

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8374  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RUBEN JOHNSON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. A-92-CA-058 (CR-88-00104-01)

- - - - -  
May 6, 1993

Before POLITZ, Chief Judge,  
HIGGINBOTHAM, and DEMOSS, Circuit Judges.

PER CURIAM:\*

Ruben Johnson was charged in a thirteen-count indictment and convicted by a jury for theft and misapplication of funds in violation of 18 U.S.C. § 656. During sentencing, the district court ordered restitution of \$4,566,298. Johnson directly appealed his conviction and sentence but later withdrew his appeal. Johnson then filed a 28 U.S.C. § 2255 motion, challenging the multiple-count indictment as violative of double jeopardy and the order of restitution as failing to comply with

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\* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Hughey v. United States, 495 U.S. 411, 110 S.Ct. 1979, 1984, 109 L.Ed.2d 408 (1990). The district court denied Johnson's § 2255 motion, and Johnson appeals.

Relief under § 2255 is reserved for violations of a defendant's 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. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981). Short of this, claims that could have been raised on direct appeal, but were not, may not be raised in a collateral proceeding. Id.

Johnson did not directly appeal the amount of restitution ordered by the district court even though he concedes that he raised objections to the alleged losses in district court. Hughey, a statutory construction case, does not raise a constitutional issue. See 495 U.S. at 419. Although Hughey, decided after Johnson was sentenced, could not have been raised on direct appeal, the appropriateness of the amount of restitution could have been, but was not, raised on direct appeal. Instead, Johnson *affirmatively* moved to withdraw his appeal. His failure to appeal waived the factual issue as to the appropriateness of the amount of restitution. The district court's denial of Johnson's § 2255 motion in such circumstances would not "result in a complete miscarriage of justice."

A claim of multiple sentences in violation of the Double Jeopardy Clause is cognizable in a § 2255 proceeding. See United States v. Marroquin, 885 F.2d 1240, 1245-46 (5th Cir. 1989). The thirteen-count indictment charging Johnson with separate violations of § 656 was based on actions committed on different dates and thus conforms with Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Johnson's overall "scheme" to receive a 15% kickback does not preclude his multiple convictions based on each instance of misconduct under that scheme. See United States v. Farmigoni, 934 F.2d 63, 65 (5th Cir. 1991) (quotation omitted), cert. denied, 112 S.Ct. 1160 (1992).

The district court's denial of Johnson's § 2255 motion is  
AFFIRMED.