

October 21, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40236
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DERRICK WAYNE BURTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:97-CR-153-4

Before JOLLY, JONES, and WIENER, Circuit Judges.

PER CURIAM:*

Derrick Wayne Burton, federal prisoner #06581-078, moves this court to proceed in forma pauperis ("IFP") in this appeal from the district court's denial of his 18 U.S.C. § 3582(c)(2) motion to reduce his sentence. He argues that his sentence should have been reduced based upon a 2002 amendment to the background commentary to U.S.S.G. § 3B1.2. See U.S.S.G. App. C, Amend. 640 (2002).

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Because Amendment 640 is not an amendment listed in U.S.S.G. § 1B1.10(c), p.s. and because Burton is seeking relief pursuant to 18 U.S.C. § 3582(c)(2), he is not entitled to take advantage of the amendment whether it contained substantive changes or merely clarified the Sentencing Guidelines. See United States v. Davidson, 283 F.3d 681, 684 (5th Cir. 2002); United States v. Drath, 89 F.3d 216, 217 (5th Cir. 1996). The district court did not abuse its discretion in denying Burton's 18 U.S.C. § 3582(c)(2) motion for reduction of sentence based upon Amendment 640.

Because Burton has not demonstrated a nonfrivolous issue for appeal, he cannot proceed IFP. See FED. R. APP. P. 24(a); see Carson v. Polley, 689 F.2d 562, 586 (5th Cir. 1982). Because his appeal is without arguable merit, it is dismissed as frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2. We caution Burton that further frivolous filings will subject him to sanctions.

MOTION FOR IFP DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.