

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

September 17, 2009

Charles R. Fulbruge III
Clerk

No. 08-20601

Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ROBERT DANIEL DAVIS

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:01-CR-140-1

Before KING, STEWART and DENNIS, Circuit Judges.

PER CURIAM:*

Robert Daniel Davis, federal prisoner # 97410-079, appeals the district court's dismissal of his motion to vacate as an unauthorized successive 28 U.S.C. § 2255 motion. Davis's motion to vacate sought to challenge his 2001 conviction and sentence due to lack of subject matter and territorial jurisdiction. Thus, the motion was properly construed as arising under § 2255. *See Tolliver v. Dobre*, 211 F.3d 876, 877-78 (5th Cir. 2000). Because Davis's motion was properly construed as arising under § 2255, this court lacks jurisdiction over the instant

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

appeal absent a certificate of appealability (COA) ruling in the district court. *See United States v. Youngblood*, 116 F.3d 1113, 1114-15 (5th Cir. 1997). The district court did not construe Davis's notice of appeal as a COA request. However, this court declines to remand this case in light of the patent frivolity of Davis's appeal. *See United States v. Alvarez*, 210 F.3d 309, 310 (5th Cir. 2000). Accordingly, the instant appeal is DISMISSED for lack of jurisdiction.