

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

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| UNITED STATES OF AMERICA, |) | |
| |) | Case No. 1:07CR00008 |
| |) | |
| v. |) | |
| |) | OPINION AND ORDER |
| |) | |
| CALVIN IBERSON, |) | By: James P. Jones |
| |) | Chief United States District Judge |
| Defendant. |) | |

Zachary T. Lee, Assistant United States Attorney, Abingdon, Virginia; Calvin Iberson, Pro Se Defendant.

In this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C.A. § 2255 (West Supp. 2009), the defendant Iberson asserts (1) that a sentence enhancement based on his prior state conviction was erroneously applied in this case and (2) that counsel failed to file a notice of appeal after Iberson asked him to do so. The government has moved to dismiss both claims. Upon review of the record, I find it appropriate to take the government’s Motion to Dismiss under advisement and set the matter for an evidentiary hearing on Iberson’s second claim.

It is well established that “a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). “[A]n attorney renders constitutionally ineffective assistance of counsel if he fails to follow his

client's unequivocal instruction to file a notice of appeal even though the defendant may have waived his right to appeal." *United States v. Poindexter*, 492 F.3d 263, 273 (4th Cir. 2007). Moreover, the defendant may raise such a claim in a § 2255 motion despite having pleaded guilty pursuant to a plea agreement that included a waiver of § 2255 rights. *Id.* at 272. Under this controlling precedent, if Iberson can prove his allegation that he communicated a request to counsel for a notice of appeal and relied to his detriment on counsel to file and pursue an appeal, he is entitled to § 2255 relief in the form of a new opportunity to appeal his criminal sentence.¹ Because the parties' factual accounts are in dispute as to whether Iberson asked counsel to pursue an appeal, I find that resolution of this claim requires an evidentiary hearing.

No hearing is necessary as to Iberson's first claim, however. If the court determines after the hearing on the second claim that Iberson is entitled to a renewed opportunity to file an appeal of his criminal sentence, I will dismiss the first claim without prejudice so that Iberson may pursue that claim on appeal if warranted. If he

¹ Iberson's § 2255 motion was filed more than a year after his conviction became final. *See* 28 U.S.C.A. § 2255(f)(1). Iberson argues, however, that his § 2255 motion is timely under § 2244(f)(4), because he reasonably delayed filing a § 2255 while mistakenly believing that counsel had filed an appeal on his behalf. To the extent that the government wishes to pursue an argument that Iberson's motion is not timely under § 2255(f)(4), the government must demonstrate why failure to raise the timeliness defense in the Motion to Dismiss does not constitute waiver of this defense and develop the necessary facts in support of this defense during the evidentiary hearing.

does not succeed in his second claim, the first claim may be dismissed as waived by Iberson's valid plea agreement waiver of his right to bring a § 2255 action. *See United States v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005).

Accordingly, for the stated reasons, it is **ORDERED** that:

1. The government's Motion to Dismiss is taken under advisement;
2. The clerk shall schedule an evidentiary hearing in the United States Courthouse in Abingdon, on the sole claim that the defendant asked his attorney to file a notice of appeal and the attorney failed to do so, and if possible shall arrange for the defendant to participate in the proceeding via videoconferencing; and
3. The clerk shall arrange for the appointment of counsel to represent the petitioner in this § 2255 action, pursuant to 18 U.S.C.A. § 3006A(a)(2)(B) (West 2000 & Supp. 2009).

The clerk shall send a copy of this Opinion and Order to the defendant at his current place of confinement.

ENTER: November 13, 2009

/s/ JAMES P. JONES
Chief United States District Judge