

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40674
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

KARL GAYWIN ACLESE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:94-CR-81-2

June 15, 2000

Before JOLLY, DAVIS, and DUHÉ, Circuit Judges.

PER CURIAM:*

Karl Gaywin Aclese, federal inmate #04913-078, appeals the district court's dismissal of his Fed. R. Civ. P. 60(b)(6) motion. Aclese's motion for appointment of counsel is DENIED.

Aclese's Rule 60(b)(6) motion challenged his criminal conviction for conspiracy to possess with intent to distribute cocaine base on the grounds that the Government failed to disclose favorable evidence in the form of a taped statement made by an informant. Aclese alleged that the statement would have shown a material variance in the indictment and would have shown

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

that he was not guilty of the drug conspiracy. Aclese also contends that he should not have been held accountable for the quantity of drugs that was used to determine his sentence.

Federal Rule of Civil Procedure 60(b) "does not provide for relief from a judgment in a criminal case." *United States v. O'Keefe*, 169 F.3d 281, 289 (5th Cir. 1999). Rule 60(b) may not be used as a vehicle to circumvent restraints on filing successive 28 U.S.C. § 2255 motions. *See United States v. Rich*, 141 F.3d 550, 553 (5th Cir. 1998), *cert. denied*, 526 U.S. 1011 (1999). The writ of audita querela is not available when the defendant may seek redress under § 2255. *See United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993). Section 2255 relief is available for claims of newly discovered evidence provided that the successive petition meets the requirements under 28 U.S.C. § 2244(b).

Accordingly, the district court's judgment is AFFIRMED.

AFFIRMED; MOTION DENIED.