

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40842
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL JAMES GAIDUSEK,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 94-CV-54
- - - - -

March 21, 1995

Before GARWOOD, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

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).

"A district court's technical application of the Guidelines does not give rise to a constitutional issue." Id. Gaidusek's challenge to his sentence based on the amended provision could

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

not have been raised on direct appeal because he was sentenced in April 1993 and the amended guideline became effective in November 1993. See U.S.S.G. § 2D1.1 (Nov. 1993). The district court's failure to apply a guideline that was not effective at the time of sentencing does not give rise to a miscarriage of justice. See United States v. Mimms, 43 F.3d 217, 219 (5th Cir. 1995)(citing United States v. Towe, 26 F.3d 614, 616-17 (5th Cir. 1994)(construing amendment 484 to § 2D1.1)). Therefore, Gaidusek's claim that his sentence was calculated incorrectly is not cognizable under § 2255. See Vaughn, 955 F.2d at 368.

In the interest of judicial economy, this court will assume that the district court treated Gaidusek's pro se § 2255 motion as a § 3582(c)(2) motion. See Mimms, 43 F.3d at 219. The district court's decision to reduce sentence under § 3582(c)(2) is discretionary. United States v. Shaw, 30 F.3d 26, 28-29 (5th Cir. 1994).

The statutory mandatory minimum sentence for Gaidusek's conviction for violation of § 841 is 120 months. 21 U.S.C. § 841 (b)(1)(B)(v). Under Amendment 488, Gaidusek's sentence could be assessed below 120 months. See § 2D1.1 (Nov. 1993). The mandatory minimum sentence for violation of § 841 overrides any retroactive application of the new guidelines. United States v. Pardue, 36 F.3d 429, 431 (5th Cir. 1994). The district court did not abuse its discretion in light of Pardue.

AFFIRMED.