

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

UNITED STATES OF AMERICA)	
)	
)	Case No. 1:14CR00003
)	
v.)	OPINION AND ORDER
)	
CARLOS PERRY,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Zachary T. Lee, Assistant United States Attorney, Abingdon, Virginia, for United States; Carlos Perry, Pro Se Defendant.

An evidentiary hearing is necessary to resolve defendant Carlos Perry’s Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (ECF No. 58).

Perry pleaded guilty to one count of mail fraud, in violation of 18 U.S.C. § 1341, with the benefit of a written plea agreement with the government. In one of his § 2255 claims, Perry alleges that counsel rendered ineffective assistance, in violation of the Sixth Amendment, by not filing an appeal as Perry instructed. (Br. Supp. § 2255 Mot. 3, 11, 23-24, ECF No. 60.) “An attorney who fails to file an appeal after being instructed by his client to do so is per se ineffective,” *United States v. Witherspoon*, 231 F.3d 923, 926-27 (4th Cir. 2000), even if an appeal is “contrary to the plea agreement and harmful to the client’s interests,” *United States v. Poindexter*, 492 F.3d 263, 273 (4th Cir. 2007). Consequently, Perry presents at

least one colorable claim of ineffective assistance of counsel, and the court defers adjudication of Perry's other § 2255 claims. *See United States v. Killian*, 22 F. App'x 300, 301 (4th Cir. 2001) (unpublished) (stating a district court should not adjudicate other § 2255 claims if vacatur is warranted on a claim of ineffective assistance of counsel for failure to perfect a direct appeal).

For these reasons, it is hereby **ORDERED** as follows:

1. The United States' Motion to Dismiss (ECF No. 62) is TAKEN UNDER ADVISEMENT;
2. The defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 will be subject to an evidentiary hearing before the undersigned limited to the sole issue as to the filing of an appeal;
3. The clerk will appoint counsel from the court's CJA panel to represent the defendant at the hearing; and
4. The clerk will schedule the hearing and will arrange for the defendant to appear at the hearing by video conference from his place of incarceration.

ENTER: December 21, 2015

/s/ James P. Jones
United States District Judge