

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-6913

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NORMAN TYRONE DAIS,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence. Terry L. Wooten, District Judge. (4:03-cr-00386-TLW-1)

Submitted: January 15, 2009

Decided: January 22, 2009

Before MOTZ and SHEDD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

David B. Betts, Columbia, South Carolina, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Norman Tyrone Dais appeals the district court's denial of his motion to compel the government to file a Fed. R. Crim. P. 35(b) motion for reduction of sentence. Dais' attorney has filed a brief in accordance with Anders v. California, 386 U.S. 738 (1967). Although counsel states that there are no meritorious issues for appeal, he challenges the district court's denial of the motion to compel. Dais advances the same challenge in a supplemental pro se brief. We affirm.

It is well-settled that whether to file a Rule 35(b) motion is a matter left to the government's discretion. Fed. R. Crim. P. 35(b); United States v. Dixon, 998 F.2d 228, 230 (4th Cir. 1993). However, a court may remedy the government's refusal to move for a reduction of sentence if: (1) the government has obligated itself in the plea agreement to move for a reduction; or (2) the government's refusal to move for a reduction was based on an unconstitutional motive. Wade v. United States, 504 U.S. 181, 185-86 (1992). Here, the plea agreement entered into between Dais and the government clearly and unequivocally establishes that the decision whether to file a Rule 35(b) motion rested within the sole discretion of the government. Moreover, there is no evidence that the government's refusal to file a Rule 35(b) motion was based on an

unconstitutional motive. Thus, we find no error by the district court in denying Dais' motion to compel.

In accordance with Anders, we have reviewed the entire record in this case and have found no meritorious issues for appeal. We therefore affirm the district court's order denying Dais' motion to compel the government to file a Rule 35(b) motion. This court requires that counsel inform his client, in writing, of his right to petition the Supreme Court of the United States for further review. If the client requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on the client. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED