

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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PAUL E. NEELY,

Petitioner,

v.

ORDER  
05-C-315-S  
01-CR-45-S-01

UNITED STATES OF AMERICA,

Respondent.

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Petitioner Paul E. Neely moves to vacate his sentence pursuant to 28 U.S.C. §2255. The United States responded on June 27, 2005. Petitioner's reply was to be filed on July 29, 2005 and has not been filed to date.

FACTS

On April 5, 2001 a grand jury sitting in the Western District of Wisconsin returned a two-count indictment charging petitioner with possession of a firearm by a controlled substance user and simple possession of cocaine base. On July 18, 2001 petitioner pled guilty to count two of the indictment. He was sentenced on September 27, 2001 to 125 months in prison.

Petitioner appealed his sentence. On October 16, 2002 the United States Court of Appeals for the Seventh Circuit vacated Neely's sentence and remanded for resentencing. On January 3, 2003 petitioner was resentenced to 125 months in prison. A judgment of

conviction was entered on January 6, 2003. Since petitioner did not appeal this judgment, it became final on January 16, 2003.

On May 31, 2005 petitioner filed this motion under 28 U.S.C. § 2255.

#### MEMORANDUM

The statute, 28 U.S.C. § 2555 provides as follows:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of -

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) 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; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered though the exercise of due diligence.

Since petitioner's conviction became final on January 16, 2003 he had until January 16, 2004 to file his motion but he did not file it until May 31, 2005.

In his petition petitioner says he did not appeal because his attorney failed to file the appeal as requested. He could have discovered this fact with due diligence prior to the expiration of

the one year statute of limitations. Accordingly, petitioner's petition is untimely.

Petitioner also argues that the Court's decision in United States v. Booker, 125 S.Ct. 738 (2005) should be applied retroactively to him. This decision does not apply retroactively to criminal cases that became final before its release on January 12, 2005. See McReynolds, et al v. United States, 397 F.3d 479 (7<sup>th</sup> Cir. 2005). Accordingly, Booker does not apply to petitioner's case.

Accordingly, petitioner's motion under 28 U.S.C. § 2255 is untimely and will be denied.

Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his motion must be denied as untimely. See Newlin v. Helman, 123 F.3d 429, 433 (7<sup>th</sup> Cir. 1997).

ORDER

IT IS ORDERED that petitioner's motion under 28 U.S.C. § 2255 is DENIED as untimely.

Entered this 9<sup>th</sup> day of August 2005.

BY THE COURT:

S/

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JOHN C. SHABAZ  
District Judge