

April 21, 2003

Charles R. Fulbruge III  
Clerk

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 02-11009  
SUMMARY CALENDAR

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NELSON TOMAS ZAMBRANO

Petitioner - Appellant

v.

L. E. FLEMING, Warden, Federal Medical Center – Fort Worth

Respondent - Appellee

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On Appeal from the United States District Court for the  
Northern District of Texas, Fort Worth Division  
(4:02-CV-672-A)

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Before REYNALDO G. GARZA, HIGGINBOTHAM, and BENAVIDES, Circuit Judges.

PER CURIAM:<sup>1</sup>

Nelson Tomas Zambrano, federal prisoner # 28146-004, appeals the district court's judgement construing his 28 U.S.C. § 2241 petition as a successive 28 U.S.C. § 2255 motion and dismissing it. Zambrano argues that the district court erred in construing his petition as a 28 U.S.C. § 2255 motion and that 28 U.S.C. § 2255 is inadequate or ineffective to test the legality of his detention. Zambrano has not shown that he is entitled to seek relief under 28 U.S.C. § 2241

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<sup>1</sup>Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

based on the savings clause of 28 U.S.C. § 2255 as he has not shown that any of his claims rely on a retroactively applicable Supreme Court decision. *See Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001). Because Zambrano is challenging the validity of his underlying conviction, the district court correctly construed his petition as a 28 U.S.C. § 2255 motion. *See Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000). Zambrano acknowledges that he filed a previous 28 U.S.C. § 2255 motion challenging his conviction. He has not obtained authorization from the appropriate court of appeals for filing a successive 28 U.S.C. § 2255 motion. Accordingly, the district court did not err in dismissing his 28 U.S.C. § 2255 motion.

Zambrano's appeal is without arguable merit and is DISMISSED as frivolous. *Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2.

APPEAL DISMISSED AS FRIVOLOUS.