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Motions, Pleadings and Filings

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United States District Court,
D. Maine.

Michael HAMLIN Movant
v.
UNITED STATES OF AMERICA, Respondent

No. Civ.05-11-B-S, CRIM.96-35-B-S.

Jan. 19, 2005.

Michael Roy Hamlin, Maine State Prison, Warren,
ME, Plaintiff, pro se.

*RECOMMENDED DECISION ON 28 U.S.C. §
2255 MOTION*

KRAVCHUK, Magistrate J.

*1 Paragraph 8 of 28 U.S.C. § 2255 provides:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, *made retroactive* to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255 ¶ 8 (emphasis added).

Michael Hamlin has filed a 28 U.S.C. § 2255 motion that is unquestionably governed by 28 U.S.C. § 2255 ¶ 8. In November 2001, I issued a recommended decision on a § 2255 motion filed by Hamlin indicating that Hamlin's motion must be dismissed under § 2255¶ 8 and that Hamlin must first get the requisite certification from the First Circuit Court of Appeals (*see Hamlin v. United*

States, Civ. No. 01-233-B-S, Docket No. 45) and that decision was affirmed by the District Court judge (*see id.* Docket No. 47).

On January 12, 2005, the United States Supreme Court's *United States v. Booker*, 543 U.S. ___, 2005 WL 50108 (Jan. 12, 2005) extended the holding of *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004) to the United States Sentencing Guidelines. Apparently, Hamlin jumped (quickly) to the conclusion that *Booker* entitles him to relief from the sentence this court imposed pursuant to the United States Sentencing Guideline after he pled guilty to two felon-in-possession offenses.

The problem for Hamlin is that Congress has expressly provided in § 2255 ¶ 8(2) that in order for defendants who have completed their first 'complimentary' round of § 2255 review to reap any benefit from a new rule --- such as those announced in *Blakely*, *Booker*, and/or their predecessors (a lineage commencing with *Apprendi v. New Jersey*, 530 U.S. 466 (2000))--the United States Supreme Court must, itself, explicitly make the case retroactive to cases on collateral review. *See Sustache-Rivera v. United States*, 221 F.3d 8, 11 (1st Cir.2000).

The 'merits majority' of *Booker* went out of its way to clarify that its holding on the merits and the remedy of the Sixth Amendment claim was to apply "to all cases on direct review." __ U.S. at __, 2005 WL 50108 at *29 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987): "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."). This statement falls far short of a § 2255 ¶ 8(2) declaration of retroactive application to cases on collateral review. Indeed, I read this passage as limiting the application of the rule to cases in the direct review pipeline especially in view of the fact that the Supreme Court has already concluded that *Ring v. Arizona*, 536 U.S. 584 (2002), a case which applied the principle of *Apprendi* to

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death sentences imposed on the basis of aggravating factors, was not to be applied retroactively to cases once they were final on direct review. See *Schriro v. Summerlin*, ___ U.S. ___, 124 S.Ct. 2519, 2526 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.>").

*2 It is for these reasons that I recommend that the Court DISMISS Hamlin's most recent 28 U.S.C. § 2255 motion because the First Circuit Court of Appeals has not authorized this court to consider Hamlin's application as required by 28 U.S.C. § 2244(b)(3)(A) and § 2255 ¶ 8.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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