IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

00-C-0483-C
97-CR-0074-C-03

v.

PATRICK HENDERSON,

Defendant.

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Defendant Patrick Henderson has moved for relief from the final order and judgment entered in this case on September 27, 2000, denying him relief under 28 U.S.C. § 2255. In an effort to avoid having his new challenge to his sentence characterized as a second or successive petition, defendant brings his case under Rule 60(b)(5). He argues that this rule authorizes relief from the operation of a final order when the movant can show that a significant change in decisional law calls into question the integrity of the final order and judgment denying § 2255 relief. It applies in this case, he maintains, because subsequent events have shown that it was error for the court to deny his § 2255 motion in 2000.

Defendant was sentenced on April 13, 1998, after having been found guilty by a jury

of conspiracy to distribute a controlled substance. He was sentenced to a term of 360 months, after I found that the amount of cocaine base that he could have foreseen the conspiracy would handle was greater than 50 grams. He appealed to the court of appeals, which affirmed his conviction in 1999. On August 7, 2000, defendant moved pursuant to § 2255 to vacate his sentence, arguing that it was an unconstitutional sentence under Apprendi v. New Jersey, 530 U.S. 466 (2000), because it was based upon sentencing factors that had not been determined by a jury.

Before Apprendi was decided, when federal courts sentenced defendants under 21 U.S.C. § 841, they did so only after making their own determinations of drug amounts for which the defendant was responsible and then sentenced the defendant to the appropriate sentencing level under § 841. Apprendi made it clear that judges could not continue to sentence in this way; they could not rely on their own determinations of drug quantities to sentence a defendant to anything other than the lowest sentencing level set out in § 841.

Before I could decide defendant's § 2255 motion, the Court of Appeals for the Seventh Circuit ruled definitively that convicted persons could not rely on Apprendi to challenge sentences that had become final before the opinion issued. The court of appeals' decision left me no option but to deny defendant's § 2255 motion, which I did in the September 25, 2000 order that defendant is now challenging.

In arguing that Rule 60(b) provides a mechanism for challenging an order as no longer

equitable in light of significant changes in circuit court law, defendant is carving out a novel path that takes him nowhere. Even if Rule 60(b) can be used for this purpose, a question on which I express no opinion, defendant can point to no "significant changes in circuit court law" that would justify overturning the 2000 order. He cites United States v. Nance, 236 F.3d 820 (7th Cir. 2000), and United States v. Mietus, 237 F.3d 866 (7th Cir. 2001), for the proposition that since the Supreme Court decided Apprendi, sentencing courts cannot sentence drug offenders above the minimums set out in 18 U.S.C. § 841 unless the jury has determined that the amount of drugs involved justifies an enhanced sentence. Neither of these two cases supports defendant's position. Both of them were pending on direct appeal when Apprendi was decided. No one denies that Apprendi applied to all cases that were pending when it was decided. The issue that arose in defendant's § 2255 motion was whether Apprendi applied to cases like defendant's in which the judgment had become final before the Court issued its opinion in Apprendi. In Hernandez v. United States, 226 F.3d 839 (7th Cir. 2000), the court of appeals decided that Apprendi did not have retroactive application. The court has never suggested that it would reach a different result. It is improbable that it would, in light of the Supreme Court's recent opinion in Schriro v. Summerlin, 124 S. Ct. 2519 (2004). In Schriro, the Court addressed the retroactivity of Ring v. Arizona, 536 U.S. 584 (2002), in which it had overruled Arizona's sentencing scheme that allowed the imposition of the death penalty if the judge found one of ten

aggravating factors. The Court held that the case had no retroactive effect.

I conclude that there is no possible merit to defendant's effort to challenge this court's denial of his first § 2255 motion by way of a Rule 60(b) motion.

ORDER

IT IS ORDERED that defendant Patrick Henderson's motion for Rule 60(b) relief from this court's final order and judgment entered on September 27, 2000, is DENIED.

Entered this 18th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge