

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FAUSTINO PENA-MORLA	:	
Petitioner,	:	
	:	CIVIL ACTION NO.
v.	:	3:08-cv-00619 (JCH)
	:	
UNITED STATES OF AMERICA	:	NOVEMBER 4, 2008
Respondent.	:	

RECHARACTERIZATION ORDER

Faustino Pena-Morla, a federal prisoner, is currently serving a thirty-seven month sentence following his plea of guilty to one count of possession of cocaine with intent to distribute, and possession of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). On April 18, 2008, Pena-Morla filed a “Motion to for Sentence Adjustment.” (Doc. No. 1). Because this motion challenges the length of the petitioner’s sentence, it should have been filed as a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Second Circuit has held that when a petitioner has never filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, a district court may not simply construe “ a motion purportedly made under some other rule”as a motion to vacate, set aside or correct sentence without providing notice to the petitioner. Adams v. United States, 155 F.3d 582, 584 (2d Cir. 1998). Prior to recharacterizing the Motion for Sentence Adjustment as a motion brought pursuant to section 2255, the court must permit the petitioner to either: (1) agree to the recharacterization of his petition as a section 2255 or (2) “withdraw the motion rather than have it so recharacterized.” Id. If petitioner chooses to withdraw the motion, he may also “amend it so that it contains all the 2255 claims he believes he has.” Castro v. United States, 540 U.S. 375, 383 (2003).

Accordingly, because the petitioner has not previously filed a motion pursuant to section 2255, on or before **November 25, 2008**, the petitioner shall file a Notice in which he either: (1) agrees to the recharacterization of his petition as a section 2255 motion, or (2) withdraws the petition rather than have the court recharacterize it as a section 2255 motion. If the petitioner fails to respond to this order, the court will recharacterize and rule on the petition accordingly. Furthermore, the court warns petitioner that recharacterizing his Motion for Sentence Adjustment to a section 2255 means that “any subsequent 2255 motion will be subject to the restrictions on ‘second or successive’ motions.” Id; see also 28 U.S.C. § 2255(h).

SO ORDERED.

Dated at Bridgeport, Connecticut this 4th day of November, 2008.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge