

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ELVIN DEMPSEY,)
)
Movant/Defendant,)
)
v.) Civ. A. No. 10-477-GMS
) Cr. A. No. 07-74-GMS
)
UNITED STATES OF AMERICA,)
)
Respondent/Plaintiff.)

MEMORANDUM

I. BACKGROUND

Movant Elvin Dempsey filed a motion pursuant to 28 U.S.C. § 2255 to set aside his conviction and sentence, asking the court to provide him with an opportunity to file a direct appeal. (D.I. 87; D.I. 93) In his sole ground for relief, Dempsey asserts that his trial counsel was ineffective because she failed to file an appeal after being instructed to do so.

II. LEGAL STANDARD

Pursuant to *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), “a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.” *Id.* If counsel fails to file a requested appeal, the defendant “is entitled to resentencing and appeal without showing that his appeal would likely have had merit.” *Peguero v. United States*, 526 U.S. 23, 28 (1999). As explained by the Third Circuit Court of Appeals, the failure to file a requested appeal is itself sufficient to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Velazquez v. Grace*, 277 F. App’x 258, 261 (3d Cir. 2008).

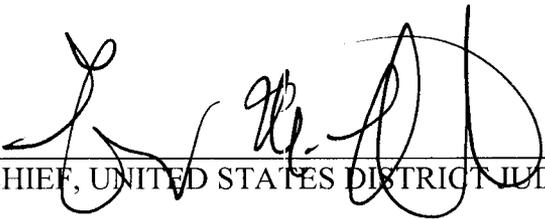
III. DISCUSSION

The court held a hearing on March 18, 2014 for the purpose of allowing Dempsey to present his claim that counsel did not follow his clear request to file an appeal. The court heard testimony and evidence was entered. The government did not oppose Dempsey's contentions. After reviewing the evidence, the court found that Dempsey is entitled to have his appellate rights reinstated.

IV. CONCLUSION

Having reviewed the record and testimony, the court will grant Dempsey's § 2255 motion. An appropriate order follows.

Dated: ^{April} ~~March~~ 4, 2014


CHIEF, UNITED STATES DISTRICT JUDGE

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ORDER

At Wilmington, this 4th day of March, 2014, for the reasons set forth in the Memorandum issued this date;

IT IS HEREBY ORDERED that:

1. Movant Elvin Dempsey's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 is **GRANTED**. (D.I. 87; D.I. 93) Therefore, the court's prior judgment of June 2, 2009, (D.I. 80), is **VACATED** and **REINSTATED** as it was entered on June 2, 2009, thereby permitting Dempsey to file a notice of appeal in Criminal Action No. 07-74-GMS, *nunc pro tunc*.

2. Dempsey's current counsel has 20 days from the reinstated judgment to file a **NOTICE OF APPEAL**.

3. The government's motion in opposition to movant's draft order is **DENIED** as moot. (D.I. 108)


CHIEF, UNITED STATES DISTRICT JUDGE