

July 9, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30244
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUSTIN E. CALLAHAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 99-CR-69-B

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:*

Justin E. Callahan, federal prisoner # 03245-095, is currently serving a 180-month sentence for being a felon in possession of a firearm. Callahan requests a certificate of appealability ("COA") to appeal the district court's denial of his motion to file an out-of-time 28 U.S.C. § 2255 motion. Because Callahan's motion did not request habeas relief, he need not obtain a COA in order to proceed on appeal. Accordingly, his request for COA is DENIED AS UNNECESSARY.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Callahan's motion to file an out-of-time 28 U.S.C. § 2255 motion was not accompanied by a 28 U.S.C. § 2255 motion on the merits. We agree with the reasoning of United States v. Leon, 203 F.3d 162 (2d Cir. 2000), and conclude "that a federal court lacks jurisdiction to consider the timeliness of a § 2255 [motion] until a [motion] is actually filed." Id. at 163. Before the motion itself is filed, "there is no case or controversy to be heard, and any opinion we were to render on the timeliness issue would be merely advisory." Id. Accordingly, the district court's denial of Callahan's motion is AFFIRMED because the district court lacked jurisdiction to entertain the motion.

COA DENIED AS UNNECESSARY; AFFIRMED.