

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

<b>ROBERT LEE SCOTT,</b>	)	
	)	
Petitioner,	)	Case No. 7:07CV00060
	)	
v.	)	<b>OPINION AND ORDER</b>
	)	
<b>UNITED STATES OF AMERICA,</b>	)	By: James P. Jones
	)	Chief United States District Judge
Respondent.	)	

*Robert Lee Scott, Petitioner Pro Se; Randy Ramseyer, Assistant United States Attorney, Abingdon, for Respondent.*

Robert Lee Scott, a federal inmate, brings this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C.A. § 2255 (West 2006). Respondent has filed a Motion to Dismiss, arguing that Scott, pursuant to a provision of his written plea agreement, waived his right to bring this § 2255 action. Upon review of the submissions of the parties and the underlying criminal record, Case No. 2:04CR00009, I find that the respondent's Motion to Dismiss should be taken under advisement pending conduct of an evidentiary hearing on Scott's claim that counsel failed to file a notice of appeal after being requested to do so.

# I

Scott pleaded guilty on May 17, 2005, pursuant to a written plea agreement, to tampering with a witness, in violation of 18 U.S.C.A. § 1512(b)(3) (West 2000 & Supp. 2007) (Count 12 of the superseding indictment), and mail fraud, in violation of 18 U.S.C.A. § 1341 (West Supp. 2007) (Count One of a related information). Paragraph 8 of Scott's plea agreement stated, "I am knowingly and voluntarily waiving any right to appeal and am voluntarily willing to rely on the Court in sentencing me." Paragraph 9 stated, "I agree not to collaterally attack the judgment and/or sentence imposed in this case and waive my right to collaterally attack, pursuant to Title 28, United States Code, Section 2255, the judgment and any part of the sentence imposed upon me by the Court." After questioning Scott, I found his guilty plea to be knowing and voluntary and found him guilty on both counts to which he had pleaded. On February 26, 2005, after conducting a sentencing hearing, I departed upward and sentenced Scott to seventy-eight months imprisonment, to be followed by three years of supervised release. I also ordered him to pay restitution in the amount of \$11,412.80. He did not appeal. He has now filed a timely § 2255 motion, raising numerous claims of ineffective assistance.

Reviewing the transcript of the guilty plea hearing, I find now, as I did at the plea hearing, that Scott's guilty plea and the waivers of his right to appeal and his

right to bring this collateral attack under § 2255 were knowing and voluntary and therefore, valid. Moreover, in his response to the Motion to Dismiss, Scott expressly states that he is not challenging his conviction or the plea agreement, but that he is merely challenging the sentence of imprisonment. He does not argue that any of counsel's alleged errors before he entered his plea agreement caused his guilty pleas or his waiver of § 2255 rights to be unknowing or involuntary. Therefore, I conclude that Scott has presented no reason on which to find that his guilty plea and his waiver of his right to bring this § 2255 action are not valid and binding. I also find that with one exception, his claims clearly fall within the scope of the § 2255 waiver and require no further factual development in this proceeding.

Scott alleges that through his wife, he told counsel to file a notice of appeal, and counsel failed to do so. The Fourth Circuit has recently held that “an 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). Under this precedent, if Scott can prove his allegation that he communicated a request to counsel for a notice of appeal, he is entitled to § 2255 relief in the form of a new opportunity to appeal his criminal sentence.

## II

As this claim of ineffective assistance relating to Scott's desire to appeal falls outside the scope of the waiver of § 2255 rights and cannot be resolved without further factual development, it is **ORDERED** as follows:

1. Scott's Motions to Amend (Dkt. Nos. 5, 17, 20 and 21) are **GRANTED**;
2. Scott's Motion to Strike (Dkt. No. 9) is **DENIED**;<sup>1</sup>
3. Respondent's Motion to Dismiss (Dkt. No. 3) is **TAKEN UNDER ADVISEMENT**;
4. The clerk is directed to arrange for appointment of counsel for the petitioner, pursuant to 18 U.S.C.A. § 3006A(a)(2)(B) (West 2000 & Supp. 2007); and
5. The clerk is directed to schedule an evidentiary hearing in Big Stone Gap on the petitioner's claim that he requested his attorney to file a notice of appeal and the attorney failed to do so.

ENTER: October 31, 2007

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

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<sup>1</sup> Scott apparently argues that the court should strike the respondent's Motion to Dismiss because he believes one of the exhibits, a copy of his plea agreement, is inaccurate. As I have relied only on the copy of the plea agreement in the court's file, I find no grounds to strike the respondent's motion.