

October 21, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60235
Conference Calendar

FRANCISCO BARRERA-DIAZ,

Petitioner-Appellant,

versus

M. PETTIFORD,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 5:03-CV-439-R

Before JOLLY, JONES, and WIENER, Circuit Judges.

PER CURIAM:*

Francisco Barrera-Diaz (Barrera), federal prisoner no. 38552-004, filed a petition for habeas corpus under 28 U.S.C. § 2241 in the Southern District of Mississippi, where he is incarcerated for drug-trafficking and firearm convictions. He contends that his firearm conviction is invalid under Bailey v. United States, 516 U.S. 137 (1995).

The district court correctly construed the petition as a successive motion under 28 U.S.C. § 2255 because Barrera has filed a previous motion and again attacks his conviction and

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

sentence. See Tolliver v. Dobre, 211 F.3d 876, 877-78 (5th Cir. 2000). The district court also correctly determined that Barrera's petition is not permitted by the "savings clause" of 28 U.S.C. § 2255 because Barrera was able to assert his Bailey claim in a prior motion. See 28 U.S.C. § 2255; Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001). The district court lacked jurisdiction over Barrera's successive motion because it could be filed only if authorized by the Eleventh Circuit Court of Appeals and only in the Southern District of Florida, where Barrera was convicted. See 28 U.S.C. § 2255.

The appeal is frivolous, and it is dismissed. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2. Further frivolous filings will subject Barrera to sanctions.

APPEAL DISMISSED; SANCTION WARNING ISSUED.