

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11082
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WINSTON GARY THOMAS,
a/k/a Blacka,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:93-CV-2079-H (3:89-CR-365-H)

- - - - -
(March 22, 1995)

Before GARWOOD, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

IT IS ORDERED that Winston Gary Thomas's motion for leave to appeal in forma pauperis (IFP) is DENIED. The appeal lacks arguable merit and is, therefore, frivolous. Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is DISMISSED. See 5th Cir. R. 42.2.

Thomas's claim that the district court erred in determining the quantity of cocaine base attributable to him for sentencing purposes is not of constitutional dimension, and this general

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

issue was raised on direct appeal. See United States v. Thomas, 932 F.2d 1085, 1091 (5th Cir.), cert. denied, 502 U.S. 1038 (1992). Accordingly, Thomas's claim does not fall within the narrow ambit of 28 U.S.C. § 2255 review. See United States v. Santiago, 993 F.2d 504, 506 (5th Cir. 1993); United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Thomas cites to Davis v. United States, 417 U.S. 333 (1974) for the proposition that collateral relief under § 2255 may be available to prevent a miscarriage of justice when there has been an intervening change in a circuit's law after the time for appeal has expired. However, Thomas's reliance on Davis is unavailing because that case "stand[s] for the principle that exceptional circumstances may exist in which a court may exercise its equitable power to grant collateral relief under § 2255 to prevent the continued incarceration of one actually innocent." United States v. Shaid, 937 F.2d 228, 235 (5th Cir. 1991), cert. denied, 502 U.S. 1076 (1992). Thomas's arguments do not implicate whether he was innocent.

APPEAL DISMISSED.