

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-81124-Civ-HURLEY
(98-8047-Cr-HURLEY)
MAGISTRATE JUDGE P. A. WHITE

MILLARD CHAVERS, :
 :
 Movant, :
 :
 v. :
 :
 UNITED STATES OF AMERICA, :
 :
 Respondent. :
 _____ :

REPORT OF
MAGISTRATE JUDGE

The movant filed a pro se motion to vacate pursuant to 28 U.S.C. §2255, attacking his convictions and sentences for conspiracy to commit credit union robbery, credit union robbery, and use of a firearm during and relation to a crime of violence entered following a jury verdict in case no. 98-8047-Cr-Hurley.

The movant raises the sole claim that counsel was ineffective for failing to prosecute a requested direct appeal. According to the movant, he was assured by counsel that the notice had been timely filed.

The government has filed a response to this court's order to show cause, in which it has attached two copies of the notice of appeal filed by movant's counsel, bearing this Court's "night box filed" date of August 18, 2000. (Cv-DE#7). By separate order, the Clerk is being directed to refile a copy of this Notice in this case, as well as, the underlying criminal proceeding. The government believes the Clerk of Court inadvertently file stamped

the notice, but failed to docket it, sending the original and the judge's copy to the United States Attorney's Office in West Palm Beach, Florida. Therefore, it appears that the movant's appeal was never processed by this court. The government concedes the movant has a right to appeal his judgment of conviction, and therefore recommends that the Clerk of Court electronically file the notice as of the date it was file stamped by the Clerk, thereby insuring the timeliness of the appeal.

The government has also indicated that John Garcia, Esquire, movant's counsel who filed the original notice, is longer a practicing attorney in Florida, and, therefore, the movant needs counsel to be appointed to prosecute the criminal direct appeal.

After review of the §2255 motion and the government's response thereto, the motion should be dismissed without prejudice once the notice of appeal is made part of the criminal docket, new appellate counsel is appointed for the movant, and the file transmitted to the Eleventh Circuit.

The notice of appeal which was properly filed in 2000 divested this Court of jurisdiction to entertain a collateral attack upon the validity of the conviction and sentence. United States v. Tovar-Rico, 61 F.3d 1529, 1532 (11 Cir. 1995), United States v. Wilson, 894 F.2d 1245, 1252 (11 Cir. 1990). Therefore, this motion should be dismissed without prejudice to its refiling if it concerns a matter appropriate to be raised after the appeal. United States v. Khoury, 901 F.2d 948, 969 n.20 (11 Cir. 1990); Shewchun v. United States, 797 F.2d 941 (11 cir. 1986).

It is therefore recommended that this motion to vacate be dismissed without prejudice once the notice of appeal is made part of the underlying criminal case, and new appellate counsel is appointed to prosecute the underlying criminal appeal.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Signed this 9th day of October, 2009.



UNITED STATES MAGISTRATE JUDGE

cc: Millard Chavers, Pro Se
Reg. No. 198690
DeSoto Correctional Institution-Annex
13617 S.E. Highway 70
Arcadia, FL 34266-7800

Janice LeClainche, AUSA
U.S. Attorney's Office
500 Australian Avenue, Suite 400
West Palm Beach, FL 33401
Phone: 561/820-8711
Fax: 561/820-8777