

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

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No. 94-60610

Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GREGORIO R. ORTIZ,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Southern District of Texas

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(No. L-94-97 (L-89-270))

(May 25, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:\*

Gregorio Ortiz, proceeding pro se, appeals from the denial by the district court of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. His § 2255 motion attacked his

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

convictions and sentences imposed for his previous conviction for the offenses of conspiracy to possess with intent to distribute more than five kilograms of cocaine, possession with intent to distribute more than five kilograms of cocaine, and possession with intent to distribute less than five kilograms of cocaine. We reject appellant's arguments and AFFIRM the district court's judgment denying appellant's § 2255 motion.

APPELLANT'S ARGUMENT BASED ON AMENDMENT 439  
TO THE GUIDELINES

Ortiz asserts that a 1992 amendment to U.S.S.G. § 1B1.3 should be retroactively applied to reduce his sentence because amendment 439 clarifies the meaning of relevant conduct and the district court did not properly consider his relevant conduct in sentencing. Ortiz contends that he should not be held accountable for "140 kilos" of cocaine seized from a co-defendant. He argues that the district court did not consider the scope of the criminal activity to which he agreed and therefore could not properly determine the conduct of others that was both in furtherance of the jointly-undertaken criminal act and reasonably foreseeable by Ortiz.

Ortiz' contention that amendment 439 should be applied retroactively is not cognizable under § 2255. 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.

Although Ortiz' claim that his sentence was calculated incorrectly is not of constitutional dimension, Ortiz' challenge to his sentence based on the amended § 1B1.3 provision could not have been raised on direct appeal because he was sentenced in 1989, his direct appeal was decided in 1990, and the amended guideline became effective in 1992. Therefore, the issue is whether Ortiz has been subjected to a miscarriage of justice by the district court's denial of his § 2255 motion. Vaughn, 955 F.2d at 368.

"The guidelines in effect at the time of sentencing are the appropriate source for determining a sentence." United States v. Gonzales, 988 F.2d 16, 18 (5th Cir.), cert. denied, 114 S. Ct. 170 (1993). Ortiz' sentence was valid at the time it was rendered. 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). Since neither a constitutional issue nor a miscarriage of justice is involved, Ortiz' claim is not cognizable.

We note additionally that the focus of the appellant's argument with respect to the amendment is not that he should be responsible for only that portion of the drugs involved in the conspiracy that were reasonably foreseeable to him. Rather, he is in effect challenging the sufficiency of the evidence linking him to the entire drug transaction. The district court was therefore correct in concluding that this challenge "is essentially an argument that there was insufficient evidence to convict him of the charges. This precise argument was foreclosed on appeal and is

foreclosed now." This court will not reexamine issues in a § 2255 motion that have been previously disposed of on direct appeal. See United States v. Kalish, 780 F.2d 506, 508 (5th Cir.)

#### APPELLANT'S OTHER CLAIMS

Appellant's argument that the district court improperly sentenced him because it did not consider granting a downward departure involves the technical application of the Guidelines, a nonconstitutional issue, which could have been raised on direct appeal. Thus, it is not cognizable in a § 2255 motion. See Vaughn, 955 F.2d at 368.

Finally, appellant's assertions that his trial counsel was ineffective are for the most part conclusory and in all respects without merit. Appellant completely fails to establish that his trial counsel's performance fell below an objective standard of reasonable competence or that he was prejudiced by counsel's allegedly deficient performance.<sup>1</sup>

The judgment of the district court is AFFIRMED.

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<sup>1</sup>Ortiz also makes several complaints about the performance of his appellate counsel. These issues are raised for the first time on appeal and are not properly before us for consideration. See United States v. Madkins, 14 F.3d 277, 279 (5th Cir. 1994).