

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 01-10389  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MERVIN GLEN ANDERSON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:99-CR-165-1-H  
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September 4, 2001

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:\*

Mervin Anderson, federal prisoner # 12497-076, appeals the district court's denial of his request to file a motion to modify his sentence under 18 U.S.C. § 3582(c) and the striking of that motion. Anderson argues that Amendment 591 to the Sentencing Guidelines applies to his sentence and requires that the offense level set out in U.S.S.G. § 2A4.1 for kidnapping, his conviction offense, be used to calculate his sentence and not the offense level in U.S.S.G. § 2A3.1 for sexual assault, the underlying

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

offense. The Government has filed a motion to dismiss Anderson's appeal as frivolous.

A review of Anderson's sentence reveals that he was properly sentenced under U.S.S.G. § 2A4.1 for kidnapping, which directed that the offense level for the underlying sexual assault offense be used to calculate the offense level. See U.S.S.G. § 2A4.1(b)(5) (1989 Sentencing Guidelines) (now § 2A4.1(b)(7)). Anderson's appeal lacks arguable merit, and is therefore frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5th Cir. R. 42.2. The Government's motion is GRANTED.

MOTION GRANTED; APPEAL DISMISSED AS FRIVOLOUS.