

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**TAFF VIRDEN,**

**Defendant.**

**Case No. 08-20012**

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**MEMORANDUM AND ORDER**

Defendant Taff Virden was convicted following a jury trial of conspiring to commit and to conceal the crime of interstate transportation of stolen goods, an offense against the United States. He received a 27-month prison sentence. Mr. Virden did not file a direct appeal, but he has now filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (doc. 196).

Mr. Virden argues, among other things, that his attorney was ineffective for failing to file a notice of appeal as requested. He claims that, after his motion for a new trial was denied, his attorney should have raised the same issue concerning a possible *Brady* violation on direct appeal.

At the court's request, Mr. Virden's trial attorney, Thomas R. Telthorst, filed an affidavit responding to Mr. Virden's petition. Mr. Telthorst avers that had Mr. Virden requested an appeal, he would have filed one. Instead, however, he contends that Mr.

Viriden chose to accept the jury's verdict and the court's ruling on the *Brady* issue, and that Mr. Viriden specifically instructed him not to file an appeal.

In response, Mr. Viriden asserts that although he did not wish to appeal his sentence, "he did not give up his position as to an appeal on the *Brady* issue at any time."

The court recognizes that an attorney who disregards a specific instruction to appeal is per se ineffective, without consideration of the merits of any possible appealable issue. *United States v. Snitz*, 342 F.3d 1154, 1156 (10th Cir. 2003). Given the conflict between Mr. Viriden's § 2255 filings and the sworn statement from his attorney, the court must hold an evidentiary hearing for the limited purpose of resolving this factual dispute.

**IT IS THEREFORE ORDERED BY THE COURT** that the case is set for an evidentiary hearing January 10, 2011 at 10:30 a.m. in Courtroom 427, Robert J. Dole United States Courthouse, 500 State Avenue, Kansas City, Kansas. This hearing will be limited to Mr. Viriden's claim that his attorney failed to file an appeal after being requested to do so.

**IT IS FURTHER ORDERED** that the United States Marshal's office shall transport Taff Viriden, 25008-009, from his current location at Marion U.S. Penitentiary in Marion, Illinois back to Kansas so that he may participate in the evidentiary hearing currently scheduled for January 10, 2011.

**IT IS SO ORDERED** this 2<sup>nd</sup> day of December, 2010.

s/ John W. Lungstrum  
John W. Lungstrum  
United States District Judge