

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH ISHAM, SR.,

Defendant.

ORDER

03-CR-0141-C
05-C-0206-C

In an order entered on May 18, 2005, I denied defendant Joseph Isham's motion for post conviction relief brought pursuant to 28 U.S.C. § 2255. Defendant filed a notice of appeal from the denial and sought a certificate of appealability. Rather than act on defendant's request, I asked the court of appeals to remand the case to this court. I was persuaded at the time that it was premature to have denied the § 2255 motion in light of the decision in Dodd v. United States, 125 S. Ct. 2478 (2005), that the one-year period for filing a post conviction motion pursuant to § 2255 starts running on the date on which the Supreme Court recognizes a new right and not when the right is held to be retroactive. I believed it fair to give defendant an opportunity to benefit from the holding in United States

v. Booker, 125 S. Ct. 738 (2005), in the event that the Supreme Court held the decision retroactive before the one-year period had expired. This did not mean, however, that I would keep defendant's motion pending for an indefinite period of time. As I told defendant in an August 2, 2005 memorandum directed to the court of appeals, I would keep the motion open until the one-year period following the entry of the Booker opinion. That period expired on January 13, 2006.

I withheld denial of the motion to consider a letter defendant wrote to the court asking it to take judicial notice of supplemental authority. Defendant advised the court that the United States Supreme Court had scheduled a case, United States v. Clark, 05-5491, raising the retroactivity of Booker for consideration at its November 23, 2005 conference and that the Court had at least ten cases on its docket awaiting action and raising the same issue. He asked this court to take note of this information before dismissing his § 2255 motion.

I checked the Supreme Court's docket and learned that the petition for certiorari filed in the Clark case was denied on November 28, 2005. See, <http://www.supremecourtus.gov/docket/05-5491.htm>. The denial of the petition supports my conclusion that the Court is not likely to decide the retroactivity of Booker anytime soon. Therefore, I will deny the motion on the same grounds on which I relied in the order entered on May 18, 2005.

With the new denial of the motion, defendant may file a new notice of appeal and request for certificate of appealability.

ORDER

IT IS ORDERED that defendant Joseph Isham Jr.'s motion for post conviction relief pursuant to 28 U.S.C. § 2255 is DENIED.

Entered this 10th day of February, 2006.

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