

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ALBERT GRIEBE, JR.

Defendant.  
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ORDER

05-C-0484-C

94-CR-0036-C

Defendant Albert Griebel, Jr., has filed a motion for vacation of his sentence pursuant to 28 U.S.C. § 2255. Defendant contends that he was sentenced illegally because the court made findings of fact concerning a drug violation and then used those facts to enhance his sentence under the sentencing guidelines in the mistaken belief that the guidelines were mandatory. Defendant argues that because the court considered facts that had not been presented to a jury, his sentence is illegal under United States v. Booker, 125 S. Ct. 738 (2005), in which the Supreme Court decided that the Constitution does not permit the use of mandatory sentencing guidelines in federal court to the extent that their application depends on facts that a jury has not determined.

Defendant's motion faces a number of hurdles, the first one of which is dispositive. Defendant has previously filed two motions for postconviction relief, one in 1995 and one in 1997. This court has no authority to entertain a second or successive motion unless defendant has obtained certification from a panel of the Court of Appeals for the Seventh Circuit. 28 U.S.C. § 2255 ¶8. Defendant has not shown that he has received such certification. Therefore, his motion must be dismissed without consideration of the untimeliness of the motion, the merits of the claim or defendant's right to bring a postconviction motion after he gave up his opportunity to appeal and has not shown cause and prejudice for his failure to appeal.

If defendant contemplates applying to the court of appeals for certification, he should know that any such application would be futile if it is based upon a Booker claim. When I sentenced defendant, I did not take into consideration any facts other than the crime to which he pleaded guilty, which was conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. § 846. I did not enhance the crime for any reason such as weight of drugs, role in the offense, use of a weapon, etc. His sentence does not implicate the holding in Booker.

#### ORDER

IT IS ORDERED that defendant Albert Griebe, Jr.'s motion for vacation of his

sentence pursuant to 28 U.S.C. § 2255 is DISMISSED because this court lacks authority to hear the motion in the absence of certification by a panel of the Court of Appeals for the Seventh Circuit.

Entered this 12th day of August, 2005.

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