

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION 'SUMMARY ORDER'). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for
2 the Second Circuit, held at the Thurgood Marshall United States
3 Courthouse, 40 Foley Square, in the City of New York, on the
4 21st day of April, two thousand seventeen.

5
6 **PRESENT: JOHN M. WALKER, JR.,**
7 **DENNIS JACOBS,**
8 **BARRINGTON D. PARKER,**
9 **Circuit Judges.**

10
11 - - - - -X
12 **United States of America,**
13 **Appellee,**

14
15 **-v.-**

16
17 **16-2361**

18 **Carmine Persico,**
19 **Appellant.***

20
21 - - - - -X

22
23 **FOR APPELLANT:** ANTHONY DIPIETRO (Gianna M. Del
24 Grippo, on the brief), White
25 Plains, NY.

* The Clerk of Court is respectfully directed to amend the official caption to conform with the above.

1 **FOR APPELLEE:**

MATTHEW D. PODOLSKY (Michael Ferrara, on the brief), Assistant United States Attorney, for Joon H. Kim, Acting United States Attorney for the Southern District of New York.

8 Appeal from a final order of the United States District Court
9 for the Southern District of New York (Duffy, J.).

10 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND**
11 **DECREED** that the final order of the district court be **AFFIRMED**.

12
13 Carmine Persico appeals from an order entered on June 24,
14 2016, by the United States District Court for the Southern
15 District of New York (Duffy, J.), denying his motion to correct
16 his sentence pursuant to the version of Federal Rule of Criminal
17 Procedure 35(a) that was in effect when he was sentenced thirty
18 years ago ("Former Rule 35(a)"). We assume the parties'
19 familiarity with the underlying facts, the procedural history,
20 and the issues presented for review.

21 In 1986, the government prosecuted Persico (and several
22 others) as the head of an organized crime "family." United
23 States v. Salerno, 868 F. 2d 524, 528 (2d Cir. 1989). The
24 government offered evidence at trial that Persico was the boss
25 of the Colombo crime family and that he sat on the "Commission"
26 that acted as a ruling body over La Cosa Nostra. After an
27 eleven-week trial, Persico was convicted of (1) conspiracy to
28 violate the Racketeer Influenced and Corrupt Organizations Act
29 ("RICO"), in violation of 18 U.S.C. § 1962(d); (2) substantive
30 RICO violations, in violation of 18 U.S.C. § 1962(c); (3)
31 conspiracy to commit extortion and twelve counts of extortion
32 or attempted extortion, in violation of 18 U.S.C. § 1951(a);
33 and (4) aiding and abetting six labor bribery violations of 18
34 U.S.C. §§ 2 and 186(b)(1). Salerno, 868 F.2d at 527. United
35 States District Judge Richard Owen sentenced Persico to a total
36 of 100 years of imprisonment.

37 Persico's direct appeal argued (among other things) that
38 the sentence was overly severe, that the evidence was
39 insufficient, that Persico's prosecution violated the Double
40 Jeopardy Clause, that the jury should have been sequestered,

1 and that the government violated its obligations under Brady
2 v. Maryland, 373 U.S. 83 (1963). This court rejected his
3 arguments and affirmed his conviction and sentence. Salerno,
4 868 F. 2d at 528.

5 Persico moved to vacate his conviction pursuant to 18 U.S.C.
6 § 2255. Judge Owen denied that motion in 1991, and this court
7 affirmed the denial. United States v. Salerno, 964 F.2d 172,
8 180 (2d Cir. 1992).

9 More than two decades later, Persico has filed the present
10 motion under Former Rule 35(a). Because Persico committed his
11 offenses prior to November 1, 1987, Former Rule 35(a) applies.
12 United States v. Blackmer, 909 F.2d 66, 67 (2d Cir. 1990) (per
13 curiam), vacated on other grounds, 499 U.S. 944 (1991). That
14 rule provided that “[t]he court may correct an illegal sentence
15 at any time and may correct a sentence imposed in an illegal
16 manner within” 120 days after the sentence is imposed or after
17 other triggering events that signify the end of the appeal
18 process. Fed. R. Crim. P. 35 (1985).

19 Persico argues that his sentence was illegal because it is
20 substantively unreasonable, violates due process by reliance
21 on factual inaccuracies, and is unlawful as a result of Brady
22 violations. United States District Judge Kevin Duffy (to whom
23 the case was reassigned after the motion was filed) observed
24 that sentence modification under Former Rule 35(a) is
25 discretionary, and exercised his discretion to deny the motion.
26 He nevertheless addressed the merits of Persico’s arguments “for
27 the sake of completeness,” App. 12, and rejected them all.

28 Our review of the denial of a motion under Former Rule 35(a)
29 “is limited to the question of abuse of discretion.” United
30 States v. Sambino, 799 F.2d 16, 16 (2d Cir. 1985) (per curiam).
31 “A district court has abused its discretion if it based its ruling
32 on an erroneous view of the law or on a clearly erroneous
33 assessment of the evidence or rendered a decision that cannot
34 be located within the range of permissible decisions.” In re
35 Sims, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks,
36 alterations and citations omitted).

37 “[T]he wide latitude provided in the older versions of Rule
38 35 for a sentence correction . . . was not required by the Due

1 Process Clause. A defendant has no due process right to continue
2 to challenge his conviction in perpetuity." United States v.
3 Rivera, 376 F.3d 86, 91-92 (2d Cir. 2004). "[T]he use of the
4 word 'may' in the rule indicates that courts are free to apply
5 reasonable and prudential limitations on the correction of
6 illegal sentences." United States v. Woods, 986 F.2d 669, 675
7 (3d Cir. 1993). Persico offers no basis to disturb the district
8 court's decision, which is easily located within the range of
9 permissible decisions, especially in light of the fact that
10 Persico was convicted and sentenced approximately thirty years
11 ago and has already had the opportunity to raise challenges on
12 direct appeal and collaterally under § 2255.

13 Moreover, to the extent that Persico's arguments are
14 directed at decisions that were made as part of his trial or
15 earlier, we observe that "a motion under [Former] Rule 35 can
16 only be used to correct an illegal sentence, and not to correct
17 trial errors or errors in other pre-sentencing proceedings."
18 United States v. Schiff, 876 F.2d 272, 274 (2d Cir. 1989). The
19 Supreme Court has construed "illegal sentence" narrowly when
20 interpreting Former Rule 35, see Hill v. United States, 368 U.S.
21 424, 430 & n.8 (1962), and the former rule is not "a vehicle
22 to reopen final judgments long since past ripe for review,"
23 Woods, 986 F.2d at 675 (quotation marks omitted). It does not
24 provide a means to raise arguments that are substantially similar
25 to those Persico more appropriately raised in earlier stages
26 of this case. We find no error, let alone abuse of discretion,
27 in the district court's decision.

28 Accordingly, and finding no merit in appellant's other
29 arguments, we hereby **AFFIRM** the order of the district court.

30 FOR THE COURT:
31 CATHERINE O'HAGAN WOLFE, CLERK