

2005 WL 226221 (D.Me.)

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
D. Maine.
Robert E. SUVEGES, Jr., Movant
v.
UNITED STATES OF AMERICA Respondent
Nos. Civ.05-18-P-C, CRIM.90-49-P-C, CRIM.90-79-P-C.
Jan. 28, 2005.

Robert E Suveges, Jr, FCI Butner, Butner, NC, Plaintiff, pro se.

[Margaret D. McGaughey](#), Office of the U.S. Attorney, District of Maine, Portland, ME, Lead Attorney, Attorney to be Noticed, for USA, Defendant.

RECOMMENDED DECISION ON [28 U.S.C. § 2255](#) MOTION

[KRAVCHUK](#), Magistrate J.

*1 Robert Suveges has filed a motion pursuant to [28 U.S.C. § 2255](#) seeking to set aside his federal sentence. He asserts that two sentencing determinations made by this Court violated his Sixth Amendment right to a jury trial and his attorney was ineffective for not advocating accordingly. Suveges has already filed one [28 U.S.C. § 2255](#) motion which resulted in his sentence being reduced from a 360-month term to a 180-month term. Suveges was spurred into [§ 2255](#) action again by the issuance of [United States v. Booker](#), U.S. , 2005 WL 50108 (Jan. 12, 2005) which held that the Sixth Amendment principles of [Apprendi v. New Jersey](#), 530 U.S. 466 (2000) and [Blakely v. Washington](#), 542 U.S. , 124 S.Ct. 2531 (2004) applied to the United States Sentencing Guidelines. Assuming, without deciding, that I could consider this as Suveges's first [28 U.S.C. § 2255](#) motion in light of his resentencing after his previous [§ 2255](#) motion, he is not entitled to any [§ 2255](#) relief based on *Booker*.

Suveges's oneyear to file a timely [28 U.S.C. § 2255](#) vis-à-vis his resentencing judgment has unquestionably expired. See [28 U.S.C. § 2255 ¶ 6\(1\)](#). Accordingly, with respect to the *Booker*-based challenge Suveges's presents, his only [§ 2255 ¶ 6](#) port in the storm would be subsection (3) which would give Suveges 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."

I have already addressed a similarly postured [§ 2255 Booker](#) claim in *Stevens v. United States*, Civ. No. 05-10-B-S-, 2005 WL 102958, 1 (D.Me. Jan 18, 2005) (concluding that a District Court could make the initial [¶ 6\(3\)](#) retroactivity determination on an untimely first petition). And, as I explained in *Stevens*, in *Quirion v. United States*, I concluded that *Booker* would not apply retroactively to timely-filed [28 U.S.C. § 2255](#) motions:

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].").

*2 Civ. No. 05-06-B-W, [2005 WL 83832](#), *3 (D.Me. Jan. 14, 2005).

Since the issuance of *Quirion* and *Stevens*, the Eleventh Circuit Court of Appeals has issued a decision on a second and successive petition that lends support for my conclusion, *In re Anderson*, ___ F.3d ___, [2005 WL 123923](#), *2-4 (11th Cir Jan. 21, 2005), and District Court Judge Hornby, in this District, denied a certificate of appealability to two [28 U.S.C. § 2255](#) movants in *Gerrish v. United States*, Civ. Nos. 04-153-P-H & 04-154-P-H, [2005 WL 159642](#), *1 (D.Me. Jan. 25, 2005), concluding that *Blakely* and *Booker* are not applicable to cases that were not on direct appeal when they were decided.

The only new twist that Suveges's motion presents is his claim that his attorney was ineffective for not raising the *Booker*-esque Sixth Amendment challenge during his sentencings and on direct appeal. However, in an unpublished decision, the First Circuit Court of Appeals rejected an ineffective assistance argument regarding counsel's failure to raise a *Blakely* challenge to his Sentencing Guideline driven sentence on the ground that such a challenge was foreclosed by circuit precedent. *Campbell v. United States*, No. 02-2378, [2004 WL 1888604](#), *3 (1st Cir. Aug. 25, 2004) (quoting *United States v. Campbell*, 268 F.3d 1, 7, n. 7 (1st Cir.2001)). While the inquiry might be a bit more difficult if Suveges's attorney failed to raise such a challenge in the intermission between *Blakely* and *Booker*, counsel's advocacy in Suveges's case occurred long before the dawn of *Apprendi* and was certainly not ineffective under the then governing law.

Accordingly, I recommend that the Court DENY Suveges's late and latest [28 U.S.C. § 2255](#) motion.

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.

D.Me., 2005.

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- [2:05CV00018](#) (Docket) (Jan. 25, 2005)

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