UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ARMANDO SERRANO,	:	
Petitioner,		
	:	
v.		**NO. 3:99cr162 (JBA)**
	:	
UNITED STATES OF AMERICA,		
Respondent.	:	

RULING ON REQUEST FOR POST-CONVICTION RELIEF
[DOC. #28, #30]

Petitioner, Armando Serrano, a prisoner in custody under sentence of this Court, has filed a letter motion [doc. #28] (supplemented by letter filed December 7, 2000 [doc. #30]) requesting the right to file a time-barred appeal to challenge his sentence under 28 U.S.C. § 2255. Serrano claims that no timely notice of appeal was filed as a result of ineffective assistance of counsel. The Government's response filed February 1, 2001 [doc. #31] included the affidavit of Attorney Frank Riccio (hereinafter "Riccio"), Serrano's counsel appointed under the Criminal Justice Act, in which Riccio avers that Serrano never indicated interest in pursuing an appeal, nor instructed him to file an appeal. Serrano's response [doc. #35] clarified his claim regarding Riccio's ineffectiveness in failing to appeal, representing that he had affirmatively requested "that counsel preserve his challenge to the [sentence] enhancements . .

. in a direct appeal" [doc. #35, p. 6], and raising several additional alleged deficiencies on Riccio's part.

Because of apparent factual disputes as to the nature of Serrano's post-sentence communications with Riccio, the Court appointed counsel for Serrano under the Criminal Justice Act and held an evidentiary hearing on February 20, 2002.

I. Background

On November 2, 1999, Armando Serrano pleaded guilty to a one count indictment charging him with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Serrano is currently serving an 84 month term of imprisonment imposed on January 26, 2000. This sentence included an enhancement of four levels under U.S.S.G. § 2K2.1(b)(5) for possession of a firearm in connection with drug dealing, which the Court concluded was adequately factually supported following a hearing on this issue.

Petitioner's letter motion dated October 11, 2000 requested that the Court "grant me an appeal of the sentence of the above-captioned matter and to supply me with an attorney to prosecute the appeal and the necessary motion for ineffective assistance of counsel for not filing my appeal in a timely manner even though your Honor had instructed my attorney . . . to do so at my sentencing hearing on Jan. 26, 2000." [Doc. #28]. His accompanying sworn affidavit [doc. #29] averred that at the time

of sentencing he had made known to Riccio that he wanted to appeal the four point firearm enhancement, but that Riccio had never filed an appeal. As an exhibit to his affidavit, he attached a letter he had sent to Kevin Rowe on August 5, 2000, inquiring about the status of any pending appeal.

Serrano supplemented this motion with an additional letter to the Court, citing Roe v. Flores-Ortega, 528 U.S. 470 (2000), and claiming that he informed Riccio twice to file an appeal: once on the record and once in private. See Doc. #30 at 1 ("In my case, not only did I put it on the record at the time of my sentencing (Jan. 26, 2000) that I wanted to appeal the additional four (4) points that were not part of my original plea, but I again informed my attorney, Mr. Frank Riccio, of my wish to appeal a second time when he came to see me after my court hearing that day.") (emphasis deleted). At his request, Serrano was sent copies of transcripts of both days of his sentencing hearings.

The Government's response sought dismissal without a hearing, citing Delgado v. United States, 162 F.3d 981 (8th Cir. 1998), which held that a district court need not hold an evidentiary hearing if the movant's allegations, "cannot be accepted as true because they are contradicted by the record, inherently incredible or conclusions rather than statements of fact." Id. at 983 (citation omitted). The Government correctly

pointed out that the transcript of the sentencing hearing in which Serrano claims to have stated on the record that he wanted to file an appeal contains no such declaration. As for Serrano's claim that he instructed Riccio in private to file an appeal, the Government maintained that his allegation is too conclusory to warrant a hearing, and attached an affidavit from Riccio denying receipt of any such instruction.

The Court determined that "[t]he pleadings in this case . . . evidence a factual dispute regarding whether Serrano instructed Riccio to file a notice of appeal," [Doc. #30], and ordered an evidentiary hearing on the matter, as required by 28 U.S.C. § 2255:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

The hearing was held on February 20, 2002. Serrano was represented by Attorney Richard Cramer. Four witnesses testified: Serrano, Riccio, Crystal Edwards (Serrano's mother), and Michelle Serrano (Serrano's sister). The record was supplemented by stipulation to include a prison telephone log [doc. #48]. At the hearing Serrano's claim expanded to encompass a failure to consult allegation (see Roe v. Flores-Ortega, 528 U.S. 470 (2000)) and at the Court's request, the parties submitted supplemental briefing on all facets of Serrano's

claims.

II. Standard of Review

Under 28 U.S.C. § 2255, the burden of proof of a Sixth Amendment violation resulting from denial of effective counsel on appeal is on the petitioner who must prove his claim by a preponderance of the evidence. See Harned v. Henderson, 588 F.2d 12, 22 (2d Cir. 1978) (citations omitted); accord Triana v. United States, 205 F.3d 36, 40 (2d Cir. 2000).

III. Findings of Fact

Immediately following sentencing, Riccio and Serrano had a conversation in the U.S. Marshal's lock-up during which Riccio advised Serrano about the merits of any appeal. The Court credits Riccio's testimony that at that meeting in the lock-up, Riccio explained to Serrano that any appeal from the Court's factual determination was without merit, Tr. 101-103, which is not inconsistent with Serrano's testimony, see Tr. 11 (testimony of Serrano) ("He explained about the appeal."), and is plausible in light of the accuracy of that advice. It is undisputed that Serrano never made an affirmative decision not to appeal. Tr. 101-103 (testimony of Riccio).

It was apparent at the hearing, however, that the genesis of the claim that Serrano expressly directed Riccio to appeal was

Serrano's conversations with an inmate who purports to give legal advice, a "jailhouse lawyer." Serrano testified that all of his written submissions to the Court, including his initial allegation that he had expressly instructed Riccio to file an appeal, were drafted by this jailhouse lawyer. Tr. 35-36, 41-42. Serrano testified that when he first spoke to the jailhouse lawyer, he told him that he was upset about the four point enhancement – not that Riccio ignored his instructions to file an appeal. Tr. 48-49. Serrano further testified that after his initial conversation with this inmate, the inmate prepared forms that Serrano read and signed, but that Serrano often did not understand what was in the forms, did not ask for assistance in determining what they meant, and never asked the inmate to make any changes. Tr. 42-43, 46, 48. Thus, the Court concludes that Serrano has failed to prove his claim that he expressly instructed Riccio to file an appeal, and that, more likely, this claim was conceived of by this jailhouse lawyer, and not by Serrano.

The Court's conclusion is supported by Serrano's admissions that many factual allegations in the submissions prepared by this other inmate were, in fact, false: Serrano's assertion that he stated in open court that he wished to appeal, Tr. 31, Serrano's assertion that the Court told Serrano's attorney to file an appeal, Tr. 33, and Serrano's assertion that Riccio never told

him that his sentence could be increased if the gun was possessed in connection with drug dealing, Tr. 38-39. Further, the Court credits Riccio's testimony that during his personal interactions with Serrano, Serrano never instructed him to file a notice of appeal, Tr. 82-83, 86, 101. Riccio was fully knowledgeable about his obligations to petitioner with respect to filing an appeal, including an appeal he deemed meritless, and has never had a disciplinary complaint filed against him, was forthright and credible, and was not contradicted by testimony that the Court found to be credible. In addition to petitioner's untrue allegations, the credibility of his testimony that he expressly directed Riccio to file an appeal is further undermined by a past instance of his dissembling under circumstances when truthfulness would be disadvantageous to him. Serrano admitted that he had provided a false name to a police officer because he knew that a records check of his own name would reveal an outstanding warrant for his arrest. Tr. at 28-29. Inasmuch as the stakes are high for Serrano in this proceeding as well, the Court's willingness to accept his testimony at face value is diminished accordingly.

While Serrano's sister initially testified that outside the courthouse Riccio told her he would not file an appeal even though Serrano had expressly instructed him to do so, Tr. 66-67, at a later point in her testimony she testified only that Serrano had inquired about an appeal and that Riccio had advised against

it. Tr. 76-77. This latter version comports with Riccio's testimony regarding his conversation with Serrano's family, Tr. 88-89, and is more plausible than the first version, which would implausibly have an attorney announcing his intent to flagrantly disregard an ethical obligation to carry out his client's instruction to file a notice of appeal.

The Court further finds that following Riccio's conversation with Serrano on the day of sentencing and possibly in response to telephone calls from Serrano or members of Serrano's family, Riccio sent a follow-up letter advising Serrano that while an appeal would have little chance of success, Riccio stood ready to file papers requesting an extension of time for filing the appeal. While Serrano testified that he never received the letter, Tr. 12-13, such testimony does not contradict Riccio's claim of having sent the letter. See Riccio Letter, January 28, 2000 [Exhibit to doc. #31]; Tr. 87.)

The Court also finds that Serrano telephoned Riccio's office from jail on February 4, 2000 and left his name with Riccio's secretary, based on the telephone call log from the Bridgeport Correctional Center [doc. #43 Ex. A] which reflects a call from Serrano to Riccio's office, and Serrano's testimony that he made one call to Riccio shortly after sentencing, Tr. 14-16. By Serrano's own account of the conversation, he spoke to Riccio's secretary, left his name, and ended the conversation with the

understanding that Riccio would be in contact. Tr. 16.

The Court concludes that during the time period for filing a Notice of Appeal, Riccio did not return Serrano's February 5th telephone call, and no further calls to Riccio's office were received regarding Serrano's case before the appeal period expired. Serrano testified that after his telephone call to Riccio's office, he never heard from Riccio again, Tr. 16, which comports with Riccio's testimony, Tr. 88-89 (after sending the January 28th letter, Riccio had no further contact with Serrano or Serrano's family). While Crystal Edwards and Michelle Serrano testified to having made numerous calls to Riccio's office, most of these calls are claimed to have been made after the period for filing an appeal had already passed. See Tr. 68-69 (Michelle Serrano's first call made approximately one month after sentencing), 56 ("over the next few months" Serrano asked Edwards to make more calls to Riccio). Edwards' recollection of having made a call less than a week after the sentencing is imprecise, see Tr. 55,[1] is made without any documentary support,[2] and is contradicted by other testimony in the record, Tr. 91-92.

[1]"Q: And these calls, do you recall roughly when the first one was in relation to sentencing; a week, two weeks, a month later? A: I don't know. I think – I don't think it was a week after."

[2]Michelle Serrano, who testified that she made her telephone calls from Crystal Edwards' house in Danbury, Tr. 79, testified that the calls were toll calls and would thus be reflected on a telephone bill. Tr. 79. No telephone bill was introduced into evidence.

IV. Analysis

Serrano's claim that Riccio disregarded his instructions to file an appeal, or alternatively that Riccio should have made a better effort to ascertain his wishes regarding an appeal, is a claim of ineffective assistance of counsel subject to the now-familiar Strickland cause and prejudice test. Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). This test has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense . . . . Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

Given the Court's finding that Serrano neither expressly directed Riccio to file an appeal nor expressly directed Riccio not to file an appeal, this matter is not disposed of by ready reference to per se rules. See Flores-Ortega, 528 U.S. at 477 ("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 . . . . At the other end of the spectrum, a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed

deficiently.") (emphasis in original, citations omitted). Instead, as in Flores-Ortega, the Court is faced with a situation "between those poles." Id.

In Flores-Ortega, the Supreme Court set out the proper analysis for analyzing a claim based on the facts of a case such as Serrano's. Rejecting a per se rule that counsel must file a Notice of Appeal unless the defendant specifically instructs otherwise, id. at 478, the Supreme Court held instead that the following assessment guides the Strickland analysis in these situations:

> [T]he question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to convey a specific meaning – advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance.

Id. (citations omitted).

Here, the evidence shows that Riccio advised Serrano about the advantages and disadvantages of taking an appeal and made a reasonable effort to discover Serrano's wishes: Riccio's uncontradicted testimony is that he informed Serrano of the

relative merits of the appeal, and Riccio followed up with a letter to Serrano advising him once again about the lack of merit in an appeal but nonetheless encouraging him to consult with another attorney if Serrano was unsure. Riccio also offered to file a motion with the Court to extend the time for filing an appeal. Regardless of whether Serrano actually received Riccio's letter or explicitly agreed with his advice, Riccio adequately "consulted" with Serrano in the Flores-Ortega sense.[3]

Because Riccio consulted with Serrano about an appeal, his performance could only be deficient if he failed to follow an express instruction with respect to an appeal. As set out in the Findings of Fact, Serrano never gave Riccio an express instruction to file an appeal. With no express instruction to follow, Riccio's performance did not fall below any objective standard of reasonableness, and cannot be the basis for an ineffective assistance of counsel claim.

V. Conclusion

For the reasons set out above, Serrano's Motions [docs. #28, #30] are DENIED. Because Serrano has failed to make "a

[3]In rejecting a per se rule requiring attorneys to file appeals unless explicitly directed not to do so, id. at 478, the decision in Flores-Ortega necessarily envisions the possibility that despite "making a reasonable effort to discover the defendant's wishes," id., an attorney may nonetheless fail to receive a clear yes or no answer from his or her client. Were the contrary true, an attorney who "consulted" in the Flores-Ortega sense would always have a clear yes or no answer, which would make the rule unnecessary.

substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no Certificate of Appealability will issue.

Appointed Attorney Richard Cramer is discharged with the thanks of the Court.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 13th day of November, 2003.