

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

Vs.

Case No. 05-3179-SAC
98-40076-01-SAC

RAY LEE D'ARMOND, JR.,

Defendant

MEMORANDUM AND ORDER

This case comes before the court on the defendant's application for issuance of a certificate of appealability. Dk. 184. An appeal from a final order in a proceeding under 28 U.S.C. § 2255 may not be taken unless a judge or circuit justice issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). The certificate issues "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Defendant may make this showing by demonstrating that the issues he raises are debatable among jurists, that a court could resolve the

issues differently, or that the questions presented deserve further proceedings. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

"Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quotation marks, alteration, and citation omitted). When the court denies a § 2255 motion on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 478 (2000) (construing 28 U.S.C. § 2253(c)).

In denying defendant's § 2255 motion, the court found his petition to be untimely. Dk. 181. The court reasoned that defendant's case became final in 2000, before *Booker* was decided, and that *Booker's* new rule of constitutional law does not apply retroactively to § 2255 motions.

See United States v. Bellamy, 411 F.3d 1182 (10th Cir. 2005). Defendant now contends that the Tenth Circuit's holding in *Bellamy* is debatable among jurists, and that the "Tenth Circuit has not ruled on or against the Supreme Court's holding in *Booker* as being a Substantive holding and not a New Rule of Law holding." Dk. 184, p. 1. The court disagrees.

In *Bellamy*, the Tenth Circuit stated: "we have previously determined that *Blakely* provides a new rule of criminal procedure and is not subject to retroactive application on collateral review. *See United States v. Price*, 400 F.3d 844 (10th Cir. 2005)." *Bellamy*, 411 F.3d at 1186. It then joined "every court to examine the issue" in concluding that *Booker* represents a "procedural rule." *Bellamy*, 411 F.3d at 1187.

The court finds that jurists of reason would not find it debatable whether defendant's § 2255 petition states a valid claim of the denial of a constitutional right, and further finds that jurists of reason would not find it debatable whether this court was correct in its procedural ruling on defendant's untimely § 2255 motion.

IT IS THEREFORE ORDERED that defendant's motion for a

certificate of appealability (Dk. 184) is denied.

Dated this 25th day of October, 2005, Topeka, Kansas.

s/ Sam A. Crow
Sam A. Crow, U.S. District Senior Judge