

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

UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

08-cr-38-bbc

v.

MARCUS KILGORE,

Defendant.

Defendant Marcus Kilgore has filed a motion for relief from judgment under Fed. R. Civ. P. 60(b). Despite the title, it must be construed as a motion for post conviction relief filed pursuant to 28 U.S.C. § 2255. 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 civil Rule 60(b) 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 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 May 22, 2009 (09-cv-328-bbc). That motion was dismissed without prejudice on May 29, 2009 because defendant's appeal was still pending. On February 1, 2010, the court of appeals affirmed defendant's conviction. Thereafter, on February 23, 2010, defendant re-filed his § 2255 motion (10-cv-91-bbc). The motion was denied on May 17, 2010. 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). Therefore, this court lacks authority to consider the claims raised in his motions without certification by the court of appeals.

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 Marcus Kilgore's motion for relief from judgment under Fed. R. Civ. P. 60(b) is DENIED for lack of jurisdiction. No certificate of appealability will 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 30th day of April, 2012.

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