

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40028
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

C. W. FIELDS, also known as
William T. Neilley,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:94-CV-260

- - - - -
February 29, 1996

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

C.W. Fields appeals the denial of his motion filed pursuant to 28 U.S.C. § 2255. He argues that the district court erred when it sua sponte determined that he was procedurally barred from arguing that the sentencing court was required to give him notice of an upward departure.

Because the court's failure to give notice of intent to upwardly depart is not an error of constitutional or jurisdictional magnitude, see United States v. Faubion, 19 F.3d

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

226, 233 (5th Cir. 1994), and the issue could have been raised on direct appeal, it may not be considered on collateral review.

United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981).

AFFIRMED.