

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RUFINO E. BUYAO, JR.,

Defendant.

ORDER

01-CR-0015-C-01

Defendant Rufino E. Buyao, Jr. has filed a motion for reduction of sentence pursuant to 18 U.S.C. §§ 3553, 3582, 3583 and “3742 et al., contending that his sentence is unconstitutional because it was increased in reliance on facts that had not been found by a jury beyond a reasonable doubt. Although defendant characterizes his motion as one brought under certain provisions of Title 18, it is actually a motion for modification of his sentence and must be brought pursuant to 28 U.S.C. § 2255 and subject to the rules of the Anti-terrorism and Effective Death Penalty Act. Any motion that is filed in the sentencing court that is substantively within the scope of § 2255 must be filed as a § 2255 motion. Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004). “Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela,

certiorari, capias, habeas corpus, ejection, quare impedit, bill of review, writ of error, or an application for a Get-Out-of-Jail Card; the name makes no difference. It is substance that controls.” Id. (citing Thurman v. Gramley, 97 F.3d 185, 186-87 (7th Cir.1996)).

However, before addressing the re-characterized motion, I am required to advise defendant that I am re-characterizing the motion and that this means that it will count as his first § 2255 motion. Castro v. United States, 124 S.Ct. 786, 792 (2004). If he proceeds with this motion, he will not have an opportunity to file a second motion to modify or vacate his sentence except in unusual circumstances and then only after he has received permission from the Court of Appeals for the Seventh Circuit for a second filing. See 28 U.S.C. § 2255 ¶ 8. If defendant wishes to proceed, he must advise the court of his intention. Because it is likely that this § 2255 motion will be the only one he will be allowed to file, he should consider carefully whether he wants to add any other § 2255 claims.

ORDER

IT IS ORDERED that defendant Rufino E. Buyao, Jr.’s motion for relief under 18 U.S.C. §§ 3553, 3582, 3583 and 3742 et al. is re-characterized as a motion brought pursuant to 28 U.S.C. § 2255. Defendant may have until October 29, 2004, in which to advise the court whether he wishes to withdraw his motion or proceed with it. If he chooses to proceed, he is either to attach a rewritten motion, setting out *all* his challenges to his

sentence, or advise the court that his only challenge is the one set out in his present motion relating to the enhancement of his sentence in reliance on facts not found by a jury beyond a reasonable doubt.

If defendant does not respond to this order by October 29, 2004, the court will consider his motion to have been withdrawn.

Entered this 4th day of October, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge