

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

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

04-C-0757-C  
01-CR-0109-C

v.

DANIEL P. BOOS,

Defendant.  
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Defendant Daniel P. Boos has filed a document entitled “Memorandum of Points and Authorities in Support of His Motion For a Certificate of Appealability Pursuant to Title 28 U.S.C. § 2253.” He has not filed a notice of appeal or a request for a certificate of appealability from the judgment of February 15, 2005 denying his § 2255 motion. However, I will construe his memorandum to include a request for a certificate of appealability before he files a notice of appeal because he must have such a certificate before he can 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 contends that the court erred in denying his § 2255 motion and should have instead held it in abeyance pending the Supreme Court’s decision in Dodd v. United States. Dodd v. United States, 365 F.3d 1273 (11th Cir. 2004), cert. granted, 125 S. Ct. 607 (2004). In a request for a certificate of appealability, defendant can raise only those issues that were raised in this § 2255 motion. Since he did not argue in his § 2255 motion that this court would have to stay a decision pending Dodd, but challenged the validity of his sentence on the ground that this court relied on facts not found by a jury beyond a reasonable doubt, defendant has shown no reason why his appeal on this new ground should be allowed to proceed. (In any event, Dodd concerns the date on which the statute of limitations begins running when the Supreme Court recognizes a new right, not whether United States v. Booker, 125 S. Ct. 738 (2005), has retroactive effect.) Therefore, I decline to issue a certificate of appealability.

I am persuaded that the issue that defendant wishes to raise on appeal is not

debatable among reasonable jurists, it is not one that a court could resolve differently and the question is not adequate to deserve encouragement to proceed further. Therefore, I decline to issue a certificate of appealability.

ORDER

IT IS ORDERED that defendant Daniel Boos's request for a certificate of appealability is DENIED.

Entered this 13th day of June, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge