

August 4, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40114
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOEL BENAVIDEZ DIAZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC Nos. B-02-CV-131
B-01-CR-139-1

Before JOLLY, EMILIO M. GARZA, and PICKERING, Circuit Judges.

PER CURIAM:*

Joel Benavidez Diaz, federal prisoner #94714-079, requests a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion. This court must examine the basis of its jurisdiction on its own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). An examination of the record in this case discloses that no final judgment has been entered as a separate document as required by

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

FED. R. CIV. P. 58. See Baker v. Mercedes Benz of N. Am., 114 F.3d 57, 60 (5th Cir. 1997).

If we were to treat the order of November 14, 2002, as a Rule 58 judgment, there was no timely notice of appeal filed by Diaz. Moreover, because, under the peculiar facts of this case, it would be unjust to apply the amendments to FED. R. CIV. P. 58, effective December 1, 2002, we conclude that the appeal must be dismissed pursuant to the procedure set out in Townsend v. Lucas, 745 F.2d 933, 934 (5th Cir. 1984). See Burt v. Ware, 14 F.3d 256, 258-59 (5th Cir. 1994). Diaz may rectify the lack of a separate document judgment by filing in the district court a motion requesting the entry of a Rule 58 judgment. See id. After a Rule 58 judgment is entered, a new notice of appeal must be filed within the time prescribed by FED. R. APP. P. 4(a)(1). See id.

APPEAL DISMISSED; COA DENIED AS MOOT.