

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1330  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDDIE LYNN SUDDETH, a/k/a  
Freddy Sudduth,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
(3:93-CV-361-R(3:89-CR-080-R))

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(June 14, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:\*

In Suddeth's fourth federal habeas petition, he alleged that the government breached his guilty plea agreement by failing to file a § 5K1.1 motion for downward departure. The district court denied his motion, finding that Suddeth did not provide "substantial assistance" to the government, that the government's decision to file such a motion was discretionary, and that even if

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the government had filed such a motion, the court would have denied it.

On appeal, Suddeth contends that his plea agreement was involuntary because the government did not comply with its requirement to file a downward departure motion. Depending on the terms of the plea agreement, i.e. if the decision to depart downward lay not in the sole discretion of the government but was conditioned upon Suddeth's giving substantial assistance to the government, he might have had a good claim on direct appeal. See United States v. Watson, 988 F.2d 544, 548-50 (5th Cir. 1993). But because this issue could have been raised on direct appeal, and Suddeth did not file a direct appeal, it is cognizable in collateral review only if Suddeth could show cause for his procedural default and actual prejudice resulting from the error. United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 978 (1992). Not only is the procedural bar doctrine a problem for Suddeth, but his motion may also be foreclosed as an abuse of the writ under Rule 9(b) of the rules governing § 2255 proceedings. The fact that Suddeth filed three previous § 2255 motions may, on proper motion by the government, bar him from asserting involuntariness of the plea agreement in the present petition.

Because of these procedural and substantive difficulties in the case, we must vacate and remand to the trial court for reconsideration of Suddeth's § 2255 motion. In so doing, the government will have the opportunity to plead that the § 2255

motion is barred by procedural default or by Rule 9(b) as an abuse of writ, or it may answer his allegations on the merits. If the district court reaches the merits, it must make a finding, which it did not do on the first go-round, whether the government's conduct was consistent with the parties' reasonable interpretations of the plea agreement and what might constitute substantial assistance. See United States v. Watson, supra at 552-53.

The judgment of the court is VACATED and REMANDED for further proceedings consistent herewith.