

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.  
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ORDER

04-C-527-C  
01-CR-0071-C-02

Defendant Stacey Miller has filed a “Petition for a Certificate of Appealability.” He has not filed a notice of appeal from the judgment entered in this case on December 30, 2004, although the time for filing such a notice expired on March 1, 2005, the date on which he filed this petition. Despite the lack of a notice of appeal, I will decide the motion for a certificate of appealability, which defendant must have if he is to appeal the denial of his motion for post conviction relief brought pursuant to 28 U.S.C. § 2255. See 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Such a certificate shall issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” § 2253(c)(2).

Before issuing a certificate of appealability, a district court must find that the issues

the applicant wishes to raise are ones that “are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.” Barefoot v. Estelle, 463 U.S 880, 893 n.4 (1983). In his request for a certificate of appealability, defendant has identified two issues he wants to appeal. I am prepared to issue a certificate of appealability with respect to one of the two issues.

First, defendant contends that trial counsel gave him ineffective assistance. This contention relates to claims numbered 26-29 in his motion. In deciding the motion as to those claims, I found that petitioner had failed to support his allegations with specific details about his counsel’s deficiencies. Although I believe that defendant failed to show his entitlement to relief under § 2255 because of his counsel’s alleged constitutional deficiencies, I cannot say that a reasonable judge would not make a different decision. Therefore, I will issue a certificate of appealability as to the claims numbered 26-29 in defendant’s motion.

Second, defendant contends that the court erred in denying his claim that he was sentenced unconstitutionally by relying on facts not found by a jury beyond a reasonable doubt in violation of Blakely v. Washington, 124 S. Ct. 2531 (2004). In an order dated August 5, 2004, I told defendant that it was premature to raise the claim because the United States Supreme Court had not decided whether the holding in Blakely applied to federal cases. For this reason, I did not order the government to respond to this claim. It was

unnecessary to discuss the claim again in the December 29 order because the Supreme Court had not yet decided Booker when I denied petitioner's motion for post conviction relief. Defendant is not entitled to a certificate of appealability on this issue. He has no basis on which to raise a claim under Blakely or Booker. On January 12, 2005, the Supreme Court rendered its opinion in United States v. Booker, 04-104 (U.S. Jan. 12, 2005). It held that defendants in federal criminal cases have a right to a jury determination of any disputed factual subject that increases the maximum punishment. The Court held also that the Sentencing Guidelines are unconstitutional to the extent they require judges to base sentences on facts that are not the product of factfinding by a jury but that the guidelines are not unconstitutional if judges use them for advisory purposes. The Court did not address the retroactivity of its decision on cases on collateral review, leaving it uncertain whether the right has retroactive application. Unfortunately for defendant, on February 2, 2005, the Court of Appeals for the Seventh Circuit resolved the retroactivity uncertainty, at least for motions filed in this circuit asserting the right newly recognized in Booker. In McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005), the court held that the rights recognized in Booker do not apply retroactively on collateral review. The court of appeals characterized the decision as a procedural one and noted that, as a general rule, procedural decisions do not apply retroactively unless they establish one of those rare "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."

Id. at 4 (quoting Schriro v. Summerlin, 124 S. Ct. 2519 (2004)). The court concluded that Booker did not establish a “watershed rule”; “the choice between judges and juries as factfinders does not make such a fundamental difference.” Id. The court was persuaded that the Booker decision would not change the process of sentencing in any significant way: defendants would continue to be sentenced as they have been, with the only difference being “the degree of flexibility judges would enjoy in applying the guideline system.” Id. Now that the court of appeals has decided that Booker has no retroactive application, defendant cannot succeed in showing that he is entitled to a modification of his sentence based upon that decision. Because this issue is not debatable among reasonable jurists, a court could not resolve the issues differently and the question is not adequate to deserve encouragement to proceed further, I decline to issue a certificate of appealability.

#### ORDER

IT IS ORDERED that defendant Stacey Miller’s request for a certificate of appealability is GRANTED as to his ineffective assistance of counsel claim and DENIED as

to his claim premised on Blakely v. Washington.

Entered this 8th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge