

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

XAVIER McCLINTON,

Defendant.

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ORDER

05-C-0049-C  
95-CR-087-C-01

Defendant Xavier McClinton has filed an application for a certificate of appealability Pursuant to Fed. R. App. P. 22(b). He has not filed a notice of appeal from the judgment entered on February 10, 2005, but I will decide the motion for a certificate of appealability in the event he does file such a notice. Defendant must have such a certificate if he is to appeal the denial of his motion for post conviction relief brought pursuant to 28 U.S.C. § 2255. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Such a certificate shall issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” § 2253(c)(2).

Before issuing a certificate of appealability, a district court must find that the issues the applicant wishes to raise are ones that “are debatable among jurists of reason; that a

court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.” Barefoot v. Estelle, 463 U.S 880, 893 n.4 (1983).

Defendant has advised the court that he is appealing this court’s conclusion that McReynolds v. United States, 397 F. 3d 479 (7th Cir. 2005), forecloses his claim that under United States v. Booker, 125 S. Ct. 738 (2005), he was sentenced unconstitutionally on the basis of facts not found by a jury beyond a reasonable doubt. However, the question defendant contends is debatable among reasonable jurists is whether the court of appeals erred in relying on Schriro v. Summerlin, 124 S. Ct. 2519 (2004), in deciding in McReynolds that the Booker decision is not retroactive. He does not contend that this court erred in holding that McReynolds governs the question of retroactivity and makes his § 2255 motion untimely.

I assume that defendant wants to preserve his rights if the Supreme Court should agree with him that Booker is retroactive. I cannot say that the question he is raising is not debatable among reasonable jurists (although it may not be debatable in this circuit), is not one that a court could resolve differently and is not adequate to deserve encouragement to proceed further. Therefore, I will issue a certificate of appealability.

ORDER

IT IS ORDERED that defendant Xavier McClinton's request for a certificate of appealability is GRANTED.

Entered this 26th day of April, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge