

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50254
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BIVIAN VILLALOBOS-MADRID,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. MO-94-CA-021 (MO-93-CR-32)

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(November 16, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

Bivian Villalobos-Madrid (Villalobos) moves this Court for leave to proceed on appeal in forma pauperis (IFP). "To proceed on appeal [IFP], a litigant must be economically eligible, and his appeal must not be frivolous." Jackson v. Dallas Police Dep't, 811 F.2d 260, 261 (5th Cir. 1986). The second requirement, whether Villalobos' appeal is not frivolous, does not require probable success on the merits. Id. "The [C]ourt only examines whether the appeal involves `legal points arguable

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

on their merits (and therefore not frivolous).'" Id. (citations omitted).

Even if Villalobos is economically eligible, he fails to meet the second requirement. Villalobos argues that the sentencing court erred in applying U.S.S.G. § 2L1.2(b)(2) instead of subsection (b)(1). "Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding." United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Technical applications of the guidelines are not cognizable under 28 U.S.C. § 2255. Id.

To the extent that Villalobos argues that the INS document created some sort of due process right to a sentence of no more than two years, controlling caselaw has determined that the INS document has no legal effect upon subsequent conviction and sentencing for illegal reentry into this country. See United States v. Perez-Torres, 15 F.3d 403, 406-08 (5th Cir.), cert. denied, 115 S. Ct. 125 (1994).

Because the appeal does not involve legal points of arguable merit, the appeal is frivolous. See Jackson, 811 F.2d at 261. The appeal is DISMISSED as frivolous, see 5th Cir. R. 42.2, and the motion to proceed IFP is DENIED. Fed. R. App. P. 24(a).

APPEAL DISMISSED. MOTION DENIED.