IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

ORDER

Plaintiff,

05-C-209-C
99-CR-0007-C

v.

CORIN J. CRAMER,

Defendant.

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Defendant Corin J. Cramer has filed a notice of appeal and a motion and brief in support of a request for a certificate of appealability from the denial of his motion brought pursuant to 28 U.S.C. § 2255. He has not paid the $255 fee for filing his notice of appeal which is required if he is to take an appeal from the denial of a § 2255 motion. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Therefore, I construe defendant's notice as including a request for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915.

According to 28 U.S.C. § 1915(a), a defendant who is found eligible for court-appointed counsel in the district court proceedings may proceed on appeal in forma pauperis without further authorization "unless the district court shall certify that the appeal is not

taken in good faith or shall find that the party is otherwise not entitled so to proceed. . . ." Defendant had retained counsel during his criminal proceedings but then had court-appointed counsel during revocation of his supervised release proceedings. Therefore, he can proceed on appeal unless I find that his appeal is taken in bad faith. However, the standard for determining whether an appeal is taken in bad faith is less demanding than the standard for deciding whether to issue a certificate of appealability. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). A certificate of appealability 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).

Starting with defendant's request for a certificate of appealability, I conclude that he does not qualify for such a certificate. Defendant contends that the court erred in denying his claim that he was sentenced unconstitutionally by relying on facts not found by a jury beyond a reasonable doubt, in violation of Blakely v. Washington, 124 S. Ct. 2531 (2004). Defendant is not entitled to a certificate of appealability on this issue. He has no basis on which to raise a claim under Blakely or Booker. It is true that when the Supreme Court decided United States v. Booker, 125 S. Ct. 738 (2005), it held that defendants in federal

criminal cases have a right to a jury determination of any disputed factual subject that increases their maximum punishment. The Court held also that the Sentencing Guidelines are unconstitutional to the extent they require judges to base sentences on facts that are not the product of factfinding by a jury. However, the Court did not address the retroactivity of its decision on cases on collateral review, leaving it uncertain whether the right has retroactive application. Unfortunately for defendant, on February 2, 2005, the Court of Appeals for the Seventh Circuit resolved the retroactivity uncertainty, at least for motions filed in this circuit asserting the right newly recognized in Booker. In McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005), the court held that the right does not apply retroactively to cases on collateral review. The court of appeals characterized the decision as a procedural one and noted that, as a general rule, procedural decisions do not apply retroactively unless they establish one of those rare "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" Id. at 4 (quoting Schriro v. Summerlin, 124 S. Ct. 2519 (2004)). The court concluded that Booker did not establish a "watershed rule"; "the choice between judges and juries as factfinders does not make such a fundamental difference." Id. The court was persuaded that the Booker decision would not change the process of sentencing in any significant way: defendants would continue to be sentenced as they have been, with the only difference being "the degree of flexibility judges would enjoy in applying the guideline system." Id. Now that the court

of appeals has decided that Booker has no retroactive application, defendant cannot rely upon that case to show that he is entitled to a modification of his sentence.

Because the issue defendant wishes to raise on appeal is not debatable among reasonable jurists, a court could not resolve the issues differently and the question is not adequate to deserve encouragement to proceed further, I decline to issue a certificate of appealability.

I turn then to defendant's request for leave to proceed in forma pauperis on appeal. Even applying the lower standard applicable to this request, I conclude that defendant is not proceeding in good faith. No reasonable jurist could believe that defendant's appeal has merit. Accordingly, I must certify that defendant's appeal is not taken in good faith and that he cannot proceed in forma pauperis on appeal.

ORDER

IT IS ORDERED that defendant Corin Cramer's request for leave to proceed in forma pauperis on appeal is DENIED because I am certifying that his appeal is not taken in good faith.

Further, IT IS ORDERED that defendant's request for a certificate of appealability is DENIED. Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for a certificate of appealability, the defendant may request a circuit judge to issue the

certificate.

Entered this 9th day of June, 2005.

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