

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20236

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT ARTHUR HALL,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC Nos. H-98-CV-1565, H-95-CR-201-ALL
- - - - -

December 6, 1999

Before HIGGINBOTHAM, DeMOSS, STEWART, Circuit Judges.

PER CURIAM:*

Robert Arthur Hall, federal prisoner # 38261-079, requests a certificate of appealability (COA) to appeal the magistrate judge's dismissal of his 28 U.S.C. § 2255 motion. Hall raised the following issues in his request for a COA: (1) counsel rendered ineffective assistance of counsel; (2) the conviction was based on evidence obtained through an illegal search and seizure; and (3) the district court erred when it denied counsel's motion to withdraw.

On the first two issues, Hall has failed to make a substantial showing of the denial of a constitutional right. See

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

28 U.S.C. § 2253(c)(2). However, Hall has made a credible showing that the magistrate judge erred when it dismissed the third issue. See *Whitehead v. Johnson*, 157 F.3d 384, 386 (5th Cir. 1998). When it dismissed the motion-to-withdraw claim, the magistrate judge incorrectly concluded that Hall had raised the issue on direct appeal and is barred from relitigating it in a collateral § 2255 proceeding. The record reveals that Hall did not raise this issue on appeal. See *United States v. Hall*, No. 96-20717, (5th Cir. May 22, 1997)(unpublished). Once it is determined that the magistrate judge erred when it dismissed a claim on procedural grounds, this court must vacate and remand for consideration of the merits of the claim in the first instance, because this court lacks jurisdiction to consider the merits of Hall's underlying substantive claim. See *Whitehead*, 157 F.3d at 388. Accordingly, we GRANT a COA and VACATE AND REMAND for consideration of the issue whether the magistrate judge erred when it denied counsel's motion to withdraw.