

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50053

DONALD BENALLY,

Petitioner-Appellant,

versus

J.E. SLADE, Warden, Federal
Correctional Institution
La Tuna; O. IVAN WHITE,
Regional Director -
United States Bureau of
Prisons,

Respondents-Appellees.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-97-CV-418-H
- - - - -

August 19, 1998

Before DAVIS, BENAVIDES and STEWART, Circuit Judges.

PER CURIAM:*

Donald Benally, federal prisoner # 26826-008, argues that the district court erred in denying his § 28 U.S.C. § 2241 habeas petition alleging that the respondents have refused to recalculate his sentence under the pre-Sentencing Guidelines law.

We have reviewed Benally's petition and have determined that Benally is challenging the validity of the district court's

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

imposition of his sentence under the Sentencing Guidelines rather than the manner in which his sentence is being executed.

Therefore, Benally's "petition" should have been construed as a motion filed pursuant to 28 U.S.C. § 2255. See Cox v. Warden, Fed. Detention Ctr., 911 F.2d 1111, 1113-15 (5th Cir. 1990).

Because a § 2255 motion requires a certificate of appealability (COA) to be eligible for appellate review, the court would generally remand the case to the district court for the limited purpose of determining whether a COA should issue. See United States v. Youngblood, 116 F.3d 1113, 1114-15 (5th Cir. 1997).

However, a § 2255 motion must be presented to the sentencing court for determination. See § 2255. Benally was sentenced by the district court in Phoenix, Arizona, which is located in the Ninth Circuit. Because neither the Texas district court nor this court has jurisdiction to address Benally's motion, Benally's appeal is DISMISSED for lack of jurisdiction.

Benally's motion to proceed in forma pauperis on appeal is DENIED as moot.

APPEAL DISMISSED.