

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

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UNITED STATES OF AMERICA,

ORDER

05-cr-8-bbc

Plaintiff,

v.

ANTHONY HOWARD,

Defendant.  
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Defendant Anthony Howard has filed a motion for relief from judgment under Fed. R. Civ. P. 60(b), contending that his 2005 conviction for possessing heroin and cocaine base with intent to distribute can no longer stand in light of the recent decision by the United States Supreme Court in Alleyne v. United States, 133 S. Ct. 2151 (2013). Despite the title, defendant's motion must be construed as a motion for post conviction relief under 28 U.S.C. § 2255 because it is a request to the court for consideration of the legality of defendant's sentence. Any motion that is filed in the sentencing court that is substantively within the scope of § 2255 must be filed as a § 2255 motion. United States v. Carraway, 478 F.3d 845, 848 (7th Cir. 2007)("The fact that [petitioner] labeled his motion as a request for relief under a Writ of Quo Warranto and Habeas Corpus rather than section 2255 is immaterial; it is the substance of the petitioner's motion that controls how his request for relief should be treated.")

Section 2255 prohibits a defendant from filing a second or successive motion under § 2255 without certification by a panel of the court of appeals that the new motion contains newly discovered evidence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." Defendant filed his first § 2255 motion on October 7, 2009. It was denied on October 9, 2009. Because defendant's motion is another attempt to challenge his sentence, this court lacks authority to consider it until defendant obtains proper certification from the court of appeals.

ORDER

IT IS ORDERED that defendant Anthony Howard's motion for relief from judgment under Fed. R. Civ. P. 60(b), is construed as a post conviction motion under 28 U.S.C. § 2255 and is DENIED for lack of jurisdiction.

Entered this 29th day of July, 2013.

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