IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

08-cr-124-bbc

v.

PHILLIP LATHROP,

Defendant.

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Defendant Phillip Lathrop has filed a Motion to Appoint Special Investigator in which he asks the court to appoint an investigator to look into misconduct on the part of the government and police investigators that led to his wrongful conviction. Defendant's motion 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 his 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 January 9, 2012 (Case No. 12-cv-28-bbc). The motion was denied on April 9, 2012. Because defendant's motion is his second attempt to challenge his sentence, this court lacks authority to consider the claims raised in the 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 Phillip Lathrop's Motion to Appoint Special Investigator 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 13th day of March, 2013.

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