

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 95-40812  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAUL MONTES,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
(C-92-CR-172-1)

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September 25, 1996

Before SMITH, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Raul Montes, #61361-079, appeals the dismissal of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Montes' contention that it was improper to refer to the § 2255 motion to the magistrate judge for findings of fact and a recommendation is without merit. His assertion that the district court's summary denial of his motion violated the notice

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\* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

requirements of FED. R. CIV. P. 56 is also without merit, because Rule 8(a) of the Rules Governing Section 2255 Proceedings provide the applicable procedure for summarily dismissing his § 2255 motion.

Montes' assertion that he received ineffective assistance of trial counsel prior to his guilty plea and during sentencing is without merit. See *Kimelman v. Morrison*, 477 U.S. 365, 375 (1986). And, the district court did not err by failing to conduct an evidentiary hearing, because Montes' motion and the record show conclusively that he is not entitled to relief. See *United States v. Drummond*, 910 F.2d 284, 285 (5th Cir. 1990), cert. denied, 498 U.S. 1104 (1991).

Accordingly, Montes' motion for appointment of counsel is **DENIED**, and the judgment is

***AFFIRMED.***