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Motions, Pleadings and Filings

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United States District Court,
D. Maine.

Jason STEVENS, Movant
v.

UNITED STATES OF AMERICA, Respondent

No. Civ.05-10-B-S, CRIM.97-45-B-S.

Jan. 18, 2005.

Jason T Stevens, FCC/USP K Unit, Coleman, FL,
Plaintiff, pro se.

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

KRAVCHUK, Magistrate J.

*1 Jason Stevens has filed a 28 U.S.C. § 2255 motion challenging his 116-month sentence for being a felon in possession of a firearm. [FN1] I have screened this motion pursuant to the expectation of Rule 4(b) of the Rules Governing § 2255 Cases and I conclude that Stevens is not entitled to the relief he seeks. Therefore, I recommend that the Court DISMISS the motion because it is facially without merit.

FN1. Stevens is also serving a twenty-seven month federal sentence in Criminal No. 00-86-B-S but he makes no mention of that conviction in his current 28 U.S.C. § 2255 motion and identifies only Criminal No. 97-45- B-S in the caption portion of his pleading.

Discussion

Stevens earlier filed a motion under Federal Rule of Criminal Procedure 35 raising a *Blakely* v.

Washington, 542 U.S. ___, 124 S.Ct. 2531 (2004) challenge. After steps were taken to make sure that Stevens wished to proceed pursuant to Rule 35 (as opposed to 28 U.S.C. § 2255 as the United States had assumed in responding thereto) this Court denied Stevens's Rule 35 motion in an endorsed order on the basis that *Blakely* was not retroactive. (Docket No. 48.)

The United States Supreme Court extended the holding of *Blakely* to the United States Sentencing Guidelines, see *United States v. Booker*, 543 U.S. ___, 2005 WL 50108 (Jan. 12, 2005), and Stevens has wasted no time in pursuing relief by dint of this elaboration.

The amended judgment in Stevens's criminal case which reduced his sentence from 140-months to 116-months was entered on May 4, 1999. As Stevens indicates in his present 28 U.S.C. § 2255 motion, he did not take a direct appeal. Accordingly, Stevens's year to file a timely 28 U.S.C. § 2255 motion has long since expired. See 28 U.S.C. § 2255 ¶ 6(1). As a consequence, in view of the type of untimely challenge Stevens tenders, his only hope would be under ¶ 6 (3) of § 2255 which would give Stevens a year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

Assuming that it would be for the District Court in the first instance to make the retroactivity determination under ¶ 6(3), *Ashley v. United States*, 266 F.3d 671, 674 (7th Cir.2001) ("A district judge may determine whether a novel decision of the Supreme Court applies retroactively, and thus whether a collateral attack is timely under § 2244(b)(2)(A) or § 2255 ¶ 6(3)."); see also *Wiegand v. United States*, 380 F.3d 890, 892-93 (6th Cir.2004) ("The district court here should decide retroactivity in the first instance. If the district court finds *Wiegand* filed timely, then it can address the merits of his claim."); *Dodd v. United*

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States, 365 F.3d 1273, 1278 (11th Cir.2004) ("[E]very circuit to consider this issue has held that a court other than the Supreme Court can make the retroactivity decision for purposes of § 2255 [¶ 6](3)."); accord *Murray v. United States*, 2002 WL 982389, *1 n. 2 (D.Ma.2002), I have already concluded, in the context of a timely § 2255 motion, that *Booker* should not be applied retroactively to cases wherein the claim was not raised on direct review. In *Quirion v. United States*, I reasoned:

*2 On the same day that *Blakely* was handed down, the United States Supreme Court concluded that one of *Blakely*'s direct ancestors, *Ring v. Arizona*, 536 U.S. 584 (2002)--which applied the principle of *Apprendi* to 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."). In the wake of *Blakely*, most courts that considered the question have concluded that *Summerlin* answered the retroactivity question in the negative vis-a-vis *Blakely* grounds pressed in timely 28 U.S.C. § 2255 motions. See, e.g., *Burrell v. United States*, 384 F.3d 22, 26 n. 5 (2d Cir.2004) (observing this proposition in affirming the District Court's conclusion that the movant was not entitled to a certificate of appealability on the question of whether *Apprendi* applied retroactively); *Lilly v. United States*, 342 F.Supp.2d 532, 537 (W.D.Va.2004) ("In *Summerlin*, the Court found that *Ring v. Arizona*, 536 U.S. 584 (2002), a case that extended *Apprendi* to aggravating factors in capital cases, was a new procedural rule and was not retroactive. A similar analysis dictates that *Blakely* announced a new procedural rule and is similarly non-retroactive.") (citation omitted); accord *Orchard v. United States*, 332 F. Supp. 23 275 (D.Me.2004); see also *cf. In re Dean*, 375 F.3d 1287, 1290 (11th Cir.2004) ("Because *Blakely*, like *Ring*, is based on an extension of *Apprendi*, *Dean* cannot show that the Supreme Court has made that decision retroactive to cases already final on direct review. Accordingly, *Dean*'s proposed claim fails to satisfy the statutory criteria [for filing a second or successive § 2255 motion].").

The 'merits majority' in *Booker* expressly affirmed the holding of *Apprendi* concluding: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." U.S. at ___, 2005 WL 50108, at *15; see also *Sepulveda v. United States*, 330 F.3d 55, 63 (1st Cir.2003) ("We hold, without serious question, that *Apprendi* prescribes a new rule of criminal procedure, and that *Teague* does not permit inferior federal courts to apply the *Apprendi* rule retroactively to cases on collateral review."). The fact that *Booker* applied *Apprendi* to the United States Sentencing Guidelines, as opposed to a state capital sentencing scheme, would not shift the tectonic plates of the *Summerlin* retroactivity analysis.

2005 U.S. Dist. Lexis 569, *7-10 (D.Me. Jan. 14, 2005).

Conclusion

*3 For the reasons stated above I recommend that the Court DENY Stevens 28 U.S.C. § 2255 relief.

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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