

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20038
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL RATHBURN,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-95-4578
- - - - -
February 21, 1997

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

In this appeal from the district court's order denying his motion for relief under 28 U.S.C. § 2255, Michael Rathburn contends that his criminal conviction violated double jeopardy because it was preceded by a civil forfeiture pursuant to 21 U.S.C. § 881 (a)(7). A recent opinion by the United States Supreme Court has rendered this issue frivolous. United States v. Ursery, 116 S. Ct. 2135, 2147-49 (1996).

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Rathburn argues for the first time on appeal that the civil forfeiture violated the Excessive Fines Clause of the Eighth Amendment. Even assuming that this claim properly was raised in the district court, it is not cognizable in this § 2255 proceeding. See United States v. Segler, 37 F.3d 1131, 1136-37 (5th Cir. 1994).

Because the appeal is frivolous, it is DISMISSED. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5th Cir. R. 42.2. To the extent that a certificate of appealability (COA) is required, we construe Rathburn's notice of appeal as an application for COA and DENY the motion.

APPEAL DISMISSED.