

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

July 21, 2008

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No. 07-10898  
Summary Calendar

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Charles R. Fulbruge III  
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAMES HOWARD HANEY

Defendant-Appellant

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:92-CR-61-3

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Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:\*

James Howard Haney, federal prisoner # 22122-077, pleaded guilty to possession of methamphetamine with intent to distribute and was sentenced as a career offender to 360 months in prison. He appeals the district court's denial of his petition for a writ of audita querela, pursuant to 28 U.S.C. § 1651(a), in which he asserted that the district court wrongly found him to be a career offender under the Sentencing Guidelines in light of *United States v. Cheramie*, 51 F.3d 538 (5th Cir. 1995). Haney has not established that his *Cheramie* claim

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

constitutes a “gap” in the federal postconviction structure warranting the extraordinary writ. See *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993); *United States v. Reyes*, 945 F.2d 862, 865 & n.5 (5th Cir. 1991); see also *Kinder v. Purdy*, 222 F.3d 209, 211-14 (5th Cir. 2000). The judgment of the district court is AFFIRMED.

Haney also asks this court to recall the mandate on his direct appeal so that he may raise his Cheramie claim. Because Haney did not argue on direct appeal that his underlying conspiracy conviction cannot serve as a predicate offense for a career offender finding under the Guidelines, he is not entitled to a recall of the mandate. See *In re Kunkle*, 398 F.3d 683, 685 n.2 (5th Cir. 2005). Haney’s motion is thus DENIED. Haney’s motion for appointment of counsel is likewise DENIED.