

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 99-210-1
v.	:	
	:	CIVIL ACTION
PETER RAMOS	:	No. 05-0505

MEMORANDUM

ROBERT F. KELLY, Sr. J.

MAY 20, 2005

Before the Court is the *pro se* Motion to Vacate, Set Aside, or Correct Sentence, filed pursuant to 28 U.S.C. § 2255, by Peter Ramos (“Ramos”) and the Government’s Response thereto.¹ Upon consideration of the parties’ respective filings, the Section 2255 Motion is denied.

I. BACKGROUND

On August 16, 1999, Ramos pled guilty to attempting to possess with an intent to distribute four kilograms of cocaine in violation of 21 U.S.C. § 846, using a communication facility to commit a drug trafficking crime in violation of 21 U.S.C. § 843(b) and making false statements to a government official in violation of 18 U.S.C. § 1001(a)(2). Ramos was required to forfeit property. On January 28, 2000, Ramos was sentenced to a total of 150 months imprisonment (which encompassed application of the Federal Sentencing Guideline enhancements). Ramos did not file a direct appeal.² On February 4, 2005, Ramos filed the instant

¹ Since Hall is acting *pro se*, I will “hold his documents to a less stringent standard than those drafted by attorneys.” United States v. Jasin, 280 F.3d 355, 361 (3d Cir. 2002).

² Ramos’s conviction became final on or about February 11, 2000, when the time for appeal expired. See Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999)(“If a defendant does not pursue a timely direct appeal to the court of appeals, his or her conviction and sentence become final, and the statute of limitation begins to run, on the date on which the time for filing such an appeal expired.”).

Section 2255 Motion, which is his first motion pursuant to Section 2255.

II. DISCUSSION

Ramos's Motion essentially seeks to invalidate his sentence as a result of the decision by the United States Supreme Court ("Supreme Court") in United States v. Booker, --- U.S. ---, 125 S. Ct. 738 (Jan. 12, 2005).³ In Booker, the Supreme Court reaffirmed its previous holding in Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Id. at 756. Concerning the holding in Blakely, which expanded the Apprendi ruling (limited to sentences that exceeded the statutory maximum) by clarifying that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," the Booker Court ruled that it was applicable to the Federal Sentencing Guidelines. Id.; Blakely, 124 S. Ct. at 2537 (emphasis in original).

Thus, "the Booker majority held that mandatory enhancement of a sentence under the Guidelines, based on facts found by the court alone, violates the Sixth Amendment." United States v. Davis, --- F.3d ---, 2005 WL 976941, at *1 (3d Cir. Apr. 28, 2005)(citation omitted).

"To remedy this constitutional infirmity, the Court excised that provision of the statute making application of the Guidelines mandatory." Id. (citation omitted). "The Supreme Court's decision

³ While Ramos refers to Booker, his Motion primarily relies upon the Supreme Court's decision in Blakely v. United States, 542 U.S. ---, 124 S. Ct. 2531 (2004). Booker directly applies to this action because its ruling specifically addresses the Federal Sentencing Guidelines. Holding Ramos's *pro se* Section 2255 Motion to a less stringent standard than if it was drafted by an attorney, I will consider his Motion based upon the ruling in Booker.

in United States v. Booker brought about sweeping changes in the realm of federal sentencing.” Id. (citation omitted). “In the aftermath of Booker, the Federal Sentencing Guidelines once a mandatory regime circumscribing the discretion of district court judges are ‘effectively advisory.’” Id. (citation omitted). “Under the post-Booker sentencing framework, District Courts will consider the applicable advisory Guidelines range in addition to factors set forth in 18 U.S.C. § 3553(a).” Id. (citation omitted). “Booker is applicable to all cases on direct review.” Id. (citation omitted). In light of the holding in Booker, Ramos argues that the sentencing enhancements imposed by this Court under the Federal Sentencing Guidelines render his sentence unconstitutional.

The Government contends that Ramos’s Motion is untimely. The timeliness of Ramos’s Motion is governed by paragraph 6(3) of 28 U.S.C. § 2255. Under paragraph 6(3) of Section 2255, a motion to vacate, set aside, or correct a sentence is timely if it is filed within one year of “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.” 28 U.S.C. § 2255 para. 6(3). Ramos filed his Motion within one year after the Booker decision. Thus, Ramos’s claim depends upon whether the newly recognized right by the Supreme Court in Booker is retroactively applicable to his case on collateral review.⁴ Id. Booker is not retroactively applicable to Ramos’s case because “Booker does not apply

⁴ The instant Motion is Ramos’s first Section 2255 motion. “While a new right to be cognizable must be recognized by the Supreme Court, the lower federal courts may determine the issue of retroactivity with respect to a petitioner’s first § 2255 motion.” United States v. Williams, No. 04-4816, 2005 WL 240939, at *1 (E.D. Pa. Jan. 31, 2005)(citations omitted); see also United States v. Leath, No. 05-1429, 2005 WL 950612, at *1 (E.D. Pa. Apr. 25, 2005) (same).

retroactively to initial motions under § 2255 where the judgment was final as of January 12, 2005, the date Booker issued.” Lloyd v. United States, --- F.3d ---, 2005 WL 1155220, at *6 (3d Cir. May 17, 2005)(affirming the dismissal of a Section 2255 motion concluding that Booker does not apply retroactively to initial Section 2255 motions “[b]ecause Booker announced a rule that is ‘new’ and ‘procedural,’ but not ‘watershed’” as required by the analysis for retroactivity regarding new rules of criminal procedure enunciated in Teague v. Lane, 489 U.S. 288 (1989)).

III. CONCLUSION

Since Ramos’s conviction and sentence were final prior to the date Booker issued, Booker does not retroactively apply to his initial Section 2255 motion. Thus, Ramos has failed to meet the requirements of paragraph 6(3) of 28 U.S.C. § 2255. Accordingly, his Motion under 28 U.S.C. § 2255 will be denied.⁵

An appropriate Order follows.

⁵ In light of this decision, it is not necessary to address the Government’s argument that Ramos procedurally defaulted his Booker claim.

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ORDER

AND NOW, this 20th day of May, 2005, upon consideration of Peter Ramos's Motion to Vacate, Set Aside, or Correct Sentence, filed pursuant to 28 U.S.C. § 2255 (Doc. Nos. 61 and 64), and the Government's Response thereto, it is hereby **ORDERED** that:

1. the Motion is **DENIED**; and
2. no certificate of appealability is issued.

BY THE COURT:

/s/ Robert F. Kelly

ROBERT F. KELLY, Sr. J.