IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

05-C-0108-C
99-CR-0106-C-03

v.

JACK ERVAN, III,

Defendant.

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Defendant Jack Ervan, III, has filed a "motion to modify sentence, pursuant to Title 18 U.S.C. § 3582(b)(3) an[d] § 3742(a)(1), (2) and (3)." He alleges that the court imposed an improper sentence on him in 2000, when it found facts on which it relied for sentencing and did not restrict the sentence to those facts found by the jury beyond a reasonable doubt. Accompanying this motion is a document entitled "Notice of Appeal," in which defendant gives notice "for review of sentence pursuant to title 18 § 3742(a)(1),(2) an[d] (4), and appeal to be modified from the United States Court for the Western District of Wisconsin, pursuant to title 18 § 3582(b)(3)." It is unclear what this notice of appeal is supposed to be. Defendant makes the question even murkier with his request for relief in which he

"prays that this Honorable Court remand back to the district court for review and modification of sentence with judicial immediacy to credit Defendant of 42 points enhancements whereat, was unconstitutionally imposed at sentencing by the sentencing judge, which unlawfully lured the Defendant into 240 months of imprisonment." Dft.'s Mot., dkt. #396, at 13.

It may be that defendant believed that he could revive his appeal of the order denying his untimely motion for modification of his sentence pursuant to 28 U.S.C. § 2255 by filing a notice of appeal. If so, defendant is mistaken. I will construe the "notice of appeal" as simply a request for this court to review his sentence and ignore the prayer for relief that appears to be directed to the court of appeals.

Although defendant tries to bring his motion for modification of his sentence under § 3582 and § 3742, his motion is properly characterized as brought pursuant to 28 U.S.C. § 2255. Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004) (holding that defendants cannot avoid the requirements of the Antiterrorism and Effective Death Penalty Act by inventive captioning; "[a]ny motion filed in the district court that imposed the sentence, and substantively within the scope of § 2255 ¶ 1, *is* a motion under § 2255").

Section 2255 prohibits a defendant from filing a second or successive motion under § 2255 without certification by the court of appeals that the new motion contains newly discovered evidence or "a new rule of constitutional law, made retroactive to cases on

collateral review by the Supreme Court." This motion is defendant's second (which tends to explain his effort to avoid labeling it as a § 2255 motion.) He filed a motion pursuant to § 2255 on March 2, 2004; that motion was denied as untimely. He has not obtained certification from the court of appeals for this second motion. Therefore, this court lacks authority to entertain it.

Defendant is free to seek certification for a second motion from the Court of Appeals for the Seventh Circuit, but he should be aware that on on February 2, 2005, the court held that the right newly recognized in Booker, 04-104 (U.S. Jan. 12, 2005) does not apply retroactively on collateral review. McReynolds v. United States, Nos. 04-2520, 04-2632 & 04-2844, 2005 WL 237642 (7th Cir. Feb. 2, 2005). 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)). 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. In view of the decision in McReynolds,

it is unlikely that the court would certify defendant's second motion, particularly since the filing of a second motion requires a holding by the Supreme Court that Booker has retroactive application. The Court did not hold Booker retroactive when it decided the case and it has not had occasion to do so since then.

ORDER

IT IS ORDERED that the motion filed by defendant Jack Ervan, III, for modification of his sentence pursuant to 18 U.S.C. §§ 3582(b)(3) and 3742(a)(1)(2) and (3) is construed as a motion to vacate or modify a sentence brought pursuant to 28 U.S.C. § 2255 and is DISMISSED because this court lacks the authority to entertain it.

Entered this 23rd day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge