

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

United States Court of Appeals
Fifth Circuit

FILED

August 18, 2010

Lyle W. Cayce
Clerk

No. 10-50259

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FERNANDO VALDEZ, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:10-CV-28

Before WIENER, PRADO, and OWEN, Circuit Judges.

PER CURIAM:*

Fernando Valdez, Jr., federal prisoner # 29537-280, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion. Valdez is serving a 252-month sentence following his guilty plea to possession with intent to distribute at least 500 grams of methamphetamine and possession of a firearm during the commission of a drug trafficking crime. As part of his plea agreement, Valdez waived the right to appeal his sentence either directly or collaterally.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

No. 10-50259

In his § 2255 motion, Valdez argued that trial counsel rendered ineffective assistance by failing to file a notice of appeal as instructed. The failure to file a requested notice of appeal is ineffective assistance of counsel, even without a showing that the appeal would have merit. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477, 483-86 (2000).

Valdez has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007). The record does not conclusively show that Valdez did not ask counsel to file a notice of appeal, making an evidentiary hearing on that issue necessary. *See Tapp*, 491 F.3d at 266. A COA is granted, the district court's judgment is vacated, and the case is remanded for further development on that issue. Valdez's motion to proceed in forma pauperis (IFP) is granted.

COA AND IFP GRANTED; VACATED AND REMANDED.