

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAULITO SALAZAR-ACUNA,
Defendant-Appellant.

No. 03-7461

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Graham C. Mullen, Chief District Judge.
(CR-00-212; CA-03-231-3)

Submitted: July 28, 2004

Decided: September 28, 2004

Before WILKINSON and DUNCAN, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

Vacated in part and remanded by unpublished per curiam opinion.

COUNSEL

Paulito Salazar-Acuna, Appellant Pro Se. Jack M. Knight, Jr., Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Paulito Salazar-Acuna appeals the district court's summary dismissal of his motion pursuant to 28 U.S.C. § 2255 (2000). In his motion, Salazar-Acuna claimed that: (1) he did not make a knowing and voluntary plea; (2) the indictment was defective because it did not allege an exact quantity of drugs and was never returned in open court; and (3) the court lacked jurisdiction over the case because the drug laws have been repealed. He also claimed that he received ineffective assistance of counsel because his attorney failed to challenge the above errors, pressured him into entering a plea agreement that held him accountable for a greater drug quantity than was alleged in the indictment, and failed to file a requested notice of appeal. By order dated February 19, 2004, we granted a certificate of appealability as to Salazar-Acuna's claim that his attorney failed to file a requested notice of appeal but denied a certificate of appealability as to his remaining claims. We now vacate in part the district court's order and remand for further proceedings.

In order to succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Rule 4(b) of the Rules Governing Section 2255 Proceedings authorizes summary dismissal of claims without a response from the Government only if it plainly appears from the face of the motion, exhibits, and prior proceedings that the movant is not entitled to relief. Otherwise, the district court shall order the Government to file a response or take other appropriate action. This Court reviews the district court's summary dismissal for abuse of discretion. *See United States v. Oliver*, 865 F.2d 600, 601 (4th Cir. 1989).

Under *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993), counsel's failure to pursue an appeal requested by a defendant constitutes ineffective assistance of counsel, regardless of the likelihood of success on the merits. Because there is no evidence in the record to dispute Salazar-Acuna's assertion that his attorney failed to file a requested notice of appeal, and his allegation, if true, would entitle

him to relief, we vacate the portion of the district court's order summarily dismissing this claim and remand to the district court for further proceedings consistent with this opinion. By this disposition, we express no view as to the ultimate merits of Salazar-Acuna's claim.

We deny Salazar-Acuna's motions to file a supplemental brief and reconsider our previous order denying a certificate of appealability as to his claims relating to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in the wake of the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). We recently determined that *Blakely* does not apply to the application of the federal sentencing guidelines. See *United States v. Hammoud*, No. 03-4253, 2004 WL 17030309 (4th Cir. Aug. 2, 2004) (order), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Aug. 6, 2004) (No. 04-193). We also deny the Government's request for a continuance, as evidence it seeks to obtain is best presented to the district court on remand. 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.

VACATED IN PART AND REMANDED