

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

June 24, 2008

No. 07-40785
Conference Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

BENEDICTO TORIBIO

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:07-CR-148-1

ON PETITION FOR REHEARING

Before PRADO, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Benedicto Toribio is GRANTED leave to file an out-of-time petition for panel rehearing, his petition for panel rehearing is GRANTED, our prior panel opinion is WITHDRAWN, and this opinion is SUBSTITUTED therefor.

The Federal Public Defender appointed to represent Benedicto Toribio has moved for leave to withdraw and has filed a brief in accordance with *Anders v.*

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

California, 386 U.S. 738 (1967). Toribio has filed a response. The record is insufficiently developed to allow consideration at this time of Toribio's claims of ineffective assistance of counsel; such claims generally "cannot be resolved on direct appeal when [they have] not been raised before the district court since no opportunity existed to develop the record on the merits of the allegations." *United States v. Cantwell*, 470 F.3d 1087, 1091 (5th Cir. 2006) (internal quotation marks and citation omitted). Our independent review of the record, counsel's brief, and Toribio's response discloses no nonfrivolous issue for appeal. Accordingly, the motion for leave to withdraw is GRANTED, counsel is excused from further responsibilities herein, and the APPEAL IS DISMISSED. See 5TH CIR. R. 42.2.