

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF INDIANA
 SOUTH BEND DIVISION

UNITED STATES OF AMERICA)	
)	
v.)	Cause No. 3:01-CR-00064(01) RM
)	(Civil No. 3:07-CV-467RM)
)	
ANTHONY WILBOURN)	
)	

ORDER

On October 1, 2007, Anthony Wilbourn filed a document with the court labeled: “Successive Petition for Writ of Habeas Corpus Relief to Vacate Sentence.” Mr. Wilbourn asks the court for relief of judgment due to ineffective assistance of trial counsel at sentencing. For the following reasons, the court denies Mr. Wilbourn’s Motion to Vacate.

Regardless of the caption, because Mr. Wilbourn’s motion asks the court to set aside his sentence as unconstitutional, it is substantively within the scope of a § 2255 petition. *See Melton v. U.S.*, 359 F.3d 855, 857 (7th Cir. 2004) (“no matter what title the prisoner plasters on the cover... it is substance that controls”) *see also Walker v. O’Brien*, 216 F.3d 626, 632 (7th Cir. 2000) (“Congress enacted 28 U.S.C. § 2255 to be the vehicle for collateral attacks on convictions and sentences for federal prisoners”). Mr. Wilbourn’s first § 2255 petition was dismissed by this court on April 18, 2005, and the Court of Appeals vacated his certificate of appealability and dismissed his appeal on November 10, 2005. Mr. Wilbourn later sought to reopen and amend his initial petition, but this court

denied his request on May 3, 2007. As such, the court construes Mr. Wilbourn's current motion as a successive petition. 28 U.S.C. § 2244 provides that before a second or successive motion is filed with the district court, "the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." Since the court of appeals has not issued such an order, the court has no power to review Mr. Wilbourn's petition.

Accordingly, the court DENIES Mr. Wilbourn's Motion to Vacate [Doc. No. 171).

SO ORDERED.

ENTERED: October 2, 2007

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court