IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA,

ORDER

Plaintiff,

01-CR-009-C-08

v.

STERLING C. DANIELS,

Defendant.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Defendant Sterling C. Daniels has filed a documents titled "Motion for Review of a Sentence to the Honorable Judge Barbara Crabb" and "Appellant's Motion to Recall the Mandate in Support of his Petition/Motion for Review of a Sentence." In these documents, defendant argues that his sentence is illegal under Blakely v. Washington, 124 S. Ct. 2531 (2004) and United States v. Booker, 375 F.3d 508 (7th Cir. 2004).

Although defendant has not filed his petition pursuant to 28 U.S.C. § 2255, he is seeking relief that he can obtain only through § 2255. Therefore, his submissions must be construed as a § 2255 motion. United States v. Evans, 224 F.3d 670, 673 (7th Cir. 2000) ("[A]ny motion filed after the expiration of the time for direct appeal, and invoking grounds

mentioned in [§ 2255(1)] is a collateral attack for purposes of [2255(8)].") However, before I attach that label on it, I will give defendant an opportunity to withdraw the motion or resubmit a motion labeled properly as a motion for vacation of sentence pursuant to § 2255. Castro v. United States, 124 S. Ct. 786 (2003); Evans, 224 F.3d at 675; Henderson v. United States, 264 F.3d 709 (7th Cir. 2001). If defendant chooses not to withdraw the motion, I will construe it as a motion brought pursuant to § 2255. Defendant should be aware that in that instance, he will not have another chance to file a § 2255 motion without the advance permission of the court of appeals. § 2255 ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals . . ."). If he thinks he has additional grounds to assert, he should withdraw his motion and amend it to include every § 2255 claim he believes he has.

If defendant chooses to pursue the motion presently filed, he should 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 dismissed 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 Booker, 04-104 (U.S. Jan 12, 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, Nos. 04-2520, 04-2632 & 04-2844, slip op. (7th Cir., Feb. 2, 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.

ORDER

IT IS ORDERED that defendant Sterling C. Daniels may have until March 1, 2005, in which to advise the court whether he wishes to withdraw his motions titled "Motion for Review of a Sentence to the Honorable Judge Barbara Crabb" and "Appellant's Motion to Recall the Mandate in Support of his Petition/Motion for Review of a Sentence," or whether he wishes to have the court construe the motions as a motion brought pursuant to 28 U.S.C. § 2255. If defendant does not respond to this order by March 1, 2005, I will proceed to construe his submission as a motion brought pursuant to § 2255 and deny it as untimely.

Entered this 16th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge