IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

ORDER

Plaintiff,

09-cv-49-bbc

v.

ALFRED T. SHIPPY,

Defendant.

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Defendant Alfred T. Shippy has filed a notice of appeal from an order denying his motion for reconsideration of the sentence imposed on him on September 28, 2009. In an order entered on March 6, 2015, dkt. #38, I explained to defendant that this court has no jurisdiction to reconsider a sentence once it is imposed, except in very limited circumstances, none of which were present in his case.

Now defendant seeks to appeal from the March 6 order, which he characterizes as an order denying his motion under 28 U.S.C. § 2255 to vacate, set aside or correct a sentence. The motion I denied on March 6 was not labeled as a motion to vacate, set aside or correct a sentence; it was labeled a "Motion for Reconsideration." Defendant said nothing in the motion about any legal error in his conviction or sentence but merely argued that the sentence he had received was too long and should be reduced to no more than 25 years. He urged the court to reduce his sentence in light of the opinion in United States v. Price, 775

F.3d 828 (7th Cir. 2014), in which the Court of Appeals for the Seventh Circuit upheld an 18-year sentence for a child pornographer, although the sentence was well below the 40-year guideline sentence.

In fact, Price does not provide any support for defendant's request for a sentence modification, because the case was decided on Price's direct appeal of his conviction and sentence, not on a motion for reconsideration filed more than five years after the movant had been sentenced. Moreover, in that case, the court of appeals did not say that an 18-year sentence was required, only that such a sentence in the case before it was not substantively unreasonable. Id. at 840.

Even if defendant had filed a true motion for post conviction relief under 28 U.S.C. § 2255, he could not have prevailed because the time had long since run for him to file such a motion. The statute allows a defendant to file within one year after the judgment of conviction has become final, § 2255(f); defendant's conviction became final one year after his time for filing a petition for certiorari expired on February 10, 2011(90 days after his appeal was denied on November 10, 2010). Thus the one-year period in which he could have filed expired on February 10, 2012, more than three years before he filed his motion for reconsideration. This time period is subject to exceptions, id. at § 2255(f)(2)-(4), but defendant has not shown that he comes within any of them.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of

the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). Defendant has not made a substantial showing of a denial of a constitutional right so no certificate will issue.

Defendant is free to seek a certificate of appealability from the court of appeals under Fed. R. App. P. 22, but that court will not consider his request unless he first files a notice of appeal in this court and pays the filing fee for the appeal or obtains leave to proceed in forma pauperis.

ORDER

IT IS ORDERED that no certificate of appealability will issue in this case.

Entered this 26th day of March, 2015.

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