IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3770
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VERNON MCKAY,

Defendant-Appellant.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CA-91-2861

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(July 19, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:[*]

Relief under 28 U.S.C. § 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). Vernon McKay's contention that the district court erroneously increased his base offense level four points as an organizer or leader is no more than an attack on the district court's

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

technical application of the Guidelines and does not give rise to a constitutional issue. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Thus, the contention is not within the narrow scope of issues cognizable under § 2255. Id. His contention that the district court erred in failing to resolve a dispute concerning the PSR also is not cognizable in a § 2255 proceeding. See United States v. Engs, 884 F.2d 894, 895-96 & n.3 (5th Cir. 1989).

The district court dismissed the motion as an abuse of the writ, but it failed to notify McKay that it was contemplating dismissal under Rule 9(b) following § 2255. Johnson v. McCotter, 803 F.2d 830, 832 (5th Cir. 1986). The "harmless-error" rule can apply in this context if a movant gives an appropriate response despite lack of notice. Brown v. Butler, 815 F.2d 1054, 1057-58 (5th Cir. 1987). The error in the instant case was harmless, as McKay's traverse brief, as well as his brief and reply brief on appeal, gave him ample opportunity to argue cause and prejudice. See Johnson, 803 F.2d at 832-33.

In Johnson v. Hargett, 978 F.2d 855, 859 (5th Cir. 1992), cert. denied, 113 S.Ct. 1652 (1993), this Court held that ineffective assistance of habeas counsel does not constitute cause excusing a serial habeas filing because there is no constitutional right to counsel in a federal habeas case. Therefore, even if the actions of McKay's writ writer were to be judged under the same standards applied to the performance of attorneys, as McKay suggests, the incompetence of a writ writer would not constitute cause.

Nor does McKay fit within the "miscarriage of justice" exception to abuse of the writ. See Sawyer v. Whitley, __ U.S. __, 112 S.Ct. 2514, 2518, 120 L.Ed.2d. 269 (1992). McKay pleaded guilty to the offense. He has neither alleged nor demonstrated a claim of factual innocence. Id. at 2519.

Thus, the district court did not abuse its discretion by dismissing McKay's § 2255 motion under Rule 9(b).

AFFIRMED.