

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10957  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SAMUEL VALENZUELA RAMIREZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
(5:94-CV-153-C/5:90-CR-056-02)

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March 27, 1995

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:<sup>1</sup>

Samuel Valenzuela Ramirez appeals the denial of § 2255 relief.

We **REVERSE AND REMAND IN PART** and **AFFIRM IN PART**.

I.

On December 28, 1990, following conviction on several drug related offenses, Ramirez was sentenced to a total of 153 months imprisonment.<sup>2</sup> He did not appeal.

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<sup>1</sup> Local Rule 47.5 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

<sup>2</sup> A jury found Ramirez guilty of: conspiracy to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 846; distribution of less than 500 grams of cocaine, in

On June 9, 1994 Ramirez moved to have his sentence vacated, set aside, or corrected pursuant to 28 U.S.C. § 2255. Adopting the magistrate judge's report and recommendation in a *de novo* review, the district court dismissed the motion with prejudice.

II.

Ramirez presents three bases for reversal of the district court: 1) his counsel rendered ineffective assistance in failing to perfect a direct appeal; 2) he was denied the right to review his presentence investigation report; and, 3) the sentence imposed was illegal.

A.

Ramirez claims he received ineffective assistance of counsel because trial counsel failed to perfect a direct appeal according to his instruction. In proceedings brought under § 2255, failure of counsel to perfect an appeal upon request of the client may constitute ineffective assistance of counsel, entitling the defendant to an out-of-time appeal. ***United States v. Gipson***, 985 F.2d 212, 215 (5th Cir. 1993). Moreover, upon proof that ineffective counsel has denied the defendant the right to appeal, the defendant "need not further establish--as a prerequisite to habeas relief--that he had some chance of success on appeal". ***Id.*** at 215.

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violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); possession with intent to distribute 500 grams or more of cocaine within one hundred feet of a playground, in violation of U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii), 845(a), and 18 U.S.C. § 2; and, use of a juvenile in a drug trafficking offense, in violation of 21 U.S.C. § 845(b).

The district court denied Ramirez's ineffective assistance claim solely on the basis that he had failed to demonstrate any chance of success on appeal, had one been perfected. As noted, however, Ramirez is not required to address the question of success on appeal, provided he has demonstrated that counsel's ineffectiveness denied him the right to an appeal. We cannot determine conclusively from the record that Ramirez has not made such a showing, and the district court did not hold an evidentiary hearing.<sup>3</sup> Therefore, we must remand for a ruling on this issue. See **United States v. Bartholomew**, 974 F.2d 39, 41 (5th Cir. 1992) (denial of § 2255 motion without hearing is appropriate only when "the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief").

B.

Ramirez also complains that he was denied the right to review his presentencing report prior to sentencing, in violation of Fed. R. Crim. P. 32(c)(3)(A), and that the district court misapplied the guidelines in adding 18 months to his sentence for involvement of a juvenile.

"Relief under [] § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." **United States v. Vaughn**, 955 F.2d 367, 368 (5th Cir. 1992). The district court held

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<sup>3</sup> Ramirez filed an affidavit stating that his attorney had assured him an appeal had been filed. The attorney's affidavit denies that Ramirez ever requested an appeal.

correctly that, on the facts presented, Ramirez's alleged Rule 32 violation does not rise to this level. See **United States v. Weintraub**, 871 F.2d 1257, 1260 (5th Cir. 1989). Likewise, the "technical application of the Guidelines does not give rise to a constitutional issue", and is not a basis for relief under § 2255. **Vaughn**, 955 F.2d at 368.

III.

For the forgoing reasons, the denial of § 2255 relief is **AFFIRMED IN PART**, and **REVERSED AND REMANDED IN PART**.