

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

United States of America,

Plaintiff,

v.

Case No. 02-20015-JWL

Julian Fuel,

Defendant.

MEMORANDUM & ORDER

On March 6, 2002, Julian Fuel was charged in a three-count indictment with possession with intent to distribute crack cocaine and cocaine powder. On June 24, 2002, Mr. Fuel entered a plea of guilty to Count III of the indictment and Counts I and II were dismissed pursuant to the plea agreement. On August 23, 2004, Mr. Fuel filed a “Motion for the District Court to Take Judicial Notice” in which he requests that the court “take judicial notice” of the Supreme Court’s decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and “apply the same” to his case.

While Mr. Fuel has not so styled his motion, the motion can only be characterized as a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. As this would be Mr. Fuel’s first § 2255 petition, the court is required to offer Mr. Fuel the opportunity to withdraw the motion rather than have it construed as a § 2255 petition for fear that characterizing Mr. Fuel’s motion as an initial § 2255 petition might prevent him from raising a legitimate claim in a subsequent § 2255 petition in light of the limitations on filing subsequent petitions. *See United States v. Torres*, 282 F.3d 1241, 1245-46 (10th Cir. 2002) (district court should only

recharacterize a motion as a § 2255 petition where the motion can only be considered under § 2255 and the movant is offered the opportunity to withdraw the motion rather than have it so recharacterized).

For this reason, Mr. Fuel shall notify the court no later than April 15, 2005 whether he desires to withdraw his motion or whether he desires the court to construe the motion as a § 2255 petition. If Mr. Fuel does not notify the court on or before April 15, 2005 about his intentions with respect to the motion, the court will deny without prejudice Mr. Fuel's motion to take judicial notice.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant shall notify the court no later than April 15, 2005 whether he desires to withdraw his "Motion for the District Court to Take Judicial Notice" or whether he desires the court to construe the motion as a § 2255 petition. If Mr. Fuel does not notify the court on or before April 15, 2005 about his intentions with respect to the motion, the court will deny without prejudice Mr. Fuel's motion to take judicial notice.

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