

respect to the Booker-based challenge Suveges's presents, his only § 2255 ¶ 6 port in the storm would be subsection (3) which would give Suveges a year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

I have already addressed a similarly postured § 2255 Booker claim in Stevens v. United States, Civ. No. 05-10-B-S-, 2005 WL 102958, 1 (D.Me. Jan 18, 2005)(concluding that a District Court could make the initial ¶ 6(3) retroactivity determination on an untimely first petition). And, as I explained in Stevens, in Quirion v. United States, I concluded that Booker would not apply retroactively to timely-filed 28 U.S.C § 2255 motions:

On the same day that Blakely was handed down, the United States Supreme Court concluded that one of Blakely's direct ancestors, Ring v. Arizona, 536 U.S. 584 (2002)--which applied the principle of Apprendi to death sentences imposed on the basis of aggravating factors--was not to be applied retroactively to cases once they were final on direct review. See Schriro v. Summerlin, ___ U.S. ___, 124 S.Ct. 2519, 2526 (2004) ("Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review."). In the wake of Blakely, most courts that considered the question have concluded that Summerlin answered the retroactivity question in the negative vis-a-vis Blakely grounds pressed in timely 28 U.S.C. § 2255 motions. See, e.g., Burrell v. United States, 384 F.3d 22, 26 n. 5 (2d Cir.2004) (observing this proposition in affirming the District Court's conclusion that the movant was not entitled to a certificate of appealability on the question of whether Apprendi applied retroactively); Lilly v. United States, 342 F.Supp.2d 532, 537 (W.D.Va.2004) ("In Summerlin, the Court found that Ring v. Arizona, 536 U.S. 584 (2002), a case that extended Apprendi to aggravating factors in capital cases, was a new procedural rule and was not retroactive. A similar analysis dictates that Blakely announced a new procedural rule and is similarly non-retroactive.") (citation omitted); accord Orchard v. United States, 332 F. Supp, 23 275 (D.Me.2004); see also cf. In re Dean, 375 F.3d 1287, 1290 (11th Cir.2004) ("Because Blakely, like Ring, is based on an extension of Apprendi, Dean cannot show that the Supreme Court has made that decision retroactive to cases already final on direct review.

Accordingly, Dean's proposed claim fails to satisfy the statutory criteria [for filing a second or successive § 2255 motion].").

Civ. No. 05-06-B-W, 2005 WL 83832, *3 (D.Me. Jan. 14, 2005).

Since the issuance of Quirion and Stevens, the Eleventh Circuit Court of Appeals has issued a decision on a second and successive petition that lends support for my conclusion, In re Anderson, ___ F.3d. ___, ___, 2005 WL 123923, *2 -4 (11th Cir Jan. 21, 2005), and District Court Judge Hornby, in this District, denied a certificate of appealability to two 28 U.S.C. § 2255 movants in Gerrish v. United States, Civ. Nos. 04-153-P-H & 04-154-P-H, 2005 WL 159642, *1 (D.Me. Jan. 25, 2005), concluding that Blakely and Booker are not applicable to cases that were not on direct appeal when they were decided.

The only new twist that Suvege's motion presents is his claim that his attorney was ineffective for not raising the Booker-esque Sixth Amendment challenge during his sentencings and on direct appeal. However, in an unpublished decision, the First Circuit Court of Appeals rejected an ineffective assistance argument regarding counsel's failure to raise a Blakely challenge to his Sentencing Guideline driven sentence on the ground that such a challenge was foreclosed by circuit precedent. Campbell v. United States, No. 02-2378, 2004 WL 1888604, *3 (1st Cir. Aug. 25, 2004) (quoting United States v. Campbell, 268 F.3d 1, 7, n.7 (1st Cir. 2001)). While the inquiry might be a bit more difficult if Suvege's attorney failed to raise such a challenge in the intermission between Blakely and Booker, counsel's advocacy in Suvege's case occurred long before the dawn of Apprendi and was certainly not ineffective under the then governing law.

Accordingly, I recommend that the Court **DENY** Suvege's late and latest 28 U.S.C. § 2255 motion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

January 28, 2005.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

SUVEGES v. USA

Assigned to: JUDGE GENE CARTER

Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK

Related Cases: [2:90-cr-00049-GC](#)
[2:90-cr-00079-GC](#)

Cause: 28:2255 Motion to Vacate / Correct Illegal
Sentenc

Date Filed: 01/25/2005

Jury Demand: None

Nature of Suit: 510 Prisoner:

Vacate Sentence

Jurisdiction: U.S. Government
Defendant

Plaintiff

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