

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES</b>	:	
	:	<b>CRIMINAL NO.</b>
	:	<b>94-189</b>
<b>v.</b>	:	
	:	
<b>LUIS ANGEL</b>	:	

**MEMORANDUM**

**Broderick, J.**

**October , 1999**

In August, 1994, following a trial by jury, Petitioner Luis Angel ("Angel") was convicted of one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). On December 13, 1994, this Court sentenced Angel to 235 months imprisonment followed by three years supervised release. Angel appealed, and on August 9, 1995, the United States Court of Appeals for the Third Circuit affirmed this Court's judgment. Angel's petition for a writ of certiorari was denied on December 11, 1995. Angel is currently incarcerated pursuant to this sentence.

On March 16, 1998, Angel filed for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. That motion challenged Angel's conviction and sentence on the basis that his Fifth Amendment due process rights were violated. Angel argued that this Court did not have jurisdiction to convict him and that the evidence at trial varied from the indictment. Angel's motion also raised a claim for ineffective assistance of counsel in violation of the Sixth Amendment. This Court, by Memorandum and Order dated April 5, 1998, held that Angel's motion should properly be treated as a motion to vacate, correct or set aside sentence pursuant to

28 U.S.C. § 2255 because Angel sought to challenge the terms of his conviction and sentence rather than events occurring subsequent to his sentencing. Having construed Angel's motion as one brought pursuant to 28 U.S.C. § 2255, this Court dismissed the motion as untimely because it was not filed on or before April 23, 1997, as required by the Third Circuit decision in Burns v. Morton, 134 F.3d 109, 111-112 (3d Cir. 1998). This Court denied Angel's request for a certificate of appealability by Order dated May 8, 1999. Angel then sought to appeal this Court's denial of his § 2255 motion pursuant to 28 U.S.C. § 2253(c)(1). The Third Circuit denied Angel's request for a certificate of appealability on the basis that his § 2255 motion was untimely and there were no exceptional circumstances which warranted consideration of his motion under § 2241.

Angel has now filed a pro se motion entitled "Petition for Writ of Error Coram Nobis." Angel alleges that his trial counsel was ineffective in not objecting to the manner in which his criminal history category was calculated at his sentencing. For the reasons stated below, the Court will deny Angel's motion without addressing the merits of his ineffective assistance of counsel claim.

Angel's petition for a writ of error coram nobis seeks relief under the All Writs Act, 28 U.S.C. § 1651(a). The writ of error coram nobis is "an ancient writ that was available at common law to correct factual errors in both civil and criminal cases." United States v. Rankin, 1 F. Supp. 2d 445, 453 (E.D.Pa. 1998) (citing United States v. Morgan, 346 U.S. 502, 507 (1954)). The Supreme Court has held that, under the All Writs Act, 28 U.S.C. § 1651(a), a district court in a criminal case can grant this "extraordinary remedy...only under circumstances compelling such action to achieve justice." United States v. Morgan, 346 U.S. 502, 511 (1954). The writ of error

coram nobis is only available where no other relief was available at the time of trial, an error "of the most fundamental character" is involved and "sound reasons exist[] for failure to seek appropriate earlier relief." Morgan, 346 U.S. at 512.

Angel's instant claim may not be raised in a petition for a writ of error coram nobis. Rather, it may only be brought as a motion attacking his sentence pursuant to 28 U.S.C. § 2255. A writ of coram nobis may only be used "to attack allegedly invalid convictions which have continuing consequences, when the petitioner has served his sentence and is no longer 'in custody' for purposes of 28 U.S.C. § 2255." United States v. Stoneman, 870 F.2d 102, 106 (3d Cir. 1989). Angel is currently incarcerated at FCI Schuylkill pursuant to the sentence which he is now seeking to challenge. Therefore, he is not eligible for coram nobis relief at this time.

Further, a criminal defendant may not challenge his sentence under a motion for a writ of error coram nobis when he could raise the same challenge in a motion under § 2255. As the Supreme Court stated in Carlisle v. United States, "[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." 517 U.S. 416, 428 (1996) (internal quotations omitted). Angel's ineffective assistance of counsel claim can be raised in a § 2255 motion. In fact, the Third Circuit has repeatedly stated that "[a] § 2255 motion is a proper and indeed the preferred vehicle for a federal prisoner to allege ineffective assistance of counsel." United States v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994).

Having found that Angel's claims cannot be raised in a petition for writ of error coram nobis, the Court will treat Angel's motion one seeking to attack his sentence pursuant to 28

U.S.C. § 2255. Angel has previously filed a § 2255 motion which has been dismissed by this Court. Therefore, the Court must treat the instant motion as a second or successive motion under 28 U.S.C. § 2255. Section 2255 provides, in relevant part:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain --

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255. Angel's motion does not allege that his ineffective assistance of counsel claims are based on newly discovered evidence or a new rule of constitutional law. The record also reveals that Angel did not seek certification from the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 2244(b)(3) as required before filing the instant motion. Therefore, Angel's motion must be dismissed for failure to comply with the dictates of § 2255. See, e.g. United States of America v. Ocampo, No. Crim. 96-63, Civ.A. 97-1996, 1999 WL 551888 \*1 (E.D.Pa. July 16, 1999) (slip op.); United States v. Wilson, No. Crim. 91-470, Civ. 97-1118, 1999 WL 391355 \*1 (E.D.Pa. June 9, 1999) (slip op.).

An appropriate order follows.

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<b>v.</b>	:	
	:	
<b>LUIS ANGEL</b>	:	

**ORDER**

**AND NOW**, this            day of October, 1999; Petitioner Luis Angel ("Angel") having filed a pro se motion entitled "Petition for Writ of Error Coram Nobis" alleging ineffective assistance of counsel in connection with his December 13, 1994 sentencing before this Court; Angel having previously filed a motion attacking his sentence pursuant to 28 U.S.C. § 2255 which was dismissed as untimely by this Court on April 15, 1999; for the reasons stated in this Court's Memorandum of this same date, the Court having determined that the instant motion should properly be treated as a motion pursuant to 28 U.S.C. § 2255 for which Angel must seek prior certification from the Third Circuit Court of Appeals under 28 U.S.C. § 2244;

**IT IS ORDERED** that Luis Angel's petition for writ of error coram nobis (Doc. No. 65) shall be treated as a second or successive motion attacking sentence pursuant to 28 U.S.C. § 2255 and **DISMISSED** without prejudice for failing to seek certification as provided in 28 U.S.C. § 2244.

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RAYMOND J. BRODERICK, J.