IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

04-C-0448-C
01-CR-0009-C-04
01-CR-0098-C-01

v.

RONNIE RAINES,

Defendant.

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Defendant Ronnie Raines has filed a document entitled "Memorandum of Law in Support of Motion for Certificate of Appealability Pursuant to F.R.A.P. 22(b)." He has not filed a notice of appeal from the judgment and conviction entered on December 6, 2004, but I will decide the motion for a certificate of appealability in the event he does file such a notice because he must have such a certificate if he is to 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 has advised the court that he is interested in appealing only one of the twelve grounds that he raised in his post-conviction motion: his claim that the court erred in denying his claim that he was sentenced unconstitutionally by relying on facts not found by a jury beyond a reasonable doubt, in violation of Blakely v. Washington, 124 S. Ct. 2531 (2004). In an order dated August 2, 2004, I told defendant that it was premature to raise the claim because the United States Supreme Court had not decided whether the holding in Blakely applied to federal cases. Now that the Supreme Court has decided that the Blakely holding does apply to federal cases, defendant argues, he should be allowed to have the court of appeals hear his claim.

Defendant is not entitled to a certificate of appealability on this issue. He has no basis on which to raise a claim under Blakely or Booker. It is true that when the Supreme Court decided United States v. Booker, 125 S. Ct. 738 (2005), it held that defendants in federal criminal cases have a right to a jury determination of any disputed factual subject that increases their maximum punishment. The Court held also that the Sentencing Guidelines are unconstitutional to the extent they require judges to base sentences on facts

that are not the product of factfinding by a jury. However, the Court did not address the retroactivity of its decision on cases on collateral review, leaving it uncertain whether the right has retroactive application. Unfortunately for defendant, on February 2, 2005, the Court of Appeals for the Seventh Circuit resolved the retroactivity uncertainty, at least for motions filed in this circuit asserting the right newly recognized in Booker. In McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005), the court held that the right does not apply retroactively to cases on collateral review. The court of appeals characterized the decision as a procedural one and noted that, as a general rule, procedural decisions do not apply retroactively unless they establish one of those rare "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" Id. at 4 (quoting Schriro v. Summerlin, 124 S. Ct. 2519 (2004)). The court concluded that Booker did not establish a "watershed rule"; "the choice between judges and juries as factfinders does not make such a fundamental difference." Id. The court was persuaded that the Booker decision would not change the process of sentencing in any significant way: defendants would continue to be sentenced as they have been, with the only difference being "the degree of flexibility judges would enjoy in applying the guideline system." Id. Now that the court of appeals has decided that Booker has no retroactive application, defendant cannot rely upon that case to show that he is entitled to a modification of his sentence.

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 Ronnie Raines's request for a certificate of appealability is DENIED.

Entered this 8th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge