

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

UNITED STATES OF AMERICA,
Plaintiff,

ORDER
06-cr-108-bbc

v.

JOHNNY NEWMAN,
Defendant.

Defendant Johnny Newman has filed a “Petition to Expedite Petition and Request for Judgment as a Matter of the Precedent of the Law of the Seventh Circuit Appellate Court and the United States Supreme Court to Correct and Modify Erroneous Sentence.” Despite the title, defendant’s petition must be construed as a motion for post conviction relief filed under 28 U.S.C. § 2255 because it is a request to the court to consider the legality of defendant’s sentence. Defendant believes that the court miscalculated the amount of crack cocaine for which he should have been held accountable by taking into account drug amounts not charged in the court of conviction. He wants to have his sentence corrected to reflect the lower drug amount.

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 September 10, 2007 (Case No. 07-cv-504-bbc). The motion was denied on December 19, 2007. This motion is defendant's second attempt to challenge his sentence, which tends to explain his effort to avoid labeling it as a § 2255 motion. This court lacks authority to consider the claims raised in his motion.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the

issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). Defendant has not made a substantial showing of a constitutional right so no certificate will issue.

ORDER

IT IS ORDERED that defendant Johnny Newman's "Petition to Expedite Petition and Request for Judgment as a Matter of the Precedent of the Law of the Seventh Circuit Appellate Court and the United States Supreme Court to Correct and Modify Erroneous Sentence" is DENIED for lack of jurisdiction. No certificate of appealability shall issue.

Further, IT IS ORDERED that if defendant files any further documents in this case, the clerk of court is directed to forward them to me before filing. If I determine that the document includes a challenge to defendant's conviction or sentence and is not accompanied by an order of the Court of Appeals for the Seventh Circuit permitting the filing, then I will place the document in the file of this case and make no response to it.

Entered this 10th day of October, 2012.

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