

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH ISHAM, SR.,

Defendant.

MEMORANDUM

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

Defendant Joseph Isham, Sr. has filed a notice of appeal from the judgment entered in this case on May 18, 2005, denying his motion for postconviction relief brought pursuant to 28 U.S.C. § 2255. Accompanying the notice of appeal is a motion for a certificate of appealability, which defendant must have in order to appeal. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Defendant asks for certification of the following issues: (1) whether his sentence should be vacated because he was denied the effective assistance of counsel at sentencing when his lawyer failed to challenge the court's reliance for sentencing purposes on facts related to the number of guns found in defendant's possession; (2) whether his rights under the Fifth and Sixth Amendments were violated when the court imposed a

sentence under the Sentencing Guidelines that was enhanced on the basis of facts that no jury had found beyond a reasonable doubt; and (3) whether he is entitled to an evidentiary hearing on these issues. Defendant relies on the Supreme Court's holding in United States v. Booker, 125 S. Ct. 738 (2005), that sentencing judges cannot impose a mandatory sentence under the Sentencing Guidelines if the sentence is based upon facts not admitted by the defendant or found by a jury beyond a reasonable doubt.

Rather than act on defendant's motion for a certificate of appealability, I am requesting the court of appeals to remand the case to this court because I am persuaded that denial of the § 2255 motion was premature in light of the Supreme Court's decision in Dodd v. United States, 125 S. Ct. 2478 (2005). In Dodd, the Court decided that the one-year period for filing a postconviction motion pursuant to § 2255 starts running on the date that the Supreme Court recognizes a new right and not when the right is held to be retroactive. The decision was issued after defendant's motion was denied on May 18, 2005 but before he filed his notice of appeal on July 20, 2005. When I denied defendant's motion, I assumed that he could file a new motion if and when the Supreme Court decided that the right recognized in Booker was retroactive, so long as he did so within a year of the Court's determination of retroactivity.

In the wake of Dodd, it is apparent that this assumption was incorrect. It is settled now that defendants have only one chance to gain the benefit of the Supreme Court's

recognition of a new right: to file a motion for relief within one year of the date of the decision in which the Court recognized the right. If the year expires without a retroactivity determination by the Supreme Court or a lower federal court (in Dodd, the Court left open the question whether the determination of retroactivity has to be made by the Supreme Court or whether it can be made by a lower court), defendants will have lost all opportunities for relief forever to the extent that they rely upon the newly-recognized right.

Although it is highly improbable that the Supreme Court will make Booker retroactive and even more improbable that the Court will reach the subject before the one-year anniversary of Booker, I cannot say that it is impossible that it would do both of these things. If it does, defendant is entitled to have the benefit of the ruling because he filed his motion within one year of the Booker decision. Therefore, if the court of appeals agrees to remand this case, I will vacate both the order and judgment entered on May 18, 2005 and hold defendant's motion in abeyance until January 13, 2006. At that time, if the Supreme Court has not found Booker retroactive, I will deny the motion on the same grounds on

which I relied in the May 18 order and enter a new judgment.

Entered this 2nd day of August, 2005.

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