

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

UNITED STATES OF AMERICA

v.

VERNON O. HERBERT

:
: **CRIMINAL NO. 90-555-01**
:
: **CIVIL ACTION NO. 05-CV-338**
:
:
:

Norma L. Shapiro, S.J.

July 15, 2005

MEMORANDUM AND ORDER

Petitioner, Vernon O. Herbert (“Herbert”) was convicted of conspiracy to distribute cocaine base, distribution of cocaine, unlawful use of communication facility, and aiding and abetting. The court referred to Sentencing Guidelines Section 3B1.1 and granted a four level enhancement for Herbert’s role in the offense, but declined to enhance the offense level for possession of a firearm. Herbert was also given credit for acceptance of responsibility. Herbert’s offense had a guideline level of thirty-six and he was in a criminal history category of one. Herbert was sentenced by this court on March 9, 1991 to 200 months in custody, followed by five years of supervised release. Herbert appealed, but his appeal was denied.

Following the Supreme Court ruling in United States v. Booker, 125 S. Ct. 738 (2005), Herbert filed a *pro se* petition for a reduction in sentence pursuant to 28 U.S.C. § 2255. Herbert alleges the four point enhancement for his role in the offense was unlawful because the facts the court relied on were not found by a jury.

In Lloyd v. United States, 407 F.3d 608, 610 (3d Cir. 2005), the Court of Appeals for the Third Circuit considered whether the rule the Supreme Court announced in Booker would apply retroactively. In Lloyd, the petitioner filed his 28 U.S.C. § 2255 petition more than a year after his conviction became final. Id. at 611. Because the petition was filed more than a year after his conviction became final, “his motion would only have been timely filed if the Supreme Court announced a newly recognized right or a ‘new rule’ that has been made retroactively applicable to cases on collateral review.” Id.

Unless new rules of criminal procedure “fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.” Teague v. Lane, 489 U.S. 288, 310 (1989). In Lloyd, the court considered whether the rule in Booker was an exception under Teague. Id. at 611-12. The court reasoned Booker would apply retroactively only if the rule were deemed “watershed,” a rule that implicates fundamental fairness and accuracy of the criminal proceeding. Id. at 612. The court held “because Booker announced a rule that is ‘new’ and ‘procedural,’ but not ‘watershed,’ it does not apply retroactively to initial motions under § 2255 where the judgment was final as of January 12, 2005, the date Booker issued.” Id. at 615-16. It is undisputed that the Herbert’s conviction was final before January 12, 2005. Therefore, the Booker decision does not invalidate Herbert’s sentence and his 28 U.S.C. § 2255 petition will be dismissed. The court declines to grant a Certificate of Appealability.

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ORDER

AND NOW, this 15th day of July, 2005, upon consideration of the petitioner's Petition pursuant to 28 U.S.C. § 2255, it is **ORDERED** that:

- 1) Petitioner's Petition is **DENIED** for the reasons stated in the attached Memorandum.

- 2) No Certificate of Appealability is granted.

/s/ Norma L. Shapiro

Norma L. Shapiro, S.J.