

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20100
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EBENEZER EMEKA NWACHUKWU, also known as
Andrew Rich Thompson, also known as Frederick
Gary Davis, also known as Howard Ron Wilson,
also known as Mark Ray Walters, also known
as Taylor Bruce McGauin, also known
as Mathew Lee Hendrix,

Defendant-Appellant.

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Appeals from the United States District Court
for the Southern District of Texas
USDC No. H-96-CV-1773
- - - - -

June 5, 1998

Before DUHÉ, DeMOSS, and DENNIS, Circuit Judges.

PER CURIAM:¹

Ebenezer Emeka Nwachukwu, a federal prisoner (# 70896-079),
moves to proceed in forma pauperis ("IFP") from the district
court's dismissal, with prejudice, of his 28 U.S.C. § 2255 motion
to vacate his sentence. Nwachukwu filed his § 2255 motion before

¹ 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that this opinion should not be published and is not precedent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.

he was sentenced for the conviction which he is attacking.

The district court was correct in dismissing Nwachukwu's § 2255 motion, because a criminal defendant ordinarily may not collaterally attack his sentence until it has been affirmed on direct appeal. See United States v. Fassler, 858 F.2d 1016, 1019 (5th Cir. 1988). Because Nwachukwu fails to address the ground upon which his motion was § 2255 motion was dismissed, he fails to present a nonfrivolous issue for appeal. His motion to proceed IFP is therefore DENIED. See FED. R. APP. P. 24(a); Carson v. Polley, 689 F.2d 562, 586 (5th Cir. 1982). Nwachukwu's appeal is DISMISSED as frivolous. 5TH CIR. R. 42.2.

Under Fassler, a prisoner is entitled to refile his § 2255 upon the affirmance of his conviction. See Fassler, 858 F.2d at 1019. Accordingly, the case is REMANDED to the district court for the sole purpose of amending the judgment to reflect that the dismissal of Nwachukwu's § 2255 motion was "without prejudice."

Nwachukwu's "Motion to Review All Issues in Case" (filed on August 27, 1997), his "Motion to Remand" (filed on October 23, 1997), his "Motion to Accept 2255 Brief" (filed on December 1, 1997), his "Motion to Withdraw Suspended 2255 Brief" (also filed on December 1, 1997), his "Notice of Motion to Remand" (filed on December 12, 1997), and his "Motion to Remand" (filed on January 12, 1998), are DENIED.

IFP DENIED; APPEAL DISMISSED; CASE REMANDED WITH DIRECTIONS; ADDITIONAL MOTIONS DENIED.