IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-2847
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WOLFGANG SUAREZ CORTES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 91 0515 & CR H 89 0007)

(November 19, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Wolfgang Suarez Cortes (Suarez) appeals the denial of his prisoner's federal petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2255. Concluding that further consideration is called for regarding the nature of the legal representation Suarez received, we vacate and remand.

---

[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Suarez pleaded guilty to three drug conspiracy counts pursuant to a plea bargain and was sentenced in the middle range of the sentencing guidelines. He did not object to the presentence investigation report, nor did he file a direct appeal.

Suarez's section 2255 motion alleges that his attorney refused his direct request to appeal "the court's aplication [sic] of the guide lines [sic], and stacking of sentences." According to Suarez, his attorney told him that he could appeal only if he provided information to the government. The government moved to expand the record pursuant to Rule 7(b) of the Rules Governing Section 2255 Proceedings by ordering Suarez's trial attorney to submit an affidavit responding to the allegations. The government also moved that, following the filing of the attorney's affidavit, the court grant summary judgment based upon the expanded record. The district court found no further evidentiary proceedings necessary in light of the nature of Suarez's challenge to his sentence and denied the section 2255 motion without ordering expansion of the record.

II.

A defendant may appeal his sentence. 18 U.S.C. § 3742(a). The district court erroneously assumed that Suarez's motion alleged that his attorney failed to advise him of his right to appeal. Finding no "ground on which a meritorious appeal could have been taken," the court denied the motion because Suarez had not

demonstrated prejudice under Strickland v. Washington, 466 U.S. 668, 685-86 (1984).

There are two types of ineffective-assistance-of-appellate-counsel claims. The first is a failure to raise or properly brief or argue certain issues, while the second is the actual or constructive complete denial of any assistance of counsel on appeal. Penson v. Ohio, 488 U.S. 75, 88-89 (1988). In the first sentence, a showing of Strickland prejudice is required. In the second, if the defendant is "actually or constructively denied any assistance of [appellate] counsel, prejudice is presumed, and neither the prejudice test of Strickland nor the harmless error test of Chapman v. California, 386 U.S. 18 . . . (1967), is appropriate." Sharp v. Puckett, 930 F.2d 450, 451-52 (5th Cir. 1991).

Suarez alleges that his attorney gave him erroneous advice and refused to file an appeal. If the allegation is true, Suarez may have suffered a constructive denial of appellate counsel, so any inquiry into prejudice would be inapposite. Even if Suarez's direct appeal were frivolous, his appointed lawyer nevertheless would be required to file a brief on appeal pointing out whether, in the record, there is "anything that might arguably support the appeal." Moss v. Collins, 963 F.2d 44, 46 (5th Cir. 1992) (per curiam) (on petition for rehearing) (citing Anders v. California, 386 U.S. 738, 744 (1967).[1] Suarez could have filed his own brief

[1] We note, however, that "Anders does not require appointed counsel to create arguments." Moss, 963 F.2d at 48.

in response to counsel's suggestion that the appeal was frivolous, and this court would have examined the record for error. See Anders, 386 U.S. at 745.

Suarez's allegation of ineffective appellate counsel may be a claim of denial of counsel and cannot be resolved on the record. We express no view as to the ultimate merits of Suarez's claim but VACATE and REMAND in order that the district court may review the claim in accordance with this opinion and determine, inter alia, whether an evidentiary hearing is required.