IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

ORDER

Plaintiff,

01-CR-0119-C

v.

THOMAS IVERSON,

Defendant.

- -

Defendant Thomas Iverson has written a "letter of motion" to the court in which he asks for a reduction of his sentence in light of Blakely v. Washington, 124 S. Ct. 2531 (2004). I will construe the motion as a motion to vacate or modify defendant's sentence, brought pursuant to 28 U.S.C. § 2255.

In order to challenge a sentence in a post-conviction motion, a defendant must file the motion within one year of the date on which the conviction became final or within one year of "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." (There are two other alternatives for computing the one-year period of limitations but defendant does not suggest that either of them is

applicable.) Defendant was sentenced on April 12, 2002, and did not appeal from his sentence. His conviction became final on April 23, 2002, when the ten-day period for filing a notice of appeal had expired, but he did not file this motion until July 19, 2004, more than 14 months too late. Unless defendant can show that he filed within one year of the date on which the Supreme Court recognized a new right and that the Supreme Court has made that right retroactive, his motion is barred.

Defendant cannot make that showing. It is true that in Blakely, the Supreme Court made statements that the Court of Appeals for the Seventh Circuit has read as invalidating the Sentencing Guidelines, United States v. Booker, No. 03-4225, 2004 WL 1535858 at *2-3 (7th Cir. July 9, 2004), the Supreme Court did not say explicitly that it was holding the guidelines unconstitutional. In fact, it refrained explicitly from doing so. See Blakely, 124 S. Ct. at 2538 n.9 ("The Federal Guidelines are not before us, and we express no opinion on them."). Moreover, the Court has not made the decision retroactively applicable to cases on collateral review. It may be that in a future opinion, the Court will clarify its opinion in Blakely and decide definitively whether the Sentencing Guidelines scheme is constitutional. Until it does so, however, motions such as defendant's are premature.

Rather than deny defendant's motion on the merits, I will follow the procedure that the court of appeals has adopted for dealing with premature requests for permission to file successive § 2255 motions. See Simpson v. United States, No. 04-2700 (7th Cir. July16,

2004). When a prisoner files a premature motion in reliance on Blakely, I will analyze the motion to determine whether the movant has a possible claim of unconstitutional sentencing under Blakely. If he does, I will dismiss his motion without prejudice. If it appears clear on the face of the motion that he does not, I will dismiss the motion on its merits.

Defendant has a facially plausible claim because his sentence was based on aggravating factors that were not determined by a jury. I will follow the court of appeals' lead and dismiss his untimely motion without prejudice. Should the Supreme Court announce that Blakely applies to the Sentencing Guidelines and that it applies retroactively to cases on collateral review, defendant can file a renewed motion under § 2255.

ORDER

IT IS ORDERED that defendant Thomas Iverson's "letter of motion" is construed as a motion to vacate or modify a sentence brought pursuant to 28 U.S.C. § 2255 and

DISMISSED without prejudice as premature.

Entered this 30th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge