IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

GORDON O. HOFF, SR.,

Defendant.

ORDER

96-CR-0010-C

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Defendant Gordon O. Hoff, Sr. has filed a motion pursuant to Fed. R. Civ. P. 60(b)(5) and (6) to set aside the January 31, 2000 judgment denying his motion to vacate his conviction and sentence under 28 U.S.C. § 2255. JDefendant raised a number of claims in that motion, but in his present one he seems to be arguing only that the court erred in denying one of those claims: that he had been denied the effective assistance of counsel at trial. Citing the Supreme Court's decision in Massaro v. United States, 538 U.S. 500 (2003), in which the Court held that a defendant may raise an ineffective-assistance-of-counsel claim in a collateral proceeding even if he could have raised the claim on direct appeal, defendant argues that this court should reopen his § 2255 motion to allow his ineffective assistance claim to go forward. Defendant's argument is ingenious but futile.

It is true that Rule 60(b) can be read to allow a court to reopen a judgment on the basis of a change in the law occurring after the judgment was entered and affirmed on appeal. LSLJ Partnership v. Frito-Lay, Inc., 920 F.2d 476, 478 (7th Cir. 1990). Doing so in this case, however, would run up against an impediment that does not exist in non-prisoner civil actions. Defendant's motion is governed by the Antiterrorism and Effective Death Penalty Act, which prohibits the bringing of successive motions attacking the same sentence, however they are labeled. Reopening defendant's 1999 motion to allow him to re-argue the alleged ineffectiveness of his counsel in his 1997 trial would be the equivalent of allowing him to bring a successive motion, in derogation of the Act.

Even if defendant's motion would not be an end run around § 2255's prohibitions on successive motions, his Rule 60(b) motion would not succeed. First, in addressing defendant's original § 2255 motion, I denied defendant's challenge to the effectiveness of his representation in large part because he did not identify any particular actions or omissions on counsel's part that might have demonstrated that he had provided substandard representation. My evaluation of the adequacy of defendant's pleading would not change even if I were to allow defendant to reopen his motion.

Second, defendant is alleging that the Massaro case made him aware of the error in this court's handling of his original § 2255 motion. He does not explain why it took him almost two years from the time the decision was issued on April 23, 2003 to bring it to this

court's attention. Rule 60(b) requires that motions made under this rule be made "within a reasonable time." Waiting as long as defendant did is not reasonable and would weigh against reopening the motion.

ORDER

IT IS ORDERED that defendant Gordon O. Hoff Sr.'s Rule 60(b) motion is DISMISSED on the ground that it is a motion attacking defendant's sentence and must be brought pursuant to 28 U.S.C. § 2255. Because it is a successive motion, this court lacks the authority to entertain it until defendant has obtained certification of the motion from a panel of the Court of Appeals for the Seventh Circuit.

Entered this 6th day of April, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge