

2005 WL 159642 (D.Me.)

[Motions, Pleadings and Filings](#)

--- F.Supp.2d ---

Only the Westlaw citation is currently available.

United States District Court,
D. Maine.
Lisa Anne GERRISH, Petitioner
v.
UNITED STATES of America, Respondent
Blaine Lewis GERRISH, Petitioner
v.
UNITED STATES of America, Respondent
No. CIV. 04-153-P-H, CIV. 04-154-P-H.
Jan. 25, 2005.

Background: Defendants sought certificate of appealability (COA) following denial of their motions to vacate, set aside, or correct their drug crimes convictions.

Holding: The District Court, [Hornby](#), J., held that defendants did not make showing for COA on their Sixth Amendment jury trial and counsel claims.

Applications denied.

[1]

[106](#) Courts

[106II](#) Establishment, Organization, and Procedure

[106II\(H\)](#) Effect of Reversal or Overruling

[106k100](#) In General

[106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

Defendants did not make substantial showing of denial of constitutional right under Sixth Amendment jury trial and counsel guarantees to entitle them to certificate of appealability (COA); *Booker*, which applies Sixth Amendment jury trial principles to sentences under Sentencing Guidelines, could not be applied retroactively to their sentences, and counsel was not ineffective in failing to take appeal absent express instruction to do so. [28 U.S.C.A. § 2253](#).

[1]

[110](#) Criminal Law

[110XX](#) Trial

[110XX\(B\)](#) Course and Conduct of Trial in General

[110k641](#) Counsel for Accused

[110k641.13](#) Adequacy of Representation

[110k641.13\(2\)](#) Particular Cases and Problems

[110k641.13\(7\)](#) k. Post-Trial Procedure and Review. [Most Cited Cases](#)

[110](#) Criminal Law

[110XXIV](#) Review

[110XXIV\(F\)](#) Proceedings, Generally

[110k1073](#) k. Certificate of Probable Cause or Reasonable Doubt. [Most Cited Cases](#)

Defendants did not make substantial showing of denial of constitutional right under Sixth Amendment jury trial and counsel guarantees to entitle them to certificate of appealability (COA); *Booker*, which applies Sixth Amendment jury trial principles to sentences under Sentencing Guidelines, could not be applied retroactively to their sentences, and counsel was not ineffective in failing to take appeal absent express instruction to do so. [28 U.S.C.A. § 2253](#).

[2]

🔗 [106](#) Courts

🔗 [106II](#) Establishment, Organization, and Procedure

🔗 [106II\(H\)](#) Effect of Reversal or Overruling

🔗 [106k100](#) In General

🔗 [106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

Booker, which applies Sixth Amendment jury trial principles to sentences under Sentencing Guidelines, applies to cases on direct review at the time it was decided, but not retroactively to cases on collateral review. [U.S.C.A. Const.Amend. 6](#); [28 U.S.C.A. § 2255](#).

[3]

🔗 [110](#) Criminal Law

🔗 [110XX](#) Trial

🔗 [110XX\(B\)](#) Course and Conduct of Trial in General

🔗 [110k641](#) Counsel for Accused

🔗 [110k641.13](#) Adequacy of Representation

🔗 [110k641.13\(2\)](#) Particular Cases and Problems

🔗 [110k641.13\(7\)](#) k. Post-Trial Procedure and Review. [Most Cited Cases](#)

Defense counsel's failure to take appeal after having discussion about costs of appeal with defendants was not deficient performance, as required element of ineffective assistance claim, as counsel would have performed in unreasonable manner only by failing to follow express instructions with respect to appeal.

Lisa Anne Gerrish, Pro Se, Alderson, WV.

[Margaret D. McGaughey](#), [F. Mark Terison](#), Office Of The United States Attorney, District Of Maine, Portland, for United States of America, Respondent.

Blaine Lewis Gerrish, Pro Se, Bradford, PA.

ORDER

[HORNBY](#), District J.

*1 [1] The applications for certificates of appealability are DENIED.

[2] 1. [Blakely v. Washington](#), --- U.S. ---, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and [United States v. Booker](#), Nos. 04-104, 04-105, 2005 WL 50108 (Jan. 12, 2005), are not applicable to cases that were not on direct appeal when they were decided. By its very terms, *Booker* states that it is to apply "to all cases on direct review." --- U.S. ---, at ---, 125 S.Ct. 738, --- L.Ed.2d ---, at ---, 2005 WL 50108, at *29 (2005), with no reference to cases on collateral review. There is no reason to treat *Blakely* any differently. These cases furnish no basis, therefore, to attack the length of the petitioners' sentences or, in Blaine Gerrish's case, [\[FN1\]](#) the amount of the fine. See [Orchard v. United States](#), 332 F.Supp.2d 275, 277 (D.Me.2004) (concluding that *Blakely* does not apply retroactively to cases on collateral review); cf. [Sepulveda v. United States](#), 330 F.3d 55, 63 (1st Cir.2003) (determining that [Apprendi v. New Jersey](#), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the decision underlying *Blakely* and *Booker*, applies only on direct appeal, not on a [section 2255](#) motion); [Schriro v. Summerlin](#), --- U.S. ---, ---, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442 (2004) (holding that [Ring v. Arizona](#), 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which, like *Blakely* and *Booker*, applied and extended the reasoning of *Apprendi*, does not apply retroactively to cases already final on direct review).

[3] 2. There is no basis for the ineffective assistance of counsel claim. As the Magistrate Judge

concluded, according to the petitioners' version there was a discussion with counsel about appeal within the meaning of [Roe v. Flores-Ortega, 528 U.S. 470, 486, 120 S.Ct. 1029, 145 L.Ed.2d 985 \(2000\)](#). The Supreme Court has ruled that in such a context, "Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." [Id. at 478](#). Here, the petitioners allege that upon the initial request to take an appeal, there was a discussion about cost and that following that discussion, no appeal was taken. That is not enough to meet the standard of *Flores-Ortega*. Moreover, the petitioners have failed to submit the allegations under penalty of perjury as required by Rule 2(b)(5) of the Rules Governing Section 2255 Proceedings, 28 U.S.C. § 2255. See [United States v. LaBonte, 70 F.3d 1396, 1413 \(1st Cir.1995\)](#) ("A habeas application must rest on a foundation of factual allegations presented under oath either in a verified petition or a supporting affidavit.... Facts alluded to in an unsworn memorandum will not suffice.") (citations omitted), *overruled on other grounds*, [520 U.S. 751, 117 S.Ct. 1673, 137 L.Ed.2d 1001 \(1997\)](#).

SO ORDERED.

[FN1](#). The petitioners, husband and wife, have filed virtually identical motions. The only significant difference is that Blaine Gerrish also attacks his fine. (No fine was imposed on Lisa Gerrish.)

D.Me., 2005.
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- [2004 WL 2248521](#) (Trial Pleading) Defendants' Answer and Affirmative Defenses to Plaintiff's Complaint and Demand for Jury Trial (Sep. 02, 2004)
- [1:04CV00154](#) (Docket) (Sep. 02, 2004)

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