

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-20067

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAIRO HERNAN PENA,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

July 29, 1997

Before HIGGINBOTHAM, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Jairo Hernan Pena, federal prisoner #46896-079, filed a motion under 28 U.S.C. § 2255 challenging his conviction for aiding and abetting the possession of cocaine with intent to distribute. The district court denied the motion, Pena noticed his appeal and the district court authorized Pena to proceed on appeal in forma

¹Pursuant 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 R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

pauperis. He did not ask the district court for a certificate of appealability nor did the district court sua sponte consider whether one should issue. We construe the notice of appeal as an application for a certificate of appealability. See Federal Rule of Appellate Procedure 22(b). We have held that the initial decision concerning certificates of appealability must be made by the district court. United States v. Youngblood, (Docket Number 97-30319) 1997 WL 355356 (5th Cir. LA). Accordingly, we remand this case to the district court for the limited purpose of considering, in accordance with Federal Rule of Appellate Procedure 22(b) and § 2253(c)(3), whether a certificate of appealability should issue.

REMANDED.