IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SALVATORE INGRATI, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	Cr. A. No. 89-49-KAJ Civ. A. No. 04-355-KAJ

MEMORANDUM ORDER

I. INTRODUCTION

In 1990, following a jury trial in this Court,[1] federal prisoner Salvatore Ingrati was convicted of three offenses: (1) conspiracy to distribute cocaine and heroin (21 U.S.C. § 846); (2) distribution of heroin (21 U.S.C. § 841(a)(1) & (b)(1)(A)); and (3) using and carrying a firearm during and in relation to a drug trafficking crime (18 U.S.C. § 924(c)(1)). (D.I. 453 at 1.) Ingrati was sentenced to a total of 320 months imprisonment. *Id.* He appealed, and the United States Court of Appeals for the Third Circuit affirmed his conviction and sentence. (D.I. 277.)

On July 18, 1996, Ingrati filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (D.I.

[1]The Honorable Jane Roth presided over the trial and sentencing.

421.) This § 2255 motion raised four claims challenging his 1990 conviction and sentence: (1) there was insufficient evidence to convict him on the 21 U.S.C. § 841(b) offense because he did not actively employ the firearm; (2) because he was wrongfully convicted on the firearm offense, his conviction for two other related charges were invalid; (3) the sentencing judge improperly enhanced his sentence for perjury because he did not lie; and (4) his trial counsel provided ineffective assistance by failing to submit proposed jury instructions, failing to produce an expert at sentencing, and failing to challenge the sufficiency of the evidence. (D.I. 421; D.I. 422.) On June 17, 1997, this Court[2] dismissed the § 2255 motion as meritless, and the Third Circuit Court of Appeals affirmed this decision. (D.I. 453; D.I. 533.) In 2001, Ingrati filed an application to file a second or successive § 2255 motion, which the Third Circuit Court of Appeals denied. (D.I. 561.)

Ingrati has recently filed two motions with this Court to vacate or correct his 1990 sentence. Both motions are asserted pursuant to the All Writs Act, the Administrative Procedure Act, the Citizens Protection Act, the Jencks Act, and Federal Rule of Civil Procedure 60(b). (D.I. 569; D.I. 586.) Together, these

[2]This matter was originally assigned to the Honorable Joseph J. Longobardi, Jr., but was reassigned to the undersigned on September 24, 2003.

two motions[3] raise five claims: (1) there was insufficient evidence to convict him; (2) he was not guilty of possessing or carrying a firearm as required by 18 U.S.C. § 841(b), and he did not partake in a conspiracy; (2) he did not commit perjury, thus, this Court's sentence enhancement was improper; (3) his trial counsel provided ineffective assistance of counsel; (4) this Court did not have jurisdiction to convict him because his crime was not against the United States; and (5) his sentence was excessive under the Comprehensive Drug Act. (D.I. 569; D.I. 586.)

II. LEGAL PRINCIPLES

"Federal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category." *Castro v. United States*, - U.S. -, 124 S.Ct. 786,791 (2003); *United States v. Fiorelli*, 337 F.3d 282, 287-88 (3d Cir. 2003)("the function of the motion, and not the caption, dictates which Rule [Fed. R. Civ. P. 59 or 60(b)] is applicable"). Prior to the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA")[4] on April 24, 1996, federal courts liberally construed prisoner's post-conviction motions as motions brought

[3]The allegations in the two separate motions are almost identical. Thus, I will dispense with the motions simultaneously.

[4] Pub. L. No. 104-132, 110 Stat. 1214.

pursuant to 28 U.S.C. § 2255. "Courts engaged in this practice in order to reach the merits of *pro se* petitions, while avoiding the wasted time and expense of forcing petitioners to redraft their pleadings." *U.S. v. Miller*, 197 F.3d 644, 648 (3d Cir. 1999).

AEDPA's enactment changed this practice by "dramatically alter[ing] the form and timing of habeas petitions filed in the federal courts." *Id.* at 649. Now, habeas petitioners must comply with a one-year statute of limitations for filing their § 2255 motions, and they are barred from filing second or successive habeas petitions without first obtaining certification from the court of appeals. *See* 28 U.S.C. § 2244(d)(1); 28 U.S.C. § 2255. Consequently, a federal court's re-characterization of a post-conviction motion into a first § 2255 motion might unfairly deprive a prisoner of "the right to have a single petition for habeas corpus adjudicated." *Adams v. United States*, 155 F.3d 582, 584 (2d Cir. 1998). Recognizing this danger, the United States Supreme Court recently held that, prior to re-characterizing a *pro se* litigant's motion as a first § 2255 motion:

> the district court must notify the pro se litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on "second or successive" motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has.

Castro, 124 S.Ct. at 792.

This restriction on re-characterizing post-conviction motions does not apply, however, to a federal court's re-characterization of a prisoner's second or successive motion which collaterally challenges his conviction or sentence in the sentencing court. *See Melton v. United States*, 359 F.3d 855, 857-58 (7th Cir. 2004); *Gonzalez v. Secretary for Dept. Of Corrections*, 366 F.3d 1253, 1277 n.10 (11th Cir. 2004).

With these principles in mind, I will review Ingrati's motions to vacate or correct his sentence.

III. DISCUSSION

Ingrati's two pending motions challenge his 1990 sentence and conviction. His first § 2255 motion challenged his 1990 sentence and conviction, and this Court denied that motion on the merits. Ingrati has thus presented the Court with second or successive § 2255 motions.[5] *See Rook v. Rice,* 478 U.S. 1040, **31-32 (1986)(dissent)(two of the guidelines for determining whether to review a possibly successive § 2255 motion is whether the first application was determined on the merits and the second application contains the same grounds)(citing *Sanders v. U.S.*, 373 U.S. 1, 15 (1963)).

[5] Re-characterizing these motions without first informing Ingrati is permissible because they constitute successive § 2255 motions.

The record reveals that Ingrati has not obtained an order from the Court of Appeals for the Third Circuit authorizing this Court to consider these claims. *See* 28 U.S.C. § 2244(b)(3). Accordingly, pursuant to 28 U.S.C. §§ 2244(a) and 2255, I will dismiss Ingrati's current § 2255 motions for lack of jurisdiction.[6] *See Lopez v. Douglas*, 141 F.3d 974, 975-76 (10th Cir. 1998) (without authorization from the Court of Appeals "the district court lacked jurisdiction to decide his unauthorized second petition, and this court must vacate the district court order"); *Nunez v. United States*, 96 F.3d 990, 991 (7th Cir. 1996)("A district court must dismiss a second or successive petition, without awaiting any response from the government, unless the court of appeals has given approval for its filing").

Ingrati attempts to circumvent the limitation on second § 2255 motions by asserting his claims pursuant to the All Writs Act (28 U.S.C. § 1651), the Administrative Procedure Act (5 U.S.C. §§ 701-706), the Jencks Act (18 U.S.C. § 3500(b)), the Citizens Protection Act (28 U.S.C. § 530B), and Federal Rule of Civil Procedure 60(b). *See, e.g., Wright v. United States,* 2003 WL 23164529 (W.D. Wis. Dec. 30, 2003)(where district court construed a document filed under the All Writs Act, the APA, the

[6]Ingrati has also filed a "Motion for Disposition" (D.I. 573.) of his first pending motion to vacate his sentence. I am dismissing his motions to vacate, thus, Ingrati's "Motion for Disposition" is moot.

Citizens Protection Act, and the Jencks Act as a § 2255 motion). However, these statutes and rule do not provide alternative vehicles for a federal prisoner to collaterally challenge his conviction and sentence when, as here, the prisoner has failed to satisfy the procedural requirements of 28 U.S.C. § 2255.[7] In

[7]First, by asserting the All Writs Act (28 U.S.C. § 1651) as a basis for jurisdiction, it appears that Ingrati is attempting to obtain a Writ of Error Coram Nobis. However, this Writ is traditionally used to attack convictions with continuing consequences only when the petitioner is no longer in custody. *United States v. Baptiste*, 223 F.3d 188, 189 (3d Cir. 2000). Because Ingrati is still in custody, relief by way of coram nobis is unavailable. Moreover,"[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Carlisle v. United States*, 517 U.S. 416, 428 (1996)(internal citations omitted).

Ingrati asserts Federal Rule of Civil Procedure 60(b) as a basis for jurisdiction. Although Rule 60(b) can be used to seek relief from a district court's denial of § 2255 motion, *See e.g. Harper v. Vaughn*, 272 F. Supp. 2d 527, 531 (E.D. Pa. 2003), it generally cannot be used to provide relief from a criminal judgment. *United States v. O'Keefe*, 169 F.3d 281, 289 (5th Cir. 1999); *see e.g. James v. U.S.*, 459 U.S. 1044, 147 (1982)(stating that Fed. R. Civ. P. 60(b) was "designed, in large part, to replace the common-law writ of coram nobis in civil cases). Here, Ingrati does not ask the Court to re-consider its denial of his prior § 2255 motion. Rather, he asks the Court to vacate his sentence.

Ingrati also alleges jurisdiction under the Administrative Procedure Act, 5 U.S.C.§ 701-706 ("APA"). However, this circuit has consistently held that the APA does not provide an independent basis for jurisdiction. *Grant v. Horn*, 505 F.2d 1220, 1225 (3d Cir. 1974); *see also Morrison v. U.S.*, 444 F. Supp. 179, 181 (D.C. Neb. 1978)(stating that the APA was not intended to undermine specific jurisdictional requirements applicable to habeas proceedings under § 2241).

Finally, although Ingrati cites the Jencks Act and the Citizens Protection Act, these Acts are not jurisdictional. *See U.S. v. Martin*, 52 F.3d 328, **2 (7th Cir. 1995)(The Jencks Act "alone . . . does not confer jurisdiction upon the district court

short,

> [p]risoners cannot avoid the AEDPA's rules by inventive captioning . . . [c]all it a motion for new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela, certiorari, capias, habeas corpus, ejectment, quare impedit, bill of review, writ of error, or an application for a Get-Out-of-Jail Card; the name makes no difference. It is substance that controls.

Melton, 359 F.3d at 857.

IV. CONCLUSION

THEREFORE, at Wilmington this 14th day of July, 2004; IT IS ORDERED that:

1. Petitioner Salvatore Ingrati's motions to vacate his sentence, which this Court construes as second or successive motions for federal habeas corpus relief pursuant to 28 U.S.C. § 2255, are DISMISSED and the writ is DENIED. (D.I. 569; D.I. 586.)

2. Ingrati's "Motion/Request for Disposition of Previous All Writs Act, Writ of Error, and Administrative Procedures Act [Motion]" is DISMISSED as moot. (D.I. 573.)

3. Ingrati has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a certificate of appealability is not warranted. *See United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997); Third Cir. Local Appellate Rule 22.2 (2000).

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to consider [a petitioner's] post-trial collateral attack on his conviction or sentence"); *see generally* 28 U.S.C. § 530(B).

4. Pursuant to Rule 4(b), 28 U.S.C. foll. § 2255, the clerk shall forthwith send a copy of this Memorandum and Order to Ingrati.

5. The clerk shall also send a copy of this Memorandum and Order to the United States Attorney for the District of Delaware.

Kent A. Jordan
United States District Judge