

December 10, 2003

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 03-20522  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARVIN GIBBS, JR.,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. H-97-CR-36-25  
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Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:\*

Marvin Gibbs, federal prisoner # 75279-079, appeals from the district court's denial of his post-conviction motion filed under 18 U.S.C. § 3742(a). The district court construed the motion as an unauthorized successive 28 U.S.C. § 2255 motion.

Gibbs argues that the district court erred in recharacterizing his motion as a successive 28 U.S.C. § 2255 motion. As the district court correctly determined, Gibbs cannot seek post-conviction relief pursuant to 18 U.S.C. § 3742(a) because he has already filed a direct criminal appeal. See United States

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

v. Early, 27 F.3d 140, 142 (5th Cir. 1994). Because Gibbs has previously filed a 28 U.S.C. § 2255 motion and because the instant motion raises issues that could have been raised in the prior motion, the district court did not err in construing his post-conviction motion as an unauthorized successive 28 U.S.C. § 2255 motion. See In re Cain, 137 F.3d 234, 235 (5th Cir. 1998). Accordingly, the judgment of the district court is AFFIRMED.