IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

ORDER

Plaintiff,

06-C-552-C

05-CR-183-C-01

v.

SANTOS LANZA,

Defendant.

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On September 29, 2006, defendant Santos Lanza filed in this closed criminal case a document titled "Motion to Have Sentence Reduction on a [sic] Pursuant to [28] U.S.C. § 2241 and [28] U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody" (Dkt. #41). For some unexplained reason, defendant filed an identical copy of the September 29 document on October 23, 2006. This duplicate copy of defendant's first submission was docketed as a second motion pursuant to 28 U.S.C. § 2255 to vacate defendant's sentence (Dkt. #42). Because defendant's second submission is merely a duplication of his first submission, I am asking the clerk of court to correct docket entry #42 to show that it is simply a duplicate of Dkt. #41. Nevertheless, given the confusing title to

defendant's submission and the mix of issues defendant raises in it, I must determine at the outset how to construe the submission.

In defendant's submissions, he mentioned appeal in several places. However, I do not understand defendant's filing to be intended as a direct appeal from his conviction, for two reasons. First, defendant does not identify his submission as a notice of appeal, perhaps because he understands that it is well beyond the time for filing a notice of appeal in his case. Fed. R. App. P. 4(b)(1)(A) requires that a notice of appeal from a criminal judgment of conviction be filed within 10 days of the date of entry of the judgment. In this case, judgment was entered on April 21, 2006, six months before defendant's submission was even signed. Second, defendant has included with his submission several proposed orders for my signature, suggesting that he wants this court time and not the court of appeals to consider his arguments at this time.

That leaves as possible options a motion to vacate defendant's sentence brought under 28 U.S.C. § 2255 or a challenge to the legality of defendant's custody brought under 28 U.S.C. § 2241. The title of defendant's submission refers both to a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence, and to a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Moreover, the submission contains two distinct parts. In the first part, defendant challenges the validity of his sentence by asserting that I miscalculated the applicable sentencing range for his offense under the

federal sentencing guidelines and that his Sixth Amendment rights were violated when I consulted the guidelines. These arguments are properly raised in a § 2255 motion. In the second portion of his submission, however, defendant asserts that the Bureau of Prisons is improperly calculating the good time credit he receives. Challenges to the Bureau of Prisons' calculation of good time credits are appropriately raised in a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241.

Despite the fact that defendant has combined in one document arguments appropriately made under both § 2255 and § 2241, I cannot consider defendant's claim under § 2241 in the context of his criminal case. Petitions for writs of habeas corpus are civil actions that must be filed in an action separate from a defendant's criminal case. In addition, habeas corpus petitioners are required either to seek leave to proceed in forma pauperis or pay a $5 filing fee. If a prisoner wants to proceed in forma pauperis, he must submit a prison trust fund account statement for the six-month period immediately preceding the filing of his habeas corpus action so that a determination can be made whether he qualifies for indigent status. Because defendant's claim under § 2241 is not properly raised in his criminal case and because he has not paid the fee for filing a separate action or submitted a trust fund account statement and a request for leave to proceed in forma pauperis, I will give no consideration to his argument that the Bureau of Prisons is improperly calculating his good time. Defendant is free to raise that claim in a separate

action, although I suggest that before he files such a case, he read White v. Scibana, 390 F.3d 997 (7th Cir. 2004), which governs his § 2241 claim.

I turn then to that portion of defendant's submission that can be construed as a § 2255 motion and I so construe it.

BACKGROUND

Defendant Santos Lanza was charged along with Cortez Cruz Laureano with three counts of selling, distributing or dispensing cocaine. On February 8, 2006, defendant Lanza pleaded guilty to one count. In defendant's presentence investigation report, the United States Probation office calculated defendant's offense level as 23 and his criminal history as category II. Although he had an opportunity to object to this calculation, defendant did not do so. The sentencing guidelines suggested a sentence of 51 to 63 months' imprisonment for persons with defendant's offense level and criminal history category. At defendant's sentencing on April 19, 2006, I accepted the parties' plea agreement and noted that in determining defendant's sentence, I was taking into consideration "the advisory sentencing guidelines" and the statutory purposes of sentencing set out in 18 U.S.C. § 3553(a). I concluded that "a sentence at the bottom of the advisory guideline imprisonment range was reasonable, necessary and sufficient to hold defendant accountable for his serious conduct and to protect the community from further criminality on his part." Defendant received a

sentence of 51 months' imprisonment and three years' supervised release. He did not take an appeal from his sentence.

OPINION

A § 2255 motion is not intended to be a substitute for appeal. Daniels v. United States, 26 F.3d 706, 711 (7th Cir. 1994). A defendant who does not appeal cannot pursue a post conviction motion under § 2255 unless he can show both cause for his failure to raise his claims on direct appeal and actual prejudice from his failure to appeal. Bousley v. United States, 523 U.S. 614, 622 (1998). Lack of knowledge of grounds for appeal does not constitute cause, except in the rare situation in which the Supreme Court recognizes a new right after the time for appeal had passed and makes it retroactive to cases that have become final before the right was recognized. "Cause" can be shown if a defendant asks his lawyer to take an appeal for him and the lawyer refuses or forgets to do so or in other situations in which a defendant is unable to appeal through no fault of his own.

Defendant does not suggest that he was unaware he could appeal his sentence. In light of my practice to instruct defendants carefully about their appeal rights, including their right to counsel on appeal at government expense, he would be hard pressed to do so. Nor does defendant argue that he asked his lawyer to take an appeal for him and that the lawyer refused or forgot to do so. Instead, I assume defendant is arguing that he did not know he

had any grounds for an appeal.

Relying on what appears to be a hodge-podge of arguments widely distributed by predatory inmates to unwitting prisoners throughout the federal prisons in this country, defendant asserts that under United States v. Booker, 125 S. Ct. 738 (2005), only a jury was permitted to decide where in the guidelines he was to be sentenced. His argument on this point is unavailing. Booker was decided before defendant was sentenced. Therefore, he cannot rely on that case to argue that the Supreme Court recognized a new right after the time for his appeal had passed. Even if Booker had been decided after the time for filing an appeal from defendant's sentence had run, defendant cannot show that he was prejudiced by not being able to raise his argument on direct appeal. He is wrong in thinking that only a jury can decide where in the guidelines he could be sentenced. Even under Booker, a court is free to decide where in the guideline range it will sentence; it is forbidden only from making factual findings that drive the calculation of the guideline range, such as quantities of drugs or role in the offense, and then only if it is applying the guidelines as if they are mandatory. Booker holds that so long as the court treats the guidelines as advisory and not mandatory, it can determine disputed issues that increase the guideline range without violating the United States Constitution. In defendant's case, I noted explicitly at sentencing that the guidelines were advisory and that I was sentencing defendant to a sentence at the bottom of the range that the parties had agreed was appropriate. Although

defendant contends now that the sentencing range was calculated inappropriately, he suggests no reason why he believes his criminal history category and offense level should have been lower than they were.

Because defendant has not shown cause for his failure to raise his § 2255 arguments on direct appeal or prejudice from his inability to do so, he is barred from raising them now. Ballinger v. United States, 379 F.3d 427, 429 (7th Cir. 2004) (defendant who "could have raised [an] argument if he litigated a direct appeal . . . is barred from raising it for the first time in a § 2255 motion"). Consequently, defendant's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 will be denied.

ORDER

IT IS ORDERED that defendant's "Motion to Have Sentence Reduction on a [sic] Pursuant to [28] U.S.C. § 2241 and [28] U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody" (Dkt. #41) is construed as a motion pursuant to 28 U.S.C. § 2255 and the motion is HEREBY DENIED.

Further, IT IS REQUESTED that the clerk of court modify docket entry #42 to

reflect that the October 23, 2006 submission is a duplicate copy of Dkt. #41.

Entered this 27th day of November, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge