

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

United States of America,

Plaintiff,

v.

Case No. 01-20062-01-JWL

Randy McCurdy,

Defendant.

MEMORANDUM & ORDER

By letter dated January 17, 2005, Mr. McCurdy has requested the appointment of counsel to assist him in presenting arguments based on the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). The request is denied as there is no constitutional right to appointed counsel to pursue a collateral attack on conviction, for "the right to appointed counsel extends to the first appeal of right, and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *see also Tapia v. Lemaster*, 172 F.3d 1193, 1196 (10th Cir. 1999) (no constitutional right to counsel exists in habeas proceedings).¹ Rather, a defendant is entitled to the appointment of counsel only when an evidentiary hearing is required on the defendant's § 2255 petition. *See* Rule 8(c) of the Rules Governing § 2255 Proceedings ("If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A."). Mr. McCurdy, then, may file a pro se § 2255 petition and the court will revisit his request for appointed counsel if Mr. McCurdy demonstrates in his petition the need

¹Mr. McCurdy's time to file a direct appeal has long since expired.

for an evidentiary hearing.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant's motion to appoint counsel (doc. 97) is denied.

IT IS SO ORDERED.

Dated this 28th day of March, 2005, at Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge