438, 443 (3d Cir. 1979). In certain instances, however, appellate review has expanded. See, e.g., United States v. Stumpf, 476 F.2d 945, 946-47 (4th Cir. 1973) (per curiam) (appellate court will review when there is abuse of discretion); United States v. McCord, 466 F.2d 17, 19 (2d Cir. 1972) (growing precedent for review when it is clear that district court has abused its discretion); McGee v. United States, 462 F.2d 243, 245 (2d Cir. 1972) (appellate court will scrutinize information considered by trial courts). If a Rule 35(b) motion is no longer available to defendant and he has exhausted all avenues of direct appeal and collateral attack, he may seek executive clemency, see Egan v. United States, 265 F.2d 820, 824 (8th Cir.), cert. denied, 361 U.S. 868 (1959), or have his sentence reduced on motion of the Bureau of Prisons, 18 U.S.C. § 4205(g) (1976).

The simplest way to amend the Rule would be to emulate the 1966 amendment by increasing the 120-day time period and clarifying the need for court action within
One approach would be to require a defendant to file a motion within some fixed period commencing upon the imposition of sentence and to require court action within a longer fixed period also commencing upon imposition of sentence. This alternative would encourage defendants to file early and ensure sufficient time for courts to decide such motions. It also would eliminate the situation presented when a defendant files on the 119th day of the time period, making court action within the prescribed time virtually impossible. Furthermore, it would specifically limit court action to a definite time and thus decrease the potential for infringement of Parole Commission authority inherent in the Advisory Committee's position.

A second alternative would also require a defendant to file a Rule 35(b) motion within a specific time period, and would grant the court a specific time within which to act upon the motion. The court action period, however, would begin to run upon the filing of the motion with the court clerk. This alternative is preferable because it would minimize the danger that a trial court could manipulate the Rule and infringe upon the Parole Commission's authority. At the same time, it would protect the diligent defendant from being unjustly deprived of a second chance to appear before the sentencing court by commencing the time period for court action upon the filing of a motion. This alternative appears to be consistent with the original purpose of the Rule and affords defendants a fair opportunity to take advantage of the remedy provided in Rule 35(b). It would both provide ample time for the filing of a motion and require expedience in court determination. Consequently, it appears to be preferable to the Advisory Committee's approach.

that time period. This would allow a defendant more time to prepare and file evidence in support of a reduction of sentence motion and the trial court would have more time to consider its merit. One commentator has recommended that the period be increased to 180 days to coincide with the provisions of 18 U.S.C. § 3651 (1976), which provides that a trial judge may suspend the imposition or execution of a sentence within 180 days of imposition of judgment. C. Renfrew, Sentence Review by the Trial Court; A Proposal to Amend Rule 35, 51 Ind. L.J. 355, 364 & n.35 (1976). While such a proposal does attempt to balance the remedial and jurisdictional policies involved, it does not appear to be an ultimate solution. It would appear inequitable because it does not eliminate the problem of a defendant filing a motion for sentence reduction near the end of the time period, making it difficult for the court to act. Id. at 361, 364 & n.36.

125. This was the general scheme proposed by the Fifth Circuit in United States v. Mendoza, 565 F.2d 1285, 1291-92 (5th Cir. 1978), and disapproved by the Fifth Circuit sitting en banc. United States v. Mendoza, 581 F.2d 89, 90 (5th Cir. 1978) (en banc) (per curiam). The court suggested that the defendant be allowed to file at any time within the 120 days and the court be allowed to go beyond the 120 days only if the defendant filed within the first 60 days. 565 F.2d at 1291-92. If the defendant filed within the first 60 days, the court could take a reasonable time beyond the period to act. Id.
CONCLUSION

The Advisory Committee’s proposal to permit a trial court to retain jurisdiction for a reasonable time upon the filing of a motion within the 120-day period has merit because it is consistent with the remedial purpose of Rule 35(b). By allowing judicial determination of a reasonable time after expiration of the 120-day period, however, the Advisory Committee’s amendment will lead to inconsistent decisions among the circuits and to more crowded court dockets. Such a rule does not adequately balance the remedial and jurisdictional policies underlying Rule 35(b). Congress and the Supreme Court therefore should amend the Rule to balance these interests and prevent judicial usurpation of legislative and executive functions.*

B. Carole Hoffman

* At the time this Note went to press, the Fourth Circuit followed United States v. Stollings, 516 F.2d 1287 (4th Cir. 1975) and held that because “the trial judge purposely delayed consideration of the motion until after the deadline in order to review the Parole Commission’s decision,” the delay was “unreasonable” and the court lacked jurisdiction to entertain the Rule 35(b) motion. United States v. Schafer, No. 83-6119, slip op. at 4-5 (4th Cir. Jan. 26, 1984).