IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

STERLING C. DANIELS,

Defendant.

ORDER

01-CR-0009-C

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Defendant Sterling Daniels has filed a motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c), contending that his sentence is unconstitutional because it was increased in reliance on facts that had not been found by a jury beyond a reasonable doubt.

As I explained to defendant in this court's order entered February 16, 2005, any motion that he files that is substantively within the scope of § 2255 must be treated as a § 2255 motion. Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004). "Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela, certiorari, capias, habeas corpus, ejectment, quare impedit, bill of review, writ of error, or an application for a Get-Out-of-Jail Card; the name makes no difference. It is substance that controls." Id. (citing Thurman v. Gramley, 97 F.3d 185,

186-87 (7th Cir.1996)). Although defendant characterizes his motion as one brought under U.S.C. § 3582(c), it is actually a motion for modification of his sentence and must be brought pursuant to 28 U.S.C. § 2255 and subject to the rules of the Anti-terrorism and Effective Death Penalty Act.

However, before addressing the re-characterized motion, I am again required to advise defendant, as I did in the February 16, 2005 order, that I am re-characterizing the motion and that this means that it will count as his first § 2255 motion. Castro v. United States, 124 S.Ct. 786, 792 (2004). If he proceeds with this motion, he will not have an opportunity to file a second motion to modify or vacate his sentence except in unusual circumstances and then only after he has received permission from the Court of Appeals for the Seventh Circuit for a second filing. See 28 U.S.C. § 2255 ¶ 8. If defendant wishes to proceed, he must advise the court of his intention. Because it is likely that this § 2255 motion will be the only one he will be allowed to file, he should consider carefully whether he wants to add any other § 2255 claims.

If defendant chooses to pursue the motion presently filed, he should again keep in mind the time limits that apply to the filing of motions for § 2255 relief. In particular, he should take particular notice that 28 U.S.C. § 2255 sets out four events that trigger the one-year limitations period for the filing of post-conviction motions: (1) the date on which the judgment of conviction becomes final; (2) the date on which an impediment to making a

motion is removed (and the impediment was the result of government action in violation of the Constitution or laws of the United States); (3) the date on which the facts supporting the claims could have been discovered through the exercise of due diligence; or (4) the date "on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

Defendant's judgment of conviction became final almost three years ago, after the Court of Appeals for the Seventh Circuit granted his motion to dismiss his appeal voluntarily. Cf. Clay v. United States, 537 U.S. 522, 529-30 (2003) (even if defendant chooses not to file petition for writ of certiorari, his conviction becomes final when time for filing petition has expired 90 days after court of appeals has entered judgment). His motion was not filed until February 14, 2005. Therefore, it is not timely under subsection (1), nor under subsections (2), (3) or (4). Defendant does not assert in the present motion the existence of any impediment to filing his motion or suggest that new facts have surfaced. Instead, he would have to argue that his motion falls within a year of January 12, 2005, when the Supreme Court held in United States v. Booker, 125 U.S. 738 (2005), 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. However, if defendant were to make this argument, it would fail. The Supreme Court's decision does

not affect the validity of his sentence. In McReynolds v. United States, 397 F. 3d. 479 (7th Cir. 2005), the court of appeals held that the rights recognized in Booker do not apply retroactively to cases on collateral review. Therefore, if defendant were to advise the court that he wishes his submission treated as a § 2255 motion, I will be required to deny it on the ground that it is untimely.

Even if the court construes defendant's motion as a motion pursuant to 18 U.S.C. 2582(c), the motion would be denied. This court lacks authority to correct a sentence once it is imposed with three exceptions: 1) within seven days of the imposition of sentence, the court may correct a sentence imposed as a result of arithmetical, technical or other clear error. Fed. R. Crim. P. 35(c); 2) the court may correct a sentence following remand from a court of appeals, Rule 35(a); or 3) the court may reduce a sentence upon motion by the government brought pursuant to Rule 35(b). None of these exceptions applies to defendant. The seven-day period has long since passed; the court of appeals did not remand his case to this court; and the government has not moved again to reduce his sentence. (Defendant's sentence was reduced in October 2002 upon the government's 9/20/02 motion.)

ORDER

IT IS ORDERED that defendant may have until July 1, 2005 in which to advise the court whether he wishes to withdraw his motion or proceed with it. If he chooses to

proceed, he is either to attach a rewritten motion, setting out *all* his challenges to his sentence, or advise the court that his only challenge is the one set out in his present motion relating to the enhancement of his sentence in reliance on facts not found by a jury beyond a reasonable doubt.

If defendant does not respond to this order by July 1, 2005, the court will consider his motion to have been withdrawn.

Entered this 8th day of June, 2005.

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