

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY L. STEVENS,

Defendant.

ORDER

04-CR-0111-C

Defendant Timothy Stevens has filed a motion for vacation of his sentence pursuant to 28 U.S.C. § 2255 in which he contends that his sentence is illegal because he had ineffective assistance of counsel when he entered a plea of guilty to an indictment charging him with conspiracy to distribute a controlled substance. He was sentenced on December 16, 2004. Defendant says that he asked his attorney to file an appeal but his attorney failed to do so. If he can show that he asked his attorney to appeal and his attorney either refused or failed to do so, he will have established the cause and prejudice necessary to raise issues on a collateral motion that he could have raised on appeal. Costellanos v. United States, 26 F.3d 717, 718 (7th Cir. 1996) (defendant whose counsel failed to appeal after defendant asked him to need not prove that he would have prevailed on appeal had one been taken; counsel's failure

is per se violation of Sixth Amendment).

If defendant wishes to pursue a challenge to his conviction or sentence or both, he will have to submit an affidavit either sworn or signed under penalty of perjury, in which he states whether he asked his attorney to take an appeal and, if so, what steps he took to consult with his attorney about the appeal. If the affidavit suggests the likelihood that counsel failed to carry out his responsibility to defendant to take an appeal, I will set the matter for an evidentiary hearing to determine whether this is true in fact. If I find that defendant was denied his right to an appeal, I will proceed to consider the § 2255 motion on its merits.

Defendant should be aware that this will be his only chance to file a § 2255 motion, unless he should discover new evidence sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the offense he is challenging or the Supreme Court should establish a new rule of constitutional law that is retroactive and would invalidate his conviction and sentence. Since it is highly unlikely that he will have a second chance to file, he should include in this motion every challenge he has to his conviction and sentence.

ORDER

IT IS ORDERED that defendant Timothy Stevens may have until May 13, 2005, in which to file an affidavit in support of his motion for post-conviction relief pursuant to 28 U.S.C. § 2255 and to amend his motion to include additional challenges, if he has them, to

the legality of his sentence. If he does not file the affidavit by that date, his motion for post-conviction relief under § 2255 will be denied.

Entered this 20th day of April, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge