

1998. Petitioner then filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, which was denied on January 3, 2001.

Petitioner first relies on 18 U.S.C. § 3582 et seq. The only possible relevant provision is § 3582(c)(2), which provides:

The court may not modify a term of imprisonment once it has been imposed except that -

- (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant ... the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent they are applicable, if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2). However, petitioner points to no reduction by the Sentencing Commission.

We turn next to petitioner's application for relief under the Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004). This decision dealt with a determinate sentencing scheme under Washington state law similar to the Federal Sentencing Guidelines. Under that scheme, the petitioner was sentenced to more than three years above the statutory maximum of the standard range because he had acted with "deliberate cruelty." Blakely, 124 S. Ct. at 2537. The facts

supporting the "deliberate cruelty" finding had not been found by a jury or admitted by the petitioner. Id. The Supreme Court held that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts [other than a prior conviction] reflected in the jury verdict or admitted by the defendant." Id. at 2536-37 (emphasis in original) (discussing Apprendi v. N.J., 530 U.S. 466, 490 (2000)). Blakely, of course, did not apply to the Federal Sentencing Guidelines. See id. at 2538 n.9.

On January 12, 2005, the Supreme Court decided United States v. Booker, Nos. 04-104, 04-105, 125 S. Ct. 738, 2005 WL 50108 (2005), which applied the reasoning of Apprendi and Blakely to the Federal Sentencing Guidelines. The Court declared that the Federal Sentencing Guidelines were unconstitutional insofar as they were mandatory. Booker, 2005 WL 50108, *16. However, it ruled that we must still take them into consideration along with other factors in deciding upon a sentence. Id. at *27. Under the less stringent standard to which pro se litigants are held, we will consider petitioner's motion to be one brought under Booker, rather than Blakely. See Jasin, 280 F.3d at 361.

A Booker motion is in effect a motion brought under 28 U.S.C. § 2255, which provides in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence

was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

However, as noted above, petitioner filed a § 2255 motion which was denied on January 3, 2001. Petitioner is now barred from filing a second or successive § 2255 motion without authorization from the Court of Appeals for the Third Circuit.¹ See 28 U.S.C. §§ 2244 & 2255.

Accordingly, we will deny petitioner's motion under 18 U.S.C. § 3582 et seq. and will deny without prejudice his motion as it relates to Booker, 125 S. Ct. 738.

1. A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain -

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
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PARRISH BARNES : NO. 95-349

ORDER

AND NOW, on this 28th day of January, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of Parrish Barnes for a reduction of sentence pursuant to 18 U.S.C. § 3582 et seq. is DENIED; and

(2) the motion of Parrish Barnes for a reduction of sentence under United States v. Booker, Nos. 04-104, 04-105, 125 S. Ct. 738, 2005 WL 50108 (Jan. 12, 2005), which is tantamount to a motion under 28 U.S.C. § 2255, is DENIED without prejudice to petitioner's moving in the United States Court of Appeals for the Third Circuit for an order authorizing this court to consider his second or successive application.

BY THE COURT:

/s/ Harvey Bartle III
J.