

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SALVADOR YANEZ RUIZ, #35269-177 §

VS. § CIVIL ACTION NO. 4:09cv172
CRIM. ACTION NO. 4:07cr42

UNITED STATES OF AMERICA §

MEMORANDUM OPINION AND ORDER

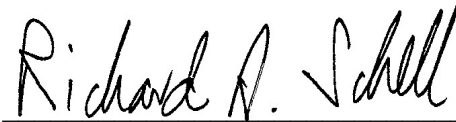
A Report and Recommendation was issued in this case, recommending that Movant's case be dismissed, which this Court adopted on March 30, 2012. Upon further reflection, however, reconsideration is warranted. In his objections to the Report and Recommendation, Movant alleged for the first time that he asked his counsel to file an appeal on his behalf. New issues raised in objections to the Report and Recommendation are not properly before the Court. *Finley v. Johnson*, 243 F.3d 215, 219 (5th Cir. 2001). In the interest of justice, however, because Movant alleged that he had asked counsel to file an appeal, and counsel failed to do so, reconsideration of this issue is appropriate.

The Court considers the issue in light of a 2007 case by the United States Court of Appeals for the Fifth Circuit, *United States v. Tapp*, 491 F.3d 263 (5th Cir. 2007). In *Tapp*, the court held that, even in a case where defendant waived his right to direct appeal and collateral review (as in the present case), the failure to file a requested notice of appeal is *per se* ineffective assistance of counsel. The court noted that if the movant is able to demonstrate by a preponderance of the evidence that he requested an appeal, prejudice will be presumed and the petitioner will be entitled

to an out-of-time appeal. The Court concludes that Movant plausibly argued that he asked for a direct appeal, but counsel did not file an appeal. Accordingly, Movant is entitled to an out-of-time appeal. It is therefore

ORDERED that the motion to vacate, set aside, or correct sentence is **DISMISSED** *without* prejudice. The Clerk shall reinstate the judgment of conviction in the Movant's criminal case on the docket, as of the date of entry of this Memorandum Opinion and Order. Movant shall have fourteen (14) days in which to file a notice of appeal. Fed. R. App. P. 4(b).

SIGNED this the 14th day of December, 2012.

Handwritten signature of Richard A. Schell in black ink, written in a cursive style.

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE