

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
 v.) Criminal No. 00-39-P-C
)
 SHAWN WEST,)
)
 Petitioner)

**ORDER DENYING APPLICATION FOR
CERTIFICATE OF APPEALIBILITY**

Petitioner has filed an Application to Proceed *in Forma Pauperis* on Appeal (Docket Item No. 52) and Notice of Appeal (Docket Item No. 49).

Before the appeal may go forward under Fed. R. App. P. 22(b)(1), Defendant must obtain a Certificate of Appealability under 28 U.S.C. § 2253(c) from a district or circuit judge. The burden falls on the district judge to act first.

I **FIND** that Petitioner has made no substantial showing to date in these proceedings, “of the denial of the constitutional right,” 28 U.S.C. § 2253 (c)(2) likely to be found on appeal to be cause for reversal of his conviction or sentence. He complains now of an enhancement in his sentence imposed prior to the decision in *Blakely v. Washington*, 542 U.S. , 124 S. Ct. 2531 (2004). His assertion is that the sentencing court “...abused his [sic] discretion when he [sic] enhanced [the defendant’s] sentence due to facts that were neither admitted to or found by a jury.” Memorandum in Support of Motion for Relief of [sic] Judgment, (Docket Item No. 48) at 1 (unnumbered). The

Request for a Certificate of Appealability herein asserts Defendant's intent to appeal two issues:

- (1) Whether the Court erred in denying Petitioner's Motion on the Illegal Enhancement (§ 3(c)(1.1) in light of *U.S. v. Booker*, and
- (2) Whether the District Court abused his [sic] discretion when it summarily dismissed Petitioner's Rule 60(b) Motion.¹

Id. at 1.

It is difficult to determine the Defendant's intention as to the precise contours and content of the issue of which he seeks appellate review in this case because his original argumentation on the Motion for Relief from Judgment is based on claims bottomed on the holding in *Blakely v. Washington, Id.*, while his statement of the issue to be the subject of appeal in the Request for Certificate of Appealability is asserted to be founded on an error precipitated by the decision in *U.S. v. Booker*, 543 U.S. , 125 S. Ct. 738 (2005).

Whatever the issue may be that Defendant seeks to present on appeal, under either formulation (in all probability the latter is derivative of the former), he has failed to preserve the issue at the time of sentencing so that it may be a proper subject of adjudication in this case or on appellate review. The argument that a *Booker* error occurred is preserved only if the Defendant at sentencing argued *Apprendi* or *Blakely* error or that the Guidelines were unconstitutional. *United States v. Antonakopoulos*, 399

¹ This second issue is not supported by any developed articulation of any reason in support of any argument against summary dismissal *per se*. Accordingly, it is waived for purposes of consideration on either the Motion for Relief from Judgment or the Request for Certificate of Appealability. The Court restricts its consideration to properly developed arguments. Those put forth in a perfunctory manner are deemed waived. *Walter Keeper Alliance v. United Department of Defense*, 152 F. Supp. 2d 155, 158-59, n. 5 (D.P.R. 2001); *see United States v. Dimarco-Zappa*, 238 F.3d 25, 34 (1st Cir. 2001). That issue will not, accordingly, be considered here as a basis of appeal.

F.3d 68, 76 (1st Cir. 2005). Here, the defendant did neither² and, in addition, has never made any formal argumentation at any stage of the proceeding to date asserting error under *Booker*. Hence, any such error would be subject to only “plain error” review on appeal. *Antonakopoulos, Id.*

The Court **FINDS** that Defendant cannot, on appeal, satisfy the third and fourth prongs of the plain-error standard. *See, Antonakopoulos*, at 78 and *United States v. Dominguez Benitez*, 542 U.S. ____ 124 S. Ct. 2333, 2340 (2004).

Accordingly, the Request for Certificate of Appealability is hereby **DENIED**.

/s/Gene Carter _____
Gene Carter
Senior U.S. District Court Judge

Dated at Portland, Maine this 9th day of May, 2005.

² The Court’s Procedural Order Scheduling Guidelines Sentencing Hearing and Imposition of Sentence in the underlying case (Docket Item No. 26) of March 2, 2001 reflects that the only issues preserved for decision at the sentencing hearing, after the initial Presentence Conference, were whether Defendant was entitled to a reduction in the Base Offense Level for acceptance of responsibility and the determination of the appropriate sentence to be imposed after the resolution of that issue.

The Court’s Memorandum of Sentencing Judgment (Docket Item No. 57) of March 15, 2001 reflects that the first preserved issue was resolved at the sentencing hearing in favor of the Defendant and that he received a two-level reduction in the computation of the Total Adjusted Offense Level. The Memorandum also reflects that all the factual findings otherwise made by the Court in computing the Total Adjusted Offense Level and the conclusions based thereon were not objected to by the Defendant. Memorandum at 2-3. The record is devoid of any challenge by Defendant at the time of determination of sentence to any of those findings and conclusions on any basis whatever.

Defendant

SHAWN WEST (1)
TERMINATED: 03/22/2001
also known as
JOHN DOE
also known as
LEN TYREIK SAUNDERS
also known as
SHAUN WILLIAMS
also known as
SEAN BRIAN HARRIS
also known as
SHAN WEST
also known as
SEAN A WEST
also known as
TYREIK LEN SAUNDERS
also known as
SHAWN WILLIAMS
also known as
ANTOINE FRANK FREDERICK
also known as
SHAKEEM DAMIAN TWEEDY
also known as
SHAWN JACKSON
also known as
BOO
also known as
SEAN R WEST
also known as
SHAWN A WEST

represented by **SHAWN WEST**
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TERMINATED: 03/22/2001
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Pending Counts

21:841A=CD.F CONTROLLED
SUBSTANCE - SELL,
DISTRIBUTE, OR DISPENSE;
Distribute and possess with intent to
distribute, 21 841(a)(1) and
(b)(1)(A)
(1s)

18:922A.F
IMPORTING/MANUFACTURING
FIREARMS; 18:922(a)(6) and
942(a)(2); presented false, fictitious,

Disposition

Imprisoned for a term of 120
months; Supervised release for a
term of 3 years on counts 2-10 to
be served concurrently; Special

or misrepresented identification with acquisition of a firearm (2s)

18:922G.F UNLAWFUL TRANSPORT OF FIREARMS, ETC.; 18:922(g)(1) and 924(a)(2); Felon in possession and affecting commerce of firearm a firearm (3s)

18:922A.F IMPORTING/MANUFACTURING FIREARMS; 18:922(a)(6) and 924(a)(2); presented false, factitious, or misrepresented identification w/acquisition of a firearm (4s)

18:922G.F UNLAWFUL TRANSPORT OF FIREARMS, ETC.; 18:922(g)(1) and 924(a)(2), Felon in possession and affecting commerce of firearm (5s)

18:922A.F IMPORTING/MANUFACTURING FIREARMS 922(a)(6) and 924(a)(2); presented false, fictitious, or misrepresented identification w/acquisition of a firearm (6s)

18:922G.F UNLAWFUL TRANSPORT OF FIREARMS, ETC.; 18:922(g)(1) and 924(a)(2); Felon in possession and affecting commerce of firearm (7s)

18:922A.F IMPORTING/MANUFACTURING FIREARMS; 18:922(a)(6) and 942(a)(2); presented false, factitious, or misrepresented

Assessment of \$900; fine is waived; and Restitution is non applicable

Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; Special Assessment of \$900; fine is waived; and Restitution is non applicable

Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; Special Assessment of \$900; fine is waived; and Restitution is non applicable

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Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; Special Assessment of \$900; fine is waived; and Restitution is non applicable

Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; Special Assessment of \$900; fine is

identification w/acquisition of a
firearm
(8s)

waived; and Restitution is non
applicable

18:922G.F UNLAWFUL
TRANSPORT OF FIREARMS,
ETC.; 18:922(g)(1) and 924(a)(2);
Felon in possession and affecting
commerce of firearm
(9s)

Imprisoned for a term of 120
months; Supervised release for a
term of 3 years on counts 2-10 to
be served concurrently; Special
Assessment of \$900; fine is
waived; and Restitution is non
applicable

18:922A.F
IMPORTING/MANUFACTURING
FIREARMS; 18:922(a)(6) and
924(a)(2); presented false,
factitious, or misrepresented
identification s/acquisition of a
firearm
(10s)

Imprisoned for a term of 120
months; Supervised release for a
term of 3 years on counts 2-10 to
be served concurrently; Special
Assessment of \$900; fine is
waived; and Restitution is non
applicable

Highest Offense Level (Opening)

Felony

Terminated Counts

18:922A.F
IMPORTING/MANUFACTURING
FIREARMS 18:922(a)(6) and
924(a)(2) Presenting false/fictitious
identification w/acquisition of a
firearm
(1-4)

Disposition

18:922A.F
IMPORTING/MANUFACTURING
FIREARMS 18:922(a)(6) and
924(a)(2) presenting false
identification in the attempted
acquisition of a firearm
(5)

Imprisoned for a term of 120
months; Supervised release for a
term of 3 years on counts 2-10 to
be served concurrently; Special
Assessment of \$900; fine is
waived; and Restitution is non
applicable

**Highest Offense Level
(Terminated)**

Felony

Complaints

None

Disposition

Plaintiff

USA

represented by **GEORGE T. DILWORTH**
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