

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MAMADOU D’JIRE, Movant, v. UNITED STATES OF AMERICA, Respondent.	MOTION TO VACATE 28 U.S.C. § 2255 CRIMINAL ACTION NO. 1:24-cr-113-SCJ-CMS-1 CIVIL ACTION NO. 1:25-cv-4739-SCJ-CMS
MAMADOU D’JIRE, Movant, v. UNITED STATES OF AMERICA, Respondent.	MOTION TO VACATE 28 U.S.C. § 2255 CRIMINAL ACTION NO. 1:16-cr-100-SCJ-CMS-1 CIVIL ACTION NO. 1:25-cv-4728-SCJ-CMS

FINAL REPORT AND RECOMMENDATION

Movant Mamadou D’Jire has filed a pro se Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“Motion to Vacate”).¹ [Doc. 14]. D’Jire was represented in his criminal proceedings by

¹ All citations are to the record in Criminal Action No. 1:24-cr-113-SCJ-CMS unless otherwise noted. D’Jire was on supervised release pursuant to a judgment in 1:16-cr-100-SCJ-CMS when he was arrested on new charges. As part of the plea agreement regarding the new charges, D’Jire agreed to both plead guilty to the charges contained in the Information and to admit the supervised release violations alleged in Case No. 1:16-cr-100-SCJ-CMS and recommend that his supervised

retained counsel Kimani King, with co-counsel Judy Kim. *See* [Doc. 2]. The Court’s docket indicates that appeals have not been filed, and the time for doing so has expired. *See* FED. R. APP. P. 4(b)(1). In the Motions to Vacate, D’Jire raises six claims of ineffective assistance of counsel. [Doc. 14].

In Ground Three, D’Jire claims that counsel failed to follow D’Jire’s instruction to file an appeal. [*Id.* at 7]. This type of claim is one where courts often grant an evidentiary hearing because lawyers’ duties regarding appeals are strict. Criminal defense lawyers have an affirmative duty to meaningfully consult with their clients regarding their appellate rights, and the lawyers must file an appeal if the client so requests, regardless of the merits of the appeal or whether the lawyer believes the appeal has any chance of success. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (“We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.”); *Thompson v. United States*, 504 F.3d 1203, 1206–07 (11th Cir. 2007). If a defendant instructs his lawyer to file an appeal and the lawyer does not do so, “prejudice is presumed.” *Gomez-Diaz v. United States*, 433 F.3d 788, 792

release be revoked. [Doc. 2-1]. D’Jire filed identical Motions to Vacate in Criminal Action Nos. 1:16-cr-100-SCJ-CMS [Doc. 64 therein] and 1:24-cr-113-SCJ-CMS [Doc. 14]. The Government only filed a response in Criminal Action No. 1:24-cr-113-SCJ-CMS. [Doc. 20].

(11th Cir. 2005). This is so even when, as here, the plea agreement contains an appeal waiver. *See id.* at 793–94 (holding that a sentence appeal waiver does not preclude a defendant from filing a § 2255 motion to challenge counsel’s failure to file a notice of appeal “regardless of whether he can identify any arguably meritorious grounds for appeal that would fit one of the exceptions contained in his appeal waiver”).

Despite acknowledging that “failure to file a requested notice of appeal is a per se ineffective assistance of counsel” [Doc. 20 at 14], the Government nevertheless argues that no evidentiary hearing is necessary and that the motion can be denied on the current record. [*Id.* at 14–17]. In support of its position, the Government points to the following evidence: (1) the wording of the plea agreement in which D’Jire waived his right to collaterally attack his sentence [*id.* at 3]; (2) D’Jire’s testimony at his change-of-plea hearing in which he affirmed his understanding of the appeal waiver [*id.* at 3–6]; (3) the fact that defense counsel is “an experienced criminal defense lawyer with nearly 15 years of experience, and thus, he would have known to discuss D’Jire’s appellate rights and the possibility of a notice of appeal with him” [*id.* at 15]; and (4) an email from defense counsel to an Assistant United States Attorney in which defense counsel states that there is “no truth to” D’Jire’s claim that he asked the attorney to file an appeal after his

sentencing [*id.* at 15; Doc. 20-1]. The Government argues that because D’Jire has provided “no letter, email, call record, etc.” to suggest that he ever asked his attorney to file a notice of appeal, D’Jire is not entitled to an evidentiary hearing. [*Id.* at 16].

Given the importance of the appeal right as discussed in *Flores-Ortega* and its progeny, I recommend that the Court take one of two actions—either (A) hold an evidentiary hearing to determine the merit of D’Jire’s claim that counsel failed to follow his instruction to file an appeal; or (B) exercise its discretion to grant D’Jire an opportunity to appeal his judgment of conviction in the interest of judicial efficiency. In my view, the latter option is preferable.

An evidentiary hearing would allow the Court to resolve any disputed issues of fact regarding communications between D’Jire and his attorney about his appellate rights. *See* 28 U.S.C. § 2255(b). Such a hearing, however, would be burdensome on both the Court and the witnesses. On the other hand, granting D’Jire the right to file an out-of-time appeal would avoid the costly and time-consuming evidentiary hearing and likely result in the appeal being dismissed based on the appeal waiver in his plea agreement under *United States v. Bushert*, 997 F.2d 1343 (11th Cir. 1993). *See, e.g., Cooper-Miller v. United States*, No. 11-cr-553-T-33AEP, 2014 WL 11412834 at *1 (M.D. Fla. May 5, 2014) (finding that the interest of judicial economy warranted granting an out-of-time appeal where an evidentiary

hearing on counsel's alleged failure to file a notice of appeal would involve considerable expense and inconvenience and where the defendant's plea agreement contained an enforceable appeal waiver).

The Eleventh Circuit has described the following procedure for granting such an out-of-time appeal:

When the district courts of this circuit conclude that an out-of-time appeal in a criminal case is warranted as the remedy in a § 2255 proceeding, they should effect that remedy in the following way: (1) the criminal judgment from which the out-of-time appeal is to be permitted should be vacated; (2) the same sentence should then be reimposed; (3) upon reimposition of that sentence, the defendant should be advised of all the rights associated with an appeal from any criminal sentence; and (4) the defendant should also be advised that the time for filing a notice of appeal from that re-imposed sentence is ten days, which is dictated by Rule 4(b)(1)(A)(i).

United States v. Phillips, 225 F.3d 1198, 1201 (11th Cir. 2000).

I **RECOMMEND** that D'Jire's Motions to Vacate, Criminal Action No. 1:16-cr-100-SCJ-CMS [Doc. 64 therein] and Criminal Action No. 1:24-cr-113-SCJ-CMS [Doc. 14 therein] be **GRANTED** for the sole purpose of reinstating his appeal rights.

To effectuate that relief, I **RECOMMEND** that the Court, pursuant to *Phillips*:

1. **VACATE** the criminal judgment in this action;
2. **REIMPOSE** the sentences of imprisonment, supervised release, and special assessment imposed by this Court on August 16, 2024, with appropriate credit for time served; and

3. **ADVISE** D’Jire that: (a) he has the right to an appeal; (b) if he is unable to pay the cost of an appeal, he may apply for *in forma pauperis* status to pursue the appeal; (c) if he so requests, the Clerk of this court will prepare and file a notice of appeal on his behalf; (d) he has the right to counsel on appeal and, if he cannot afford counsel, an attorney will be appointed to represent him; and (e) any notice of appeal must be filed within fourteen days of the date the court reimposes its sentence in this case.

If the Court grants D’Jire the right to file an out-of-time appeal, I **FURTHER RECOMMEND** that the other claims in the Motions to Vacate be **DISMISSED WITHOUT PREJUDICE** so that D’Jire may reassert those claims, if necessary, after the conclusion of his appeal. *See United States v. Frank*, 353 F. App’x 305, 307 (11th Cir. 2009) (“[T]he best approach is for the district court to dismiss the collateral claims without prejudice if it grants an out-of-time appeal[.]”) (internal quotation marks omitted).²

SO RECOMMENDED, this 14th day of July, 2026.



Catherine M. Salinas
United States Magistrate Judge

² If the District Judge prefers that an evidentiary hearing be held, the case can be referred back to me, at which point I will promptly schedule one.