IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

ORDER

Plaintiff,

92-CR-0106-C-01

v.

JOHN M. HAMILTON

Defendant.

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Defendant John M. Hamilton has filed a motion to reduce his sentence pursuant to 28 U.S.C. § 2255. Citing Blakely v. Washington, 124 S. Ct. 2531 (2004), he contends that his sentence is illegal because it was imposed in violation of his Sixth Amendment right to have a jury find beyond a reasonable doubt any fact that is used to increase his sentence.

The first question is whether defendant's motion is timely. Defendant's sentence became final 90 days after the court of appeals denied his appeal from his conviction and sentence on April 13, 1994. At that time, no deadline applied to the filing of a § 2255 motion. In 1996, however, Congress passed the Antiterrorism and Effective Death Penalty Act, which amended § 2255 to add a one-year deadline for the filing of § 2255 motions.

Because the one-year deadline was new and previously convicted defendants had had no notice that it would apply to their post-conviction motions, they were allowed one year from the effective date of the AEDPA (April 24, 1996) in which to file post-conviction motions. Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996), rev'd on other grounds, 521 U.S. 320 (1997) ("Courts treat a reduction in the statute of limitations as a rule for new cases only.") (citing Landgraf v. USI Film Products, 511 U.S. 244, 275 n.29 (1994)). Defendant filed his motion on August 6, 2004, well after either of the two deadlines would have run. His motion is not timely unless he can bring it under one of the exceptions to the usual one-year statute of limitations contained in § 2255.

Section 2255 sets out four statutes of limitations. The limitations period starts to run from the date on which the judgment of conviction becomes final *or* from the date on which an impediment to making a motion is removed (and the impediment was the result of government action in violation of the Constitution or laws of the United States) *or* from the date on which the facts supporting the claims could have been discovered through the exercise of due diligence *or* from the date "on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." This last exception is the only one that has potential application to defendant's sentence.

The possibility exists that the Supreme Court will decide that the lower courts have

been acting unconstitutionally in basing sentencing determinations on facts that were not established by a jury finding using the beyond-a-reasonable-doubt standard of proof. In Blakely, 124 S. Ct. 2531, the Court ruled that the Washington state courts could not constitutionally rely on judicial findings to impose a sentence above the "standard range" set forth in the statute. In United States v. Booker, 375 F.3d 508 (7th Cir. 2004), the court of appeals held that the ruling in Blakely rendered the federal sentencing guidelines unconstitutional. The Supreme Court has agreed to hear the government's appeal from the Booker decision in October.

At the present time, it is questionable whether it could be said that the Supreme Court has recognized a right not to be sentenced in accordance with the sentencing guidelines when the sentence falls within the statutory maximums. Although the majority of the panel that decided Booker thought that such a holding was implicit in Blakely, the dissenting judge did not and neither did the Court of Appeals for the Fifth Circuit. See United States v. Pineiro, 2004 WL 1543170 (July 12, 2004). Certainly, no court has held that if the Supreme Court has recognized such a right, the right applies retroactively to cases on collateral review.

Defendant's motion is premature. In these circumstances, the issue is whether it should be denied without prejudice, permitted but stayed or denied outright.

On first consideration, it appears that defendant would not lose any rights if his

motion were denied without prejudice. However, two matters give me pause. This circuit has ruled that the time for filing a first petition grounded on a newly recognized right starts to run from the date on which the new right has been made retroactively applicable to cases on collateral review. Ashley v. United States, 266 F.3d 671 (7th Cir. 2001). (In the same case, it held also that the retroactivity decision may be made by a district court or court of appeals.) However, other circuits have held that the filing time starts running on the day that the Supreme Court initially recognizes the new right. Dodd v. United States, 365 F.3d 1273, 1277 (11th Cir. 2004); United States v. Lopez, 248 F.3d 427, 432-33 (5th Cir. 2001); Nelson v. United States, 184 F.3d 953, 954 (8th Cir. 1999) (dicta); Triestman v. United States, 124 F.3d 361, 371 n.13 (2d Cir. 1997) (dicta). As unlikely as it is, it is not beyond the realm of possibility that the Supreme Court would rule that Blakely applies to the sentencing guidelines, that this holding was obvious in the Blakely decision *and* that ¶ 6 of § 2255 should be read as holding that the filing time begins to run on the day that the Supreme Court recognizes a new right, not on the day that the right is made retroactively applicable to cases on collateral review. If that were to happen, any defendant who had not filed within one year of the Blakely decision would be barred from obtaining the benefit of the decision.

The other factor is more likely and also more problematic. Now that defendant has filed his § 2255 motion with the court, I do not think I am free to ignore it or to treat it as

anything other than the § 2255 motion it is intended to be. Thus, it becomes defendant's first filed § 2255 motion. If I deny it outright as premature, it is possible that the next motion that defendant files will have to be considered a second petition, subject to more onerous requirements under § 2255. To avoid this obvious prejudice to defendant, I will hold his present motion in abeyance, pending a decision on Booker. If in that case, the Supreme Court holds that Blakely does not apply to the sentencing guidelines, I will deny defendant's motion. If the Supreme Court reaches the opposite conclusion, I will allow the parties to brief the question of retroactivity at that time, together with any other issues that might bear on defendant's motion.

ORDER

IT IS ORDERED that defendant John M. Hamilton's motion for reduction of his sentence pursuant to 28 U.S.C. § 2255 is held in abeyance until after the Supreme Court issues

its decision in United States v. Booker, No. 04-104.

Entered this 17th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge