

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-50288  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY AUSTIN THOMAS, SR.,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. A-91-CR-173  
- - - - -  
(November 17, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:\*

This case is here on a motion to proceed in forma pauperis on appeal. This Court may authorize Thomas to proceed IFP on appeal if he is unable to pay the costs of the appeal and the appeal is taken in good faith, i.e., the appeal presents nonfrivolous issues. 28 U.S.C. § 1915(a); Holmes v. Hardy, 852 F.2d 151, 153 (5th Cir.), cert. denied, 488 U.S. 931 (1988).

Thomas raises several sentencing issues on appeal. In his plea agreement, Thomas agreed to waive his right to appeal his sentence on any ground unless the Court ordered an upward

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

departure, and he agreed not to contest his sentence or the manner in which it was determined in any postconviction proceeding. A defendant may waive postconviction relief under 28 U.S.C. § 2255. United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994). Thomas does not contend that his waiver was unknowing or involuntary. He does not contend that the district court actually departed upward from the guidelines. He argues that the waiver is not effective because the district court "in effect" departed upward when it misapplied the guidelines by ordering a consecutive sentence.

This Court has distinguished an upward departure from a misapplication of the guidelines in the context of the imposition of consecutive sentences. See United States v. Gross, 979 F.2d 1048, 1051-52 (5th Cir. 1992). If every misapplication of the guidelines which resulted in a higher sentence was to be considered "in effect" an upward departure, then the conditional clause in the plea agreement limiting a defendant's ability to appeal his sentence unless there was an upward departure would be rendered meaningless in every case.

Thomas has waived his right to challenge his sentence in a § 2255 proceeding. He has not raised a nonfrivolous issue on appeal. Therefore, IT IS ORDERED that Larry Austin Thomas, Sr.'s, motion for IFP is DENIED, and his appeal is DISMISSED AS FRIVOLOUS. See 5th Cir. R. 42.2.