

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ELIGIO BACALLAO, SR.,

Defendant.

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ORDER

97-CR-0047-C-02

Moving through the Federal Rules of Civil Procedure, defendant Eligio Bacallao, Sr. has attacked his sentence in separate motions filed pursuant to Rules 59(e) and 60; now he has filed a motion pursuant to Rule 52(b). His latest motion is no more successful than the two previous ones. Like them, this motion is a collateral attack on his sentence and must be brought under 28 U.S.C. § 2255. Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004), holds that a prisoner cannot avoid the Antiterrorism and Effective Death Penalty Act's rules by inventive captioning. "Any motion filed in the district court that imposed the sentence, and substantively within the scope of § 2255 ¶ 1, is a motion under § 2255, no matter what title the prisoner plasters on the cover." Id.

Defendant has filed one § 2255 motion, on which he did not succeed. Paragraph 8

of § 2255 requires appellate certification of a second or successive motion brought under § 2255. Defendant has not obtained a certificate of his “Rule 52(b)” motion; until he does, this court has no authority to entertain it.

ORDER

IT IS ORDERED that defendant Eligio Bacallao, Sr.’s Rule 52(b) motion is construed as a motion attacking his sentencing brought pursuant to 28 U.S.C. § 2255 and dismissed because this court has no authority to entertain it.

Entered this 5th day of April, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge