

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8299
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO JAVIER GARCIA-PESCADOR,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-92-CA-111(H) (EP-89-CR-81)

- - - - -
(January 21, 1993)

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

PER CURIAM:*

Garcia-Pescador contends that he received ineffective assistance of counsel because his attorney did not seek a downward departure for his minimal participation in the offense. The record indicates that Garcia-Pescador's attorney did in fact request a downward adjustment at the sentencing hearing. Garcia-Pescador's claims regarding counsel's ineffectiveness for failing to move for a downward adjustment are meritless.

Garcia-Pescador also alleges that the district court erred for failing to impose a sentence less than the statutory minimum.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Relief under § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992).

Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding. Id.

Garcia-Pescador's claim does not give rise to a constitutional issue.** He did not appeal the nonconstitutional issue he now presents in this § 2255 motion; accordingly, the district court's denial of the motion is AFFIRMED.

** Insofar as Garcia-Pescador, in his reply brief, challenges the constitutionality of the ten-year mandatory minimum sentence of 21 U.S.C. § 841(b)(1)(A), we reject his claim as meritless. This Court has previously held that the imposition of a minimum mandatory sentence does not establish a constitutional violation. See U.S. v. Rojas-Martinez, 968 F.2d 415, 419-20 (5th Cir. 1992). Garcia-Pescador's mandatory minimum sentence of 120 months was within the applicable Guideline range of 97-121 months. Further, Garcia-Pescador did not raise his challenge to the constitutionality of § 841(b)(1)(A) below.