

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 98-50733  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN LEON ROBINETTE,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. W-97-CA-138  
USDC No. W-88-CR-130-1  
- - - - -

April 12, 2000

Before WIENER, DeMOSS, and PARKER, Circuit Judges

PER CURIAM:\*

John Leon Robinette was convicted of, *inter alia*, operating a continuing criminal enterprise (CCE), in violation of 21 U.S.C. § 848(a). See United States v. Devine, 934 F.2d 1325 (5<sup>th</sup> Cir. 1991). He appeals the district court's denial of relief pursuant to 28 U.S.C. § 2255 on his claim that his sentence on the CCE conviction should have been determined by the Sentencing Guidelines, and counsel was ineffective at sentencing for not objecting to the use of pre-guidelines law to arrive at a life sentence for the CCE conviction.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5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

The issue underlying Robinette's ineffective-assistance-of-counsel claim, i.e., whether the CCE fell under the guidelines for purposes of sentencing, was decided by this court on appeal of the denial of Robinette's Fed. R. Crim. P. 35 motion, in which he made the same argument he makes now. This court concluded that there was no basis for the district court to sentence Robinette under the Sentencing Guidelines as he was already in custody and incapable of further offense conduct when the guidelines took effect. United States v. Robinette, No. 95-50290 (5<sup>th</sup> Cir. Nov. 15, 1995)(unpublished). Robinette does not challenge this factual finding. It is therefore the law of this case. See Free v. Abbott Lab., Inc., 164 F.3d 270, 272 (5<sup>th</sup> Cir. 1999).

Because this court has determined that the guidelines were inapplicable to Robinette's CCE conviction, counsel's failure to raise this issue at sentencing did not constitute deficient performance and did not prejudice Robinette. See Smith v. Puckett, 907 F.2d 581, 585 n.6 (5<sup>th</sup> Cir. 1990). The denial of § 2255 relief on this claim is therefore AFFIRMED.