

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

**No. 09-7881**

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL SCOTT MCRAE,

Defendant - Appellant.

---

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, Senior District Judge. (5:97-cr-00094-H-6)

---

Submitted: December 17, 2009

Decided: December 31, 2009

---

Before WILKINSON, NIEMEYER, and AGEE, Circuit Judges.

---

Affirmed by unpublished per curiam opinion.

---

Michael Scott McRae, Appellant Pro Se. Rudolf A. Renfer, Jr., Robert Edward Skiver, Assistant United States Attorneys, Raleigh, North Carolina, for Appellee.

---

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Michael Scott McRae appeals the district court's order denying his petition for a writ of audita querela on the ground that United States v. Booker, 543 U.S. 220 (2005), did not apply retroactively to his case. We have reviewed the record and find no reversible error. Although the district court addressed McRae's claim on the merits, we find that the petition was tantamount to a successive motion under 28 U.S.C.A. § 2255 (West Supp. 2009), over which the district court lacked jurisdiction. The fact that McRae cannot proceed under § 2255 unless he obtains authorization from this court to file a successive motion does not alter our conclusion. See Carrington v. United States, 503 F.3d 888, 890 (9th Cir. 2007) ("[T]he statutory limits on second or successive habeas petitions do not create a 'gap' in the post-conviction landscape that can be filled with the common law writs."), opinion amended on other grounds on denial of reh'g, 530 F.3d 1183 (9th Cir. 2008); United States v. Torres, 282 F.3d 1241, 1245 (10th Cir. 2002) ("[A] writ of audita querela is not available to a petitioner when other remedies exist, such as a motion to vacate sentence under 28 U.S.C.[A.] § 2255.") (internal quotation marks and citation omitted). Accordingly, we affirm the denial of relief. We deny McRae's motions for appointment of counsel and for a transcript at government expense. We dispense with oral argument because

the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED