UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LISA ANNE GERRISH,	)	
	)	
PETITIONER	)	
	)	
v.	)	**CIVIL NO. 04-153-P-H**
	)	
UNITED STATES OF AMERICA,	)	
	)	
RESPONDENT	)	
BLAINE LEWIS GERRISH,	)	
	)	
PETITIONER	)	
	)	
v.	)	**CIVIL NO. 04-154-P-H**
	)	
UNITED STATES OF AMERICA,	)	
	)	
RESPONDENT	)	

ORDER

The applications for certificates of appealability are **DENIED**.

1. Blakely v. Washington, 124 S. Ct. 2531 (2004), and United States v. Booker, Nos. 04-104, 04-105, 2005 WL 50108 (Jan. 12, 2005), are not applicable to cases that were not on direct appeal when they were decided. By its very terms, Booker states that it is to apply "to all cases on direct review." 2005 WL 50108, at *29 (2005), with no reference to cases on collateral review. There is no reason to treat Blakely any differently. These cases furnish no basis, therefore, to

attack the length of the petitioners' sentences or, in Blaine Gerrish's case,[1] the amount of the fine. See Orchard v. United States, 332 F. Supp.2d 275, 277 (D. Me. 2004) (concluding that Blakely does not apply retroactively to cases on collateral review); cf. Sepulveda v. United States, 330 F.3d 55, 63 (1st Cir. 2003) (determining that Apprendi v. New Jersey, 530 U.S. 466 (2000), the decision underlying Blakely and Booker, applies only on direct appeal, not on a section 2255 motion); Schriro v. Summerlin, 124 S. Ct. 2519, 2526 (2004) (holding that Ring v. Arizona, 536 U.S. 584 (2002), which, like Blakely and Booker, applied and extended the reasoning of Apprendi, does not apply retroactively to cases already final on direct review).

2. There is no basis for the ineffective assistance of counsel claim. As the Magistrate Judge concluded, according to the petitioners' version there was a discussion with counsel about appeal within the meaning of Roe v. Flores-Ortega, 528 U.S. 470, 486 (2000). The Supreme Court has ruled that in such a context, "Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." Id. at 478. Here, the petitioners allege that upon the initial request to take an appeal, there was a discussion about cost and that following that discussion, no appeal was taken. That is not enough to meet the standard of Flores-Ortega. Moreover, the

[1] The petitioners, husband and wife, have filed virtually identical motions. The only significant
(continued on next page)

petitioners have failed to submit the allegations under penalty of perjury as required by Rule 2(b)(5) of the Rules Governing Section 2255 Proceedings, 28 U.S.C. § 2255. See United States v. LaBonte, 70 F.3d 1396, 1413 (1st Cir. 1995) ("A habeas application must rest on a foundation of factual allegations presented under oath either in a verified petition or a supporting affidavit. . . . Facts alluded to in an unsworn memorandum will not suffice.") (citations omitted), overruled on other grounds, 520 U.S. 751 (1997).

SO ORDERED.

DATED THIS 25TH DAY OF JANUARY, 2005

/s/D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

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difference is that Blaine Gerrish also attacks his fine. (No fine was imposed on Lisa Gerrish.)

U.S. DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CIVIL DOCKET FOR CASE #: 04CV153 AND 04CV154

04cv153

Lisa Anne Gerrish

Petitioner

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v.

United States of America

Respondent

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04cv154

Blaine Lewis Gerrish

Petitioner

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v.

United States of America

Respondent

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