

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

United States Court of Appeals
Fifth Circuit

FILED

August 31, 2009

No. 08-20777
Summary Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WENDELL ALBOYD CORNETT,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:00-CV-4308
USDC No. 4:95-CR-265-1

Before GARZA, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Wendell Alboyd Cornett, federal prisoner # 04675-081, has moved for a certificate of appealability (COA) in his appeal from the district court's denial of his petition for a writ of audita querela. Cornett sought the writ to challenge sentences imposed in 1998 on offenses related to drug trafficking. Cornett has also moved to proceed in forma pauperis (IFP) on appeal.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

A COA is not required for Cornett to appeal the denial of a writ of audita querela. *See 28 U.S.C. § 2253(c)*. Accordingly, Cornett's request for a COA is denied as unnecessary.

Cornett contends that his sentences, imposed prior to the decision in *United States v. Booker*, 543 U.S. 220 (2005), violate the Fifth, Sixth, and Eighth Amendments because the district court, rather than the jury, determined facts that resulted in a sentence of life imprisonment. He asserts that, at the time of his direct appeal, there was no existing legal basis to challenge the constitutionality of the Sentencing Guidelines. Cornett, who has previously litigated a 28 U.S.C. § 2255 motion, argues that he may pursue relief through the writ of audita querela.

The district court correctly denied Cornett's petition for a writ of audita querela because Cornett may pursue relief under 28 U.S.C. § 2255. *See Tolliver v. Dobre*, 211 F.3d 876, 878 (5th Cir. 2000); *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993). Cornett's motion to proceed in forma pauperis is denied, and the appeal is dismissed as frivolous. *See 5TH CIR. R. 42.2*.

COA DENIED AS UNNECESSARY; IFP DENIED; APPEAL DISMISSED.