

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

ORDER

04-C-0527-C

01-CR-0071-C-02

Defendant Stacey Miller has filed a motion pursuant to § 2255 to vacate his sentence. (In fact, he has filed two versions of a motion, with only very minor variations between the two. I am assuming that the second filed motion is an amendment to the first one and is the operative one. If this is not correct, defendant should advise the court promptly.) The motion is timely: he was sentenced on April 12, 2002. He appealed from his sentence and conviction; his appeal was denied on May 1, 2003. Although he did not petition for certiorari, the one-year limitations period did not start to run until the expiration of the 90-day period for filing such a petition. Clay v. United States, 537 U.S. 522 (2003). He filed this motion on July 28, 2004.

In his motion, defendant sets out 32 grounds for the vacation of his sentence, many

of which overlap, such as his claim that he was denied a fair trial when the court failed to grant him a third continuance and his related claim that he was denied his right to equal protection when he was not treated as favorably as Caucasian defendants when his counsel asked for a third continuance.

I will give the government an opportunity to be heard on the motion. Although defendant has raised many of his claims on direct appeal and is therefore presumptively barred from raising them in a collateral motion by the doctrine of the law of the case, he has alleged that his appellate attorney gave him constitutionally ineffective assistance. It may be that if he can prove his allegation, he would be relieved of the usual bar to re-argument of these claims.

The one claim on which defendant cannot go forward is his last one, which he raises in reliance on Blakely v. Washington, 124 S. Ct. 2531 (2004). *If* Blakely does apply to the federal sentencing guidelines, it applies only to cases pending on direct appeal when the case was decided. Defendant's case was decided more than a year before Blakely. In the event the Supreme Court were to hold that Blakely has retroactive application, defendant could renew his claim. At the present time, however, it is premature.

ORDER

IT IS ORDERED that the government may have until August 27, 2004, in which to

file and serve a brief in opposition to defendant's motion to vacate his sentence, brought pursuant to 28 U.S.C. § 2255. Defendant may have until September 17, 2004, in which to serve and file a reply brief. If an evidentiary hearing is necessary, the court will appoint counsel to represent defendant.

Entered this 5th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge