

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL STAFFORD, SR.,

Defendant.

ORDER

04-C-0467-C

99-CR-0003-C-01

Defendant Paul Stafford has filed a motion to correct a sentence, ostensibly pursuant to Fed. R. Crim. P. 35(b). He contends that Blakely v. Washington, No. 02-1632, 542 U.S. ___ (2004), requires correction of his sentence. Defendant asks also for a cease and desist order, restraining the government from making any further demands for information regarding his assets and those of his spouse. He contends that under Blakely, restitution must be determined by a jury; no jury determined the restitution he is ordered to pay; and therefore, the obligation is void and any attempts to collect the void obligation must be prohibited. In a document entitled "Supplement to a Rule 35 Motion," defendant argues that he is entitled to challenge his sentence because he is actually innocent under the statute

and for this reason need not show “cause” for his procedural default. The arguments he makes in his “Supplement” appear to focus on his contentions that the court applied certain sentencing enhancements improperly, not that the Constitution bars sentencing courts from basing their sentences on facts not found by the jury. Defendant notes that these issues may now be moot in light of Blakely.

As I have explained to defendant on three previous occasions, this court has no jurisdiction to entertain a second or successive petition to vacate or correct his sentence. Although defendant captions his motion as brought under Rule 35, in fact the motion is the equivalent of a motion brought pursuant to § 2255. United States v. Evans, 224 F.3d 670 (7th Cir. 2000) (any motion brought after time for direct appeal has expired that challenges sentence and conviction must be construed as brought under § 2255). Defendant filed a § 2255 motion long ago (March 8, 1999); he filed three additional motions equivalent to § 2255 motions, all of which were denied, so he is well aware that he must secure the certification of the Court of Appeals for the Seventh Circuit before this court can entertain his motion.

Defendant alleges that he was sentenced under the Sentencing Guidelines and that the court enhanced his base offense level on various grounds that were not determined by a jury. Defendant is correct. He was the subject of “a longer sentence than that supported solely on the facts he admitted during his plea colloquy.” Simpson v. United States, No. 04-

2700, slip op. at 3 (7th Cir. July 16, 2004). That means that if and when the Supreme Court determines both that Blakely applies to the federal sentencing guidelines *and* that it has retroactive application to cases on collateral review, he may apply to the Court of Appeals for the Seventh Circuit for leave to file a successive collateral attack. Id. Of course, such an attack would be limited solely to the constitutionality of applying the enhancements to his base offense level. It is too late for him to challenge other matters that could have been challenged on appeal or in his first § 2255 motion. In the meantime, however, he would be wasting his own and the court of appeals' resources by filing an application that the court would dismiss without prejudice under Simpson. He has no viable claim unless the Supreme Court holds that Blakely has retroactive application.

Defendant has no ground on which to ask the court to restrain the government from trying to collect the restitution he was ordered to pay. No court has held that Blakely requires that a jury determine restitution amounts. At this time, defendant has no valid reason for opposing the government's collection efforts.

ORDER

IT IS ORDERED that defendant Paul R. Stafford, Sr.'s motion to correct his sentence under Fed. R. Crim. P. 35 is DISMISSED for lack of jurisdiction. His request to restrain the government from taking steps to collect restitution from him is DENIED.

Entered this 19th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge