

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

On August 31, 2004, defendant filed a motion for a 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. In an order dated October 4, 2004, I noted that defendant’s motion, if it was to be considered, would have to be re-characterized as a motion pursuant to 28 U.S.C. § 2255. Castro v. United States, 124 S.Ct. 786, 792 (2004). However, I noted also that before I would re-characterize defendant’s motion as a first § 2255 motion, I was required under the holding in Castro to inform defendant of my intent to re-characterize his submission, warn him that this re-characterization means that any subsequent § 2255 motion will be subject to the restrictions on "second or successive"

motions, and provide defendant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has. Pursuant to the ruling in Castro, if these warnings are not given, the defendant's motion cannot be considered to have become a § 2255 motion for purposes of applying to later motions the law's "second or successive" restrictions. Id at 791-792.

The October 4, 2004 order was sent to defendant Buyao on that same day. On October 18, the order was returned to the court. The envelope was stamped, "Not Deliverable As Addressed, Unable to Forward." A search of the Federal Bureau of Prison's website reveals that defendant was released from FPC Taft, defendant's last known address, on September 23, 2004. Defendant has not contacted this court since that time to advise it of his new address.

Because defendant did not receive notice of this court's intent to re-characterize his filing as a § 2255 motion or an opportunity to withdraw or modify the motion, the filing will not be considered defendant's first § 2255 motion. Instead, the filing will be considered to have been withdrawn.

ORDER

IT IS ORDERED that defendant's motion filed on August 31, 2004, is considered to have been withdrawn.

Entered this 19th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge