

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF
FLORIDA, TAMPA DIVISION

United States of America v. Viraj Anilkumar Patel

Patel · No. 8:25-cv-2910-SDM-SPF; 8:24-cr-252-SDM-SPF · Decided February 5, 2026

SUMMARY

The United States District Court for the Middle District of Florida granted Viraj Anilkumar Patel’s 28 U.S.C. § 2255 motion in part based on his claim that counsel failed to file a requested appeal. The court ordered an out-of-time appeal under the Phillips procedure, dismissed Patel’s remaining claims without prejudice, and directed that counsel be appointed in the criminal case.

CASE DETAILS

COURT	United States District Court for the Middle District of Florida, Tampa Division
WRITING FOR THE COURT	Steven D. Merryday
JURISDICTION	United States District Court for the Middle District of Florida, Tampa Division
DECIDED	February 5, 2026
DOCKET	8:25-cv-2910-SDM-SPF; 8:24-cr-252-SDM-SPF
DISPOSITION	other
PROCEDURAL POSTURE	Viraj Anilkumar Patel moved under 28 U.S.C. § 2255 to vacate his federal conviction and sentence, alleging, among other claims, that trial counsel was ineffective for failing to file an appeal. The United States conceded that, based on Patel's allegations, an evidentiary hearing would ordinarily be necessary, but agreed that judicial economy favored granting an out-of-time appeal under the Phillips procedure.
STANDARD OF REVIEW	For ineffective-assistance claims, the court applied the Strickland deficient-performance and prejudice framework. The order did not identify a separate appellate standard of review.
PRECEDENTIAL VALUE	Nonprecedential, unreported district-court order

TOPICS

- federal habeas corpus
- post-conviction relief
- ineffective assistance
- right to counsel
- appellate procedure

PRACTICE AREAS

federal habeas corpus

post-conviction relief

ineffective assistance

plea bargaining

appellate procedure

sentencing guidelines

QUESTIONS PRESENTED

1. Whether Patel's allegations that he requested an appeal and counsel failed to file one warranted relief under § 2255.
2. Whether the district court could provide an out-of-time appeal without conducting an evidentiary hearing by following the Phillips procedure.
3. Whether Patel's remaining § 2255 claims should be dismissed without prejudice while the out-of-time direct appeal proceeds.

HOLDINGS

1. A defendant who alleges that he expressly requested an appeal and that counsel failed to file it may obtain § 2255 relief in the form of an out-of-time appeal, even when the defendant pleaded guilty under an agreement containing an appellate waiver.
2. When an out-of-time criminal appeal is warranted as the remedy in a § 2255 proceeding, the district court must vacate the criminal judgment, reimpose the same sentence, advise the defendant of appellate rights, and provide the applicable period for filing a notice of appeal.
3. When an out-of-time appeal is granted, the remaining collateral claims should be dismissed without prejudice because they may be pursued in a later § 2255 motion after the direct appeal and are not thereby rendered second or successive.

KEY QUOTATIONS

“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.”
(Order at 1)

“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 re-imposed; (3) upon re-imposition 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 . . . dictated by Rule 4(b)(1)(A)(i).”
(Order at 3)

FACTUAL BACKGROUND

Patel pleaded guilty pursuant to a plea agreement to conspiring to launder money and was sentenced to forty-six months' imprisonment. He alleged that he told trial counsel he wanted to appeal, that counsel incorrectly advised

him that he could not appeal because he had waived appellate rights, and that he wanted to challenge an allegedly erroneous sentencing-guidelines calculation. Counsel did not file an appeal.

PROCEDURAL HISTORY

Patel pleaded guilty under a plea agreement to conspiring to launder money and received a forty-six-month sentence. He filed this § 2255 motion alleging that he requested an appeal, counsel misadvised him that an appeal was unavailable because of the appellate waiver, and counsel failed to appeal. The district court granted relief on the failure-to-appeal claim by providing an out-of-time appeal through vacatur and reimposition of the same sentence, dismissed the remaining claims without prejudice, and closed the civil § 2255 case.

DISPOSITION

other

REMAND INSTRUCTIONS

The magistrate judge must appoint counsel in the criminal action for the purpose of appealing. After counsel appears, the district court must vacate the criminal judgment, reimpose the same sentence, enter a new judgment, advise Patel of his appellate rights, and permit appointed counsel to timely appeal. The remaining § 2255 claims are dismissed without prejudice.

CASES CITED

- Strickland v. Washington, 466 U.S. 668 (1984)
- Sims v. Singletary, 155 F.3d 1297, 1305 (11th Cir. 1998)
- Roe v. Flores-Ortega, 528 U.S. 470, 476-77 (2000)
- Thompson v. United States, 481 F.3d 1297 (11th Cir. 2007)
- Gomez-Diaz v. United States, 433 F.3d 788, 793 (11th Cir. 2005)
- McIver v. United States, 307 F.3d 1327, 1331 n.2, 1332 (11th Cir. 2002)
- Ravikumar Patel v. United States, 252 F. App'x 970, 974 (11th Cir. 2007)
- United States v. Phillips, 225 F.3d 1198, 1201 (11th Cir. 2000)
- United States v. Robinson, 648 F. App'x 823 (11th Cir. 2016)
- United States v. Parrish, 427 F.3d 1345, 1348 (11th Cir. 2005) (per curiam)
- United States v. Frank, 353 F. App'x 305, 307 (11th Cir. 2009)
- Shepeck v. United States, 150 F.3d 800, 801 (7th Cir. 1998)

OPINION

Patel

PER CURIAM.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:25-cv-2910-SDM-SPF 8:24-cr-252-SDM-SPF

VIRAJ ANILKUMAR PATEL

ORDER

Patel moves under 28 U.S.C. § 2255 to vacate and challenges the validity of his federal conviction for conspiring to launder money, for which conviction he is imprisoned for forty-six months. Both the conviction and the sentence accord with his plea agreement. Among other claims,¹ Patel alleges that trial counsel rendered ineffective assistance by not appealing. To prove his claim of ineffective assistance of counsel, Patel must meet the test established in *Strickland v. Washington*, 466 U.S. 668 (1984), which test *Sims v. Singletary*, 155 F.3d 1297, 1305 (11th Cir. 1998), explains as follows: [F]irst, 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. 1 As suggested in *McIver v. United States*, 307 F.3d 1327, 1331, n.2 (11th Cir. 2002), whether Patel is entitled to a delayed appeal warrants resolution before resolving his other claims. As explained at the end of this order, a delayed appeal preserves Patel’s other claims for possible review in a future Section 2255 motion. *Strickland* governs a claim that counsel was ineffective for not appealing. *Roe v. Flores-Ortega*, 528 U.S. 470, 476–77 (2000); *Thompson v. United States*, 481 F.3d 1297

(2007). Patel’s pleading guilty based on a plea agreement, under which he waived most of his right to appeal, does not foreclose his raising an ineffective assistance of counsel claim based on trial counsel’s alleged failure to appeal. *Gomez-Diaz v. United States*, 433 F.3d 788, 793 (11th Cir. 2005). In his supporting memorandum Patel alleges (1) that he expressed to his counsel a desire to appeal, (2) that counsel misadvised him that he could not appeal because he had waived his right to appeal, and (3) that he wanted to appeal what he believed was an erroneous calculation of sentence under the sentencing guidelines. (Doc. 2 at 5) The United States admits (Doc. 7) that, under these circumstances, an evidentiary hearing is necessary. See *Ravikumar Patel v. United States*, 252 F. App’x 970, 974 (2007)² (remanding to the district court “to conduct an evidentiary hearing into . . . whether Patel, in fact, requested counsel to file a direct appeal sufficient to trigger the per se duty to appeal set forth in *Flores-Ortega*” because “[i]n his § 2255 motion and accompanying memorandum, Patel asserted that he specifically requested his attorney to file an appeal of his sentence and conviction, but noted that counsel failed to do so and did not provide any reasons for ignoring his request”). To conduct an evidentiary hearing, an incarcerated defendant must be brought to a 2 “Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.” 11th Cir. Rule 36–2. hearing at considerable expense to the United States Marshal,³ to the United States Attorney, either to the Federal Defender or to

private counsel appointed under the Criminal Justice Act, and to the judiciary. As the United States represents (Doc. 7), the interest of judicial economy is best served by granting the motion but only to the extent that Patel will have an out-of-time appeal with the assistance of appointed counsel in accord with *United States v. Phillips*, 225 F.3d 1198, 1201 (11th Cir. 2000): 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 re-imposed; (3) upon re-imposition 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 . . . dictated by Rule 4(b)(1)(A)(i). The circuit court approves the granting of a motion to vacate without an evidentiary hearing if the district court follows *Phillips*. “A defendant does not have a right to a new sentence hearing or a right to be present when resentenced under the *Phillips* procedure.” *United States v. Robinson*, 648 F. App’x 823 (11th Cir. 2016) (citing *United States v. Parrish*, 427 F.3d 1345, 1348 (11th Cir. 2005) (per curiam)). Allowing a belated appeal yields to the need for judicial economy (given the present 3 Patel is imprisoned in the Allenwood Federal Correctional Institution in White Deer, Pennsylvania. peculiar state of pertinent law) and neither includes nor suggests a determination that trial counsel was ineffective. The present motion to vacate is granted-in-part and limited to only the claim that counsel failed to appeal. Patel’s remaining issues are not lost because after his appeal Patel can again move under Section 2255, which motion is not barred as second or successive under Section 2255(h), as *McIver v. United States*, 307 F.3d at 1332, explains: [W]e hold that “an order granting a § 2255 petition, and reimposing sentence, resets to zero the counter of collateral attacks pursued.” *Shepeck [v. United States]*, 150 F.3d [800,] 801 [7th Cir. 1998)]. A successful motion to file an out-of-time notice of appeal therefore does not render subsequent collateral proceedings “second or successive.” See also *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 because ‘collateral claims should not be entertained while a direct appeal is pending,’ and ‘[o]nce the court has determined that the petitioner is entitled to a direct appeal, such an appeal is pending for all relevant policy purposes.’”) (quoting *McIver*, 307 F.3d at 1332 n.2) (brackets original). The motion to vacate (Doc. 1) is GRANTED on Ground One, the claim that counsel failed to appeal. The other grounds are DISMISSED WITHOUT PREJUDICE. The clerk must (1) enter a judgment for Patel in the civil case and CLOSE the civil case and (2) enter a copy of this order in the criminal case and GRANT the motion to vacate (Doc. 43) that pends in the criminal case. This matter is referred to the United States Magistrate Judge, who must appoint counsel in the criminal action for the purpose of appealing. After counsel files an appearance, the court will re-impose sentence and enter a new judgment, and the newly appointed counsel must timely appeal. All further

proceedings will occur in the criminal action. ORDERED in Tampa, Florida, on February 5, 2026.
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE
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