

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-30434
No. 94-30536

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EMANUEL BROWN,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-94-562 & CR-89-310-H)

(January 17, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Emanuel Brown appeals the denial of his second 28 U.S.C. § 2255 (1988) habeas corpus motion and the dismissal of his third § 2255 motion attacking his conviction and sentence. We affirm.

Brown was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846 (1988), two counts of distribution of cocaine in violation of 21 U.S.C. § 841(a)(1)

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(1988) and 18 U.S.C. § 2 (1988), and possession of a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) (Supp. V 1993). The district court sentenced Brown to three concurrent terms of 168 months' incarceration on the conspiracy and distribution counts, followed by a mandatory consecutive 60-month term of incarceration on the firearm count.¹ This court affirmed Brown's conviction and sentence in *United States v. Beverly*, 921 F.2d 559 (5th Cir.), *cert. denied*, 501 U.S. 1237, 111 S. Ct. 2869, 115 L. Ed. 2d 1035 (1991).

Having exhausted his direct appeals, Brown filed a motion under 28 U.S.C. § 2255, arguing that the district court had imposed an excessive sentence and that the government had failed to provide notice of its intent to utilize prior convictions at sentencing. The district court denied the motion, and this court affirmed the district court's decision. Brown then filed a second habeas corpus motion under § 2255, arguing that the evidence was insufficient to support his conviction for use of a firearm during a drug trafficking offense. The district court denied the motion, and Brown appealed that decision to this court.

While Brown's appeal of his second § 2255 motion was pending, Brown filed a third § 2255 motion. In this motion, he contended that his counsel's assistance had been ineffective, that his Presentence Investigation Report was inaccurate, that the evidence was insufficient to support his conviction on the firearm count,

¹ Brown's sentence also included three years of supervised release and a \$200 special assessment.

and that his sentence was invalid for various other reasons. The district court dismissed the third motion because Brown's appeal of the denial of his second motion was still pending. Brown now appeals the dismissal of his third § 2255 motion, and he has consolidated this appeal with his earlier appeal of the denial of his second § 2255 motion.

In his second § 2255 motion, Brown challenged the sufficiency of the evidence supporting his conviction for use of a firearm in connection with drug trafficking offenses. Brown has already raised this issue on direct appeal. See *Beverly*, 921 F.2d at 561-63 (challenging on direct appeal conviction for using a firearm in relation to drug trafficking offenses). "It is settled in this Circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 Motions." *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118, 106 S. Ct. 1977, 90 L. Ed. 2d 660 (1986); see also *United States v. Santiago*, 993 F.2d 504, 506 & n.4 (5th Cir. 1993) (refusing to consider upon habeas petition issues already raised on direct appeal).² Accordingly, the district court correctly denied Brown's second § 2255 motion.

Brown filed his third § 2255 motion while the appeal of his

² The Government challenges Brown's second § 2255 motion as "procedurally barred," and Brown argues that he has demonstrated "cause and prejudice" to avoid the procedural bar. A procedural bar analysis only applies to issues that the petitioner failed to raise on direct appeal. See *United States v. Segler*, 37 F.3d 1131, 1133 (5th Cir. 1994) (applying cause and prejudice standard to claims not raised on direct appeal); see also *English v. United States*, ___ F.3d ___, Nos. 91-16442, 91-16500, 92-15368, 1994 WL 652591, at * 5 (9th Cir. Nov. 21, 1994) ("[T]he cause and prejudice standard is limited to cases in which the petitioner has defaulted a claim by failing to comply with some procedural rule.").

second motion was pending in this court. District courts generally do not review the merits of subsequent § 2255 motions until prior motions have been finally resolved. *Woolard v. United States*, 416 F.2d 50, 51 (5th Cir. 1968) ("[T]here is no jurisdictional bar to the District Court's entertaining a Section 2255 motion during the presence of a direct appeal [of a prior § 2255 motion] but . . . the orderly administration of criminal law precludes considering such a motion absent extraordinary circumstances." (citations omitted)).³ Consequently, the district court properly dismissed Brown's third § 2255 motion without prejudice.

For the foregoing reasons, we AFFIRM the district court's denial of Brown's second § 2255 motion and the district court's dismissal of his third § 2255 motion.

³ Because nothing now prevents Brown from filing his third motion, Brown has failed to demonstrate any extraordinary circumstances compelling us to review his motion at this time.