

October 27, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-50891
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MATTHEW HERRINGTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:04-CR-252

Before JONES, Chief Judge, and KING and DAVIS, Circuit Judges.

PER CURIAM:*

Matthew Herrington appeals his conviction following a guilty plea for conspiracy to manufacture 500 grams or more of methamphetamine. 21 U.S.C. §§ 841(a)(1), 846. He argues that retained trial counsel, Jorge Sanchez, rendered ineffective assistance because counsel labored under an actual conflict of interest and was absent during a critical stage of the proceedings. He contends that counsel failed to conduct discovery and failed to facilitate his timely cooperation with the Government and that as

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

a result 1) he was improperly characterized as the leader of the conspiracy for purposes of the Sentencing Guidelines, 2) he was unable to receive an additional one point reduction for acceptance of responsibility as did his co-defendants, and 3) he was deprived of the opportunity to enter into a timely plea agreement. He further argues that the district court failed to remedy the resulting harm at sentencing.

"We have undertaken to resolve claims of inadequate representation on direct appeal only in rare cases where the record allowed us to evaluate fairly the merits of the claim." United States v. Higdon, 832 F.2d 312, 314 (5th Cir. 1987); see Massaro v. United States, 538 U.S. 500, 504-05 (2003). This is not one of those rare cases. Without prejudice to Herrington's right to file a motion pursuant to 28 U.S.C. § 2255, the judgment of the district court is AFFIRMED.