

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	<b>CRIMINAL NO. 01-391</b>
<b>v.</b>	:	
	:	
<b>CHRISTOPHER PADILLA</b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**December 11, 2007**

On June 5, 2002, Petitioner Christopher Padilla (“Petitioner”) pled guilty pursuant to a plea agreement to one count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On September 30, 2002, the Court sentenced him to 46 months imprisonment, three years supervised release, and a \$100 special assessment. Now before the Court is Petitioner’s timely-filed Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (the “Petition”).<sup>1</sup> For the reasons that follow, the Petition will be granted.

**I. BACKGROUND**

Petitioner argues that he is entitled to relief on two grounds. First, he claims that his counsel at sentencing, Fred Harrison (“Harrison”), was ineffective for failing to file a direct

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<sup>1</sup> Petitioner is currently on supervised release. However, his Petition is not moot because “in the criminal context, an individual who is on parole or released on his or her own recognizance is deemed in custody because of the significant restrictions imposed on his or her freedom.” Kumarasamy v. Attorney General of U.S., 453 F.3d 169, 172 (3d Cir. 2006) (citing Jones v. Cunningham, 371 U.S. 236 (1963); Hensley v. Municipal Court, 411 U.S. 345 (1973)); see also Johnson v. Daniels, 204 Fed. Appx. 585, 586 (9<sup>th</sup> Cir. 2006) (“We conclude that Johnson's [habeas] petitions are not moot because, at the time of the district court's order [dismissing the petitions], he was on home confinement and, in any event, he is now on supervised release.”).

appeal with the Third Circuit after being instructed to do so. Second, he claims that Harrison also was ineffective because he failed to object to a four-level weapons enhancement in the Pre-Sentence Investigation Report. The Court scheduled a hearing to give Petitioner the opportunity to “prove that he made the request [for his lawyer to file an appeal] and that the lawyer failed to honor it.” Solis v. United States, 252 F.3d 289, 295 (3d Cir. 2001). The hearing was held on December 5, 2007. The Court finds that Petitioner’s counsel was ineffective for not filing an appeal as directed, and, therefore, will reinstate his right to appeal nunc pro tunc.<sup>2</sup>

## **II. LEGAL STANDARD**

A petitioner claiming ineffective assistance of counsel must demonstrate (1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that counsel’s deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 689-92 (1984). With respect to the first prong of the Strickland test, “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) (noting that counsel’s failure to file a notice of appeal is a ministerial as opposed to a strategic decision and that failure to file reflects “inattention” to a defendant’s wishes) (citations omitted). Under the second part of the Strickland test, “[p]rejudice is presumed from counsel’s failure to file a notice of appeal when so requested by a client.” Solis, 252 F.3d at 293-94. Thus, a petitioner need not establish that his

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<sup>2</sup> Because the Court is reinstating Petitioner’s appellate rights nunc pro tunc, the issue of whether counsel was ineffective for failing to object to the weapons enhancement is premature and will not be addressed since Petitioner will have the opportunity to challenge his sentence on direct appeal. See Bonner v. U.S., 2007 WL 2461751, at \*1 (W.D. Pa. August 25, 2007) (holding that since the petitioner’s counsel was ineffective for failing to file a notice of appeal, all other claims regarding ineffective assistance of counsel were premature and would be dismissed until after the petitioner’s direct appeal).

appeal would have succeeded or even that it had merit in order to prevail on a claim of ineffective assistance of counsel for failure to file an appeal. Id. at 295; see also Peguero v. U.S., 526 U.S. 23, 28 (1999) (“when counsel fails to file a requested appeal, a defendant is entitled to ... an appeal without showing that his appeal would likely have had merit” (citing Rodriquez v. U.S., 395 U.S. 327, 329-30 (1969)). Petitioner has “the burden of establishing by a preponderance of the evidence the facts which support his claim” that his counsel failed to file an appeal as requested. U.S. ex rel. Senk v. Brierly, 363 F. Supp. 51, 51 (M.D. Pa. 1973) (citations omitted).

### **III. ANALYSIS**

This Court held a hearing on December 5, 2007 for the purpose of allowing Petitioner to present his claim that counsel did not follow his instruction to file an appeal. At the hearing, Petitioner testified affirmatively that: (1) he asked Harrison to file an appeal immediately following his sentencing; and (2) he tried unsuccessfully to contact Harrison regarding his appeal on other occasions within the ten-day deadline for filing an appeal. Harrison testified that he had no recollection that Petitioner asked him to file an appeal. Giving Petitioner the benefit of the doubt, the Court finds that he has met his burden of establishing by a preponderance of the evidence that counsel failed to file an appeal as requested. Accordingly, his appellate rights will be reinstated nunc pro tunc.

### **IV. CONCLUSION**

After hearing testimony and considering the record, the Court will grant the Petition. An appropriate Order follows.

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v.	:	
	:	
<b>CHRISTOPHER PADILLA</b>	:	

**ORDER**

**AND NOW**, this            day of December, 2007, upon consideration of Petitioner Christopher Padilla’s Motion to Vacate, Set Aside, or Correct Sentence (docket no. 48) (the “Petition”), the Government’s response thereto, and the testimony presented at the December 5, 2007 hearing, it is **ORDERED** that:

- (1) The Petition is **GRANTED**;
- (2) Petitioner’s direct appeal rights shall be **REINSTATED** and he shall be given the opportunity nunc pro tunc to file a notice of appeal; and
- (3) Petitioner’s current counsel is directed to file a notice of appeal within 10 days from the date of this Order.

**BY THE COURT:**

/s/ Bruce W. Kauffman

**BRUCE W. KAUFFMAN, J.**