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Citation: **2005 U.S. Dist. LEXIS 1094**

*2005 U.S. Dist. LEXIS 1094, **

UNITED STATES OF AMERICA VS. RANDY K. MASSEY, Defendant.

NO. 3-00-CR-0335-R, NO. 3-05-CV-0150-R

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS
DIVISION

2005 U.S. Dist. LEXIS 1094

January 26, 2005, Decided

January 26, 2005, Filed

PRIOR HISTORY: [United States v. Massey, 2002 U.S. Dist. LEXIS 15059 \(N.D. Tex., Aug. 13, 2002\)](#)

DISPOSITION: Recommended Defendant's motion to correct, vacate, or set aside his sentence be dismissed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant, pro se, filed a motion to correct, vacate, or set aside his sentence pursuant to [28 U.S.C.S. § 2255](#). The matter was referred to a magistrate judge (MJ).


OVERVIEW: Defendant pled guilty to uttering a counterfeit security. He sought post-conviction relief for a second time. However, the relevant court of appeals had not issued an order authorizing the district court to consider the successive motion. Defendant had to obtain such an order before another motion for post-conviction relief was filed.

OUTCOME: The MJ recommended that the motion be dismissed without prejudice pending review by a three-judge panel of the court of appeals.

CORE TERMS: sentence, successive, court of appeals, post-conviction, three-judge, vacate

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HN1  The Antiterrorism and Effective Death Penalty Act of 1996 limits the circumstances under which a federal prisoner may file a second or successive motion for post-conviction relief. Pub. L. No. 104-132, 110 Stat. 1214 (1996). A defendant must show that the successive motion is based on: (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 her guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable. [28 U.S.C.S. § 2255](#). This determination must be made by a three-judge panel of the court of appeals before the defendant files her motion in district court. [28 U.S.C.S. §§ 2241, 2255](#). [More Like This Headnote](#)

COUNSEL: [*1] For Randy K Massey (1) also known as Randy K Massey, Defendant: Pro se, Memphis, TN; Jason D Hawkins, Public Defender or Community Defender Appointment, Federal Public Defender, Northern District of Texas, Dallas, TX; Douglas H Parks, CJA Appointment, Law Office of Douglas H Parks, Holly Lake Ranch, TX.

For USA, Plaintiff: Leonard A Senerote, US Attorney's Office, Department of Justice, Dallas, TX.

JUDGES: JEFF KAPLAN, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY: JEFF KAPLAN

OPINION: FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Defendant Randy K. Massey, appearing *pro se*, has filed a motion to correct, vacate, or set aside his sentence pursuant to [28 U.S.C. § 2255](#). For the reasons stated herein, the motion should be dismissed without prejudice pending review by a three-judge panel of the court of appeals.

I.

Defendant pled guilty to uttering a counterfeit security in violation of [18 U.S.C. § 513\(a\)](#). Punishment was assessed at 21 months confinement followed by supervised release for a period of three years. The district court also ordered defendant to make restitution in the amount of \$ 113,903.71. Defendant appealed [*2] his conviction and sentence, but later voluntarily dismissed the appeal. *United States v. Massey*, No. 01-10862 (5th Cir. Dec. 10, 2001). On January 4, 2002, defendant filed a motion to correct, vacate, or set aside his sentence under [28 U.S.C. § 2255](#). The motion was denied on the merits. *United States v. Massey*, 2002 U.S. Dist. Lexis 15059, No. 3-02-CV-0037-R (N.D. Tex. Aug. 12, 2002). n1

----- Footnotes -----

n1 Defendant filed a prior [section 2255](#) motion while his direct appeal was pending. That motion was dismissed without prejudice. *United States v. Massey*, 2001 U.S. Dist. LEXIS 14125, No. 3-01-CV-1192-R (N.D. Tex. Sept. 10, 2001).

----- End Footnotes -----

Defendant now seeks post-conviction relief for a second time. In his sole ground for relief, defendant contends that his sentence was enhanced by factors not alleged in the indictment or determined by a jury as required by [Blakely v. Washington](#), U.S., 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and [United States v. Booker](#), 125 S. Ct. 738, 2005 WL 50108 (U. [*3] S. Jan. 12, 2005). Before addressing this claim, the court must determine whether defendant can file a successive [section 2255](#) motion without prior approval from the court of appeals.

II.

HN1 The Antiterrorism and Effective Death Penalty Act of 1996 limits the circumstances under which a federal prisoner may file a second or successive motion for post-conviction relief. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, Pub.L. 104-132, 110 Stat. 1214(1996). A defendant must show that the successive motion is based on: (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 her 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](#). This determination must be made by a three-judge panel of the court of appeals before defendant files her motion in district court. [28 U.S.C. §§ 2241 & 2255](#).

The Fifth Circuit has not issued an order authorizing the district court to consider [*4] this successive motion. Defendant must obtain such an order before another motion for post-conviction relief is filed.

RECOMMENDATION

Defendant's motion to correct, vacate, or set aside his sentence should be dismissed without prejudice pending review by a three-judge panel of the court of appeals.

DATED: January 26, 2005.

JEFF KAPLAN

UNITED STATES MAGISTRATE JUDGE






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