

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

CARL V. WHITBY,

Defendant.  
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ORDER

04-C-0521-C

92-CR-0069-C-03

Defendant Carl Whitby has filed a motion to reduce his sentence pursuant to 28 U.S.C. § 2255. This is the fourth post-conviction motion defendant has filed since he was convicted in August 1992. Because it is a successive motion, this court has no authority to hear it unless a panel of the Court of Appeals for the Seventh Circuit certifies that it contains either newly discovered evidence or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. § 2255, ¶ 8.

Defendant is arguing that his sentencing offense level was increased for relevant conduct and that the increase deprived him of his Sixth Amendment right to have a jury

determine all the facts legally essential to the sentence imposed. If the Supreme Court recognizes this right as being applicable to sentences determined under the Sentencing Guidelines *and* makes it retroactive, it is likely that the court of appeals will certify his motion. However, defendant should be aware that the Supreme Court has not yet given explicit recognition to the right or given it retroactive effect. If he files for certification now, the court of appeals will either deny his motion outright if it finds that he would not be eligible to sentence reduction even if the Supreme Court does recognize the right to have all sentence enhancing facts determined by a jury or the court will dismiss his motion as premature. See Simpson v. United States, No. 04-2700 (7th Cir. July 16, 2004) (copy attached).

ORDER

IT IS ORDERED that defendant Carl V. Whitby's motion attacking his sentence pursuant to 28 U.S.C. § 2255 is DISMISSED because this court lacks the authority to entertain it.

Entered this 3rd day of August, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge

