

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

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JUAN PABLO PADILLA,

Petitioner,

v.

ORDER  
05-C-492-S  
04-CR-42-S-01

UNITED STATES OF AMERICA,

Respondent.

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Petitioner moved to vacate his sentence under 28 U.S.C. § 2255. He filed an affidavit stating that he told his attorney to appeal his criminal conviction but the attorney failed to file his appeal. An evidentiary hearing was held on November 29, 2005. Defendant appeared in person and by Thomas Wilmouth, Federal Defender Service of Wisconsin, Inc. The government appeared by Assistant United States Attorney Laura A. Przybylinski Finn.

After hearing testimony from Jess Martinez, Jr., who had represented defendant at sentencing the Court determined that defendant had unequivocally told him not to file a notice of appeal. Petitioner's claim that he was denied effective assistance of counsel because his counsel failed to file a notice of appeal as requested is without legal merit.

In his motion under 28 U.S.C. § 2255 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 (7th Cir. 2005). Accordingly, Booker does not apply to petitioner's case.

Petitioner's motion under 28 U.S.C. § 2255 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 dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7<sup>th</sup> Cir. 1997).

ORDER

IT IS ORDERED that petitioner's motion to vacate his sentence under 28 U.S.C. 2255 is DENIED.

Entered this 29<sup>th</sup> day of November, 2005.

BY THE COURT:

s/

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JOHN C. SHABAZ  
District Judge