

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

PATRICK W. BARRETT,

Defendant.

ORDER

04-C-0855-C

02-CR-0101-C-01

Defendant Patrick W. Barrett has not filed an affidavit supplementing the one he filed on December 9, 2004, although he asked for and was granted until January 10, 2005, in which to do so. As I advised defendant in the order granting him additional time, I will proceed to consider the original affidavit that he filed.

Defendant is aware that if he is to pursue his motion for post-conviction relief pursuant to 28 U.S.C. § 2255, he must show that he could not have known earlier than November 12, 2003 (one year before he filed his motion) that his court-appointed lawyer had not taken an appeal from his conviction. On that question, defendant has explained that he was sentenced in this court on February 7, 2003, that he was either in the county jail

or in transit status from then until April 2003, when he arrived at the United States Penitentiary at Leavenworth, where he says that it took him two weeks to contact counsel. On May 18, the penitentiary was locked down and remained that way until June 18, when defendant called his family and counsel and was told "it's being taken care of." On November 18, 2003, defendant went into administrative segregation for five months. In June 2004, he became aware of the Supreme Court's opinion in Blakely v. Washington, 124 S. Ct. 2531 (2004). Sometime after that, defendant's family checked with this court and learned that no appeal had ever been filed on his behalf.

This affidavit falls short of establishing that defendant exercised due diligence to learn whether an appeal had been filed on his behalf unless defendant has evidence that his court-appointed lawyer affirmatively assured him or a member of his family that the appeal had been filed. The averments in defendant's December affidavit do not make it explicit that counsel made any such statement to him or to his family. I will give defendant one last chance to make a showing that he could not have known earlier than November 12, 2003, that no appeal was filed on his behalf.

ORDER

IT IS ORDERED that defendant Patrick W. Barrett has until March 1, 2005, in which to file an affidavit setting out explicitly when he or his family members communicated

with his court-appointed counsel, whether it was in person or by telephone or whether it was through written correspondence, and exactly what counsel said about defendant's appeal. If defendant fails to file such an affidavit, his motion for post-conviction relief will be denied.

Entered this 7th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge