IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3608
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALVIN TAYLOR,

Defendant-Appellant.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CA-93-1819 (CR-91-562-F)
- - - - - - - - - - -
(March 23, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

BY THE COURT:

Alvin Taylor has filed a motion with this Court to proceed in forma pauperis (IFP) in the appeal of the denial of his motion filed pursuant to 28 U.S.C. § 2255. This Court may authorize Taylor to proceed IFP on appeal if Taylor is unable to pay the costs of the appeal and his appeal is taken in good faith, i.e., it presents a nonfrivolous issue. 28 U.S.C. § 1915(a); Holmes v. Hardy, 852 F.2d 151, 153 (5th Cir.), cert. denied, 488 U.S. 931 (1988). As set forth below, however, the arguments Taylor asserts are frivolous.

To the extent that Taylor asserts that the court's failure to advise him that his criminal history could affect its ruling on a Rule 35(b) motion was a violation of Fed. R. Crim. P. 11,

Taylor failed to raise this issue in the district court. Issues raised for the first time on appeal are not reviewed unless they involve purely legal questions and failure to consider them would result in manifest injustice. United States v. Sherbak, 950 F.2 1095, 1101 (5th Cir. 1992). Taylor's argument regarding what the Court advised him is not purely legal, thus precluding this Court's review.

Taylor's argument that the court failed to apply correct principles in deciding the Rule 35(b) motion fails to state a constitutional violation. "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).

Nor does Taylor's argument that his liberty interest in the Government's Rule 35(b) was violated amount to a constitutional claim. Rule 35(b) provides that the court "may" reduce a sentence, and contains no mandatory language. See Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) (absent substantive limitations on official discretion, no liberty interest entitled to protection under the Due Process Clause is created).

Taylor had no constitutional right to appear or allocute at the Rule 35(b) proceeding because the court did not resentence him, but modified his sentence to be less onerous. See United

States v. Moree, 928 F.2d 654, 655 (5th Cir. 1991) (recognizing distinction between proceedings in the district court that modify an existing sentence at which the defendant's presence is not required and proceedings that impose a new sentence after the original sentence has been set aside at which the defendant's rights to be present and allocute are of constitutional dimension). Because this argument fails to state a constitutional claim, it is not cognizable under § 2255. Vaughn, 955 F.2d at 368.

Taylor does not address why these issues could not have been raised on direct appeal. Therefore, he fails to demonstrate that any of these issues fall into that "narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." See id.

Because Taylor raises no nonfrivolous issues, his motion to proceed IFP is DENIED and his appeal is DISMISSED. See Howard, 707 F.2d at 220; 5th Cir. R. 42.2.