

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JARRELL A. MURRAY,

Defendant.

ORDER

08-cr-87-bbc

Defendant Jarrell A. Murray has filed a motion for the appointment of counsel to represent him in taking an appeal from his sentence in light of the Supreme Court's recent opinion in Rosemond v. United States, 528 U.S. — (Mar. 5, 2014). The motion will be denied because this court lacks jurisdiction to consider it.

Defendant wants to appeal his 2009 conviction for armed bank robbery and thinks that he can do so under Rosemond. However, in that case, the defendant was charged under 18 U.S.C. § 924(c) with using or carrying a gun in connection with a drug trafficking crime or, in the alternative, with aiding and abetting that offense under 18 U.S.C. § 2. The question raised in Rosemond's case was whether the court had given the proper instruction to the jury with regard to aiding and abetting. The Court held that the federal aiding and abetting statute has two components and that a person is guilty under the statute only if he "(1) takes an affirmative act in furtherance of the underlying offense (2) with the intent to

facilitate that offense's commission." United States v. Rosemond, slip op at 5-6.

Rosemond has no application to defendant. Although defendant was charged with knowingly using, carrying and brandishing a semi-automatic pistol with an extended magazine during a bank robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), he was not charged with aiding and abetting. As a result, Rosemond gives him no reason to argue that the jury instructions in his case were improper. Even if Rosemond did apply to defendant, this court would have no jurisdiction to consider such a claim (or the appointment of counsel) because defendant filed a motion for post conviction relief, in 2010, which was denied. He cannot proceed on a second motion unless and until he obtains permission from a panel of the Court of Appeals for the Seventh Circuit to file a successive petition.

Although it is probably unnecessary to consider a certificate of appealability in a case in which the court lacks jurisdiction to take up defendant's request for appointment of counsel, I will err on the safe side and address the availability of such a certificate.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). In this

case, defendant has not made the necessary showing, so no certificate will issue. Petitioner is free to seek a certificate of appealability from the court of appeals under Fed. R. App. P. 22, but that court will not consider his request unless he first files a notice of appeal in this court and pays the filing fee for the appeal or obtains leave to proceed in forma pauperis.

ORDER

IT IS ORDERED that defendant Jarrell A. Murray's request for appointment of counsel to help him challenge his conviction in case no. 08-cr-87-bbc is DENIED for lack of jurisdiction. No certificate of appealability shall issue. Defendant may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 2d day of September, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge