

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 98-41059  
Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN HENRY TOPSY,

Defendant-Appellant.

- - - - -  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. C-91-CR-303-1  
- - - - -

May 12, 1999

Before POLITZ, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:\*

John Henry Topsy (#55462-079), has applied for a certificate of appealability ("COA") for an appeal from the dismissal of his motion under 28 U.S.C. § 2255 and of his application for a writ of audita querela. Topsy does not challenge the district court's conclusion that his § 2255 motion is time-barred.

Even if it is assumed that the writ of audita querela survives as a vehicle for challenging criminal convictions, it is not available to Topsy because the issue he wishes to raise does not involve a legal defense which arose after the judgment. See

---

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993). The request for a COA is DENIED AS UNNECESSARY and the appeal is DISMISSED AS FRIVOLOUS. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5th Cir. R. 42.2.

COA DENIED AS UNNECESSARY; APPEAL DISMISSED.