

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACK ERVAN III,

Defendant.

ORDER

99-CR-0106-C

Defendant Jack Ervan III has filed a motion to proceed in forma pauperis and motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2), 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)).

Defendant has filed two § 2255 motions, 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 3582” motion; until he does, this court has no authority to entertain it.

Even if the court construes defendant’s motion as a motion pursuant to 18 U.S.C. 2582(c), the motion would be denied. This court lacks authority to correct a sentence once it is imposed with three exceptions: 1) within seven days of the imposition of sentence, the court may correct a sentence imposed as a result of arithmetical, technical or other clear error. Fed. R. Crim. P. 35(c); 2) the court may correct a sentence following remand from a court of appeals, Rule 35(a); or 3) the court may reduce a sentence upon motion by the government brought pursuant to Rule 35(b). None of these exceptions applies to defendant. The seven-day period has long since passed; the court of appeals did not remand his case to this court; and the government has not moved again to reduce his sentence.

ORDER

IT IS ORDERED that defendant’s motion for reduction of sentence pursuant to 18

U.S.C. § 3582(c)(2) is construed as a motion brought pursuant to 28 U.S.C. § 2255 and dismissed because it is a successive collateral attack under that statute and this court lacks authority to entertain it. Defendant's motion to proceed in forma pauperis is DENIED as moot.

Entered this 15th day of June, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge