

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

UNITED STATES OF AMERICA

VERSUS

CHARLES MOSS

CRIMINAL ACTION

NO: 09-123

SECTION: "S" (3)

ORDER AND REASONS

Charles Moss filed a motion in this action titled: "Petitioner's 'Actual Innocence' Claim, and Motion for Declaratory Judgment, Pursuant to Article III, §2, Clause 1, and §21, Collateral Legal Consequences of Sentence (B. Criminal Matters) within the Concept of a 'Case' or 'Actual Controversy' and the Federal Declaratory Judgment Act 28 USCS § 2201" (Doc. #478). After reviewing the motion, the court determined that it is more properly characterized as a petition for habeas corpus under 28 U.S.C. §2255. On July 17, 2014, the court issued an order notifying Moss of the recharacterization, and granted him 30 days to amend or withdraw his pending motion, or the court would proceed with the motion and analyze it under §2255.

On August 4, 2014, Moss filed a Motion to Vacate Court's "Recharacterization" Order (Doc. #485). Moss argues that §2255 is an inadequate avenue to pursue his actual innocence claim, and that he may have prosecutorial misconduct claims that he will want to raise in a later §2255, which would be precluded by the prohibition against second and successive §2255 motions if his motion for declaratory judgment is recharacterized as a §2255 motion.

Section 2255 "is the primary means of collaterally attacking a federal sentence." Tolliver v. Dobre, 211 F.3d 876, 877 (5th Cir. 2000) (citing Cox v. Warden, Fed. Det. Ctr., 911 F.2d 1111, 1113 (5th Cir. 1990)). The Declaratory Judgment Act, under which Moss seeks to proceed, "does not provide a means whereby previous judgments by state or federal courts may be reexamined, nor is


it a substitute for appeal or post conviction remedies." Shannon v. Sequeechi, 365 F.2d 827, 829 (10th Cir. 1966) (citations omitted).

Thus, Moss must file a motion under §2255 to collaterally attack his conviction and sentence. He has not previously filed such a motion and is able to bring all potential claims at this time, which the court will consider under the appropriate standards.

IT IS HEREBY ORDERED that Moss' Motion to Vacate Court's "Recharacterization" Order (Doc. #485) is **DENIED**, and Moss is granted leave to amend or withdraw his pending motion titled "Petitioner's 'Actual Innocence' Claim, and Motion for Declaratory Judgment, Pursuant to Article III, §2, Clause 1, and §21, Collateral Legal Consequences of Sentence (B. Criminal Matters) within the Concept of a 'Case' or 'Actual Controversy' and the Federal Declaratory Judgment Act 28 USCS § 2201" (Doc. #478), within 30 days of the date of this order. If he does not act, the court will proceed with the motion as it is filed and analyze it under §2255.

IT IS FURTHER ORDERED that the Clerk of Court provide Moss with the §2255 form along with a copy of this order.

New Orleans, Louisiana, this 18th day of December, 2014.



MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE