

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-41476
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HERBERT EDWARD JAMES,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
USDC Nos. 1:97-CV-164 & 1:92-CR-163-1

January 29, 2001

Before JOLLY, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Herbert Edward James, federal prisoner # 04134-078, appeals the district court's dismissal of his 28 U.S.C. § 2255 motion to set aside his sentence. Based on the certificate of appealability, the only issue before the court is whether James received ineffective assistance of counsel because of his attorney's failure to challenge the indictment because two counts (counts 10 and 18) under 18 U.S.C. § 924(c)(1) were tied to the same drug conspiracy.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Use of more than one gun during a single drug-trafficking offense does not support multiple counts of conviction under § 924(c). United States v. Privette, 947 F.2d 1259, 1262 (5th Cir. 1991). Because the weapons listed in counts 10 and 18 are linked to the same underlying drug offense--conspiracy to knowingly and intentionally distribute and possess with intent to distribute cocaine--sentencing James on both counts violated double jeopardy principles. See id. Counsel's failure to raise this challenge amounts to deficient performance, and the 20-year consecutive sentence James received evidences prejudice resulting from counsel's performance. Accordingly, James has established that he received ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). His conviction on count 18 is VACATED, and the case is REMANDED to the district court for resentencing.

VACATED and REMANDED.