

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	CRIMINAL ACTION
)	No. 12-20099-02-KHV
v.)	
)	CIVIL ACTION
LAURA SHOOP,)	No. 18-2011-KHV
)	
Defendant.)	
_____)	

MEMORANDUM AND ORDER

On July 28, 2015, the Court sentenced defendant to 42 months in prison. This matter is before the Court on Petitioner/Movant’s Motion For Change Of Incarceration (Doc. #341) filed December 27, 2017, which the Court construes as a successive motion to vacate sentence under 28 U.S.C. § 2255. For reasons stated below, the Court dismisses defendant’s motion for lack of jurisdiction.

Factual Background

On July 12, 2012, a grand jury returned an indictment which charged defendant with conspiracy to commit money laundering, conspiracy to possess with intent to distribute marijuana and various substantive offenses. On March 18, 2014, defendant pled guilty to one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). On July 28, 2015, the Court sentenced defendant to 42 months in prison.¹ Defendant did not appeal.

Cheryl Pilate represented defendant throughout the change of plea.² In November of 2014,

¹ Defendant’s total offense level was 21, with a criminal history category V, resulting in a guideline range of 70 to 87 months in prison.

² Thomas W. Barte, an Assistant Federal Public Defender, represented defendant at (continued...)

Pilate withdrew, and David M. Bell entered an appearance. Bell represented defendant throughout the remaining proceedings.

On August 20, 2015, defendant filed a pro se motion to vacate her sentence under 28 U.S.C. § 2255. Liberally construed, defendant's Section 2255 motion asserted that Bell provided ineffective assistance at sentencing because (1) he did not ask for a sentence lower than the government recommendation of 42 months in prison; (2) he presented a poor argument which actually did more damage than good; and (3) he did not ask for a recommendation that defendant be housed close to family. Motion Under 28 U.S.C. § 2255 (Doc. #249) at 4. Defendant also asserted a claim of prosecutorial misconduct. Id. at 5. On October 30, 2015, the Court overruled defendant's motion and denied a certificate of appealability. See Memorandum And Order (Doc. #273).

Defendant has filed three motions to reduce sentence under 18 U.S.C. § 3582(c)(2), which claimed relief under Amendments 782, 791 and 794 to the Sentencing Guidelines. The Court denied all three motions. See Memorandum And Order (Doc. #281) filed January 5, 2016 (Amendment 791); Memorandum And Order (Doc. #283) filed January 19, 2016 (Amendment 782); Memorandum And Order (Doc. #314) filed August 22, 2016 (Amendment 794).

In the Tenth Circuit Court of Appeals, defendant sought leave to file a successive Section 2255 motion to assert a claim that Bell provided ineffective assistance because he did not seek a continuance of sentencing. Defendant maintained that at a new sentencing hearing, she would have been able to take advantage of amendments to the Sentencing Guidelines which were

²(...continued)
the initial Rule 5 hearing. The next day, the Court granted his motion to withdraw.

scheduled to take effect several months after her actual sentencing. On July 7, 2016, the Tenth Circuit denied defendant's request for leave to file a successive Section 2255 motion. See Order (Doc. #309).

On October 5, 2016, defendant filed a second motion to vacate her sentence under 28 U.S.C. § 2255. Defendant asserted that (1) she had a constitutional right to be sentenced under the amended guidelines because they involved clarifying amendments and (2) counsel provided ineffective assistance because he did not request a continuance of sentencing based on Sentencing Guideline amendments which were scheduled to take effect November 1, 2015. See Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. #319). On October 11, 2016, the Court dismissed defendant's motion. See Memorandum And Order (Doc. #320).

In the Tenth Circuit, defendant sought leave to file a successive Section 2255 motion based on Amendment 794. On December 12, 2016, the Tenth Circuit denied defendant's request. See Order (Doc. #326).

In the Tenth Circuit, defendant filed a subsequent request for leave to file a successive Section 2255 motion based on Amendment 791 in light of a new rule of law. On May 1, 2017, the Tenth Circuit denied defendant's request and noted that she did not provide a legal citation to the putative new rule of law in "United States vs. Bade." See Order (Doc. #332) at 2.

On December 27, 2017, defendant filed the instant motion to reduce her term of incarceration from 42 to 33 months. See Petitioner/Movant's Motion For Change Of Incarceration (Doc. #341). Defendant's motion seeks relief under 18 U.S.C. § 3582(c)(2) based on Amendment 791 and consistent with the district court decision in United States v. Bade, D. Kan. No. 15-20001-01-CM.

Analysis

Defendant seeks relief under 18 U.S.C. § 3582(c)(2) based on Amendment 791 to the Guidelines which became effective after her sentencing. See Petitioner/Movant's Motion For Change Of Incarceration (Doc. #341) at 2. The Court lacks authority to reduce defendant's sentence under Section 3582(c)(2) because (1) the Sentencing Commission has not designated Amendment 791 for retroactive application and (2) to the extent Amendment 791 is a clarifying amendment, the Court could only provide relief under Section 2255. See 18 U.S.C. § 3582(c)(2) (court may reduce sentence where consistent with policy statements of Commission); U.S.S.G. § 1B1.10 (if amendment not listed in subsection 1B1.10(c), reduction not consistent with policy statement); United States v. Torres-Aquino, 334 F.3d 939, 941 (10th Cir. 2003) (claim based on "clarifying" amendment must be asserted on direct appeal or in Section 2255 motion, not Section 3582(c)(2) motion).

In substance, defendant's motion seeks to reduce her sentence under Amendment 791. See Petitioner/Movant's Motion For Change Of Incarceration (Doc. #341) at 2-3. The relief sought – not a motion's title – determines whether movant filed an unauthorized second or successive petition under Section 2255. United States v. Nelson, 465 F.3d 1145, 1149 (10th Cir. 2006); see also United States v. Torres, 282 F.3d 1241, 1242, 1246 (10th Cir. 2002) (allowing petitioner to avoid bar against successive petitions by styling petition under different name would erode procedural restraints of Sections 2244(b)(3) and 2255). The Court therefore construes defendant's motion as a successive Section 2255 motion. In United States v. Bade, D. Kan. No. 15-20001-01-CM, the Honorable Carlos Murguia sustained defendant's Section 2255 motion which asserted that counsel provided ineffective assistance because he failed to ask to continue sentencing until after the

effective date of Amendment 791. See Clerk's Courtroom Minute Sheet (Doc. #36 in D. Kan. No. 15-20001-01-CM); Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. #24 in D. Kan. No. 15-20001-01-CM) at 4. In Bade, however, Judge Murguia addressed the claim in the context of an initial Section 2255 motion. Here, defendant has filed two prior Section 2255 motions.

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, a defendant may not file a second or successive motion pursuant to Section 2255 unless she first applies to the appropriate court of appeals for an order authorizing the district court to consider the motion. See 28 U.S.C. §§ 2244(b)(3), 2255(h). If defendant files a second or successive motion without first seeking the required authorization, the district court may (1) transfer the motion to the appellate court if it determines that it is in the interest of justice pursuant to 28 U.S.C. § 1631 or (2) dismiss the motion for lack of jurisdiction. See In re Cline, 531 F.3d 1249, 1252 (10th Cir. 2008). The Court has discretion in deciding whether to transfer or dismiss without prejudice. Trujillo v. Williams, 465 F.3d 1210, 1222-23 (10th Cir. 2006). In making this decision, the Court considers whether the claims would be time barred if filed anew in the proper forum, whether the claims are likely to have merit and whether the claims were filed in good faith or if, on the other hand, it was clear at the time of filing that the Court lacked jurisdiction. Id. at 1223 n.16.

Because it appears that defendant's claims do not satisfy the authorization standards under Section 2255, the Court overrules the motion rather than transferring it to the Tenth Circuit. See In re Cline, 531 F.3d at 1252 (district court may refuse to transfer motion which fails on its face to satisfy authorization standards of Section 2255(h)); Phillips v. Seiter, 173 F.3d 609, 610 (7th Cir. 1999) (waste of judicial resources to require transfer of frivolous, time-barred cases). A second or

successive motion under 28 U.S.C. § 2255 may be filed in the district court if the court of appeals certifies that the motion is based on (1) newly discovered evidence that if proven and viewed in light of the evidence as a whole would establish by clear and convincing evidence that no reasonable factfinder would have found defendant 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(h).

Here, defendant has not asserted “newly discovered evidence.” She also has not shown any new rule of constitutional law that was previously unavailable.³ The Court therefore declines to transfer the present motion to the Court of Appeals.

IT IS THEREFORE ORDERED that Petitioner/Movant’s Motion For Change Of Incarceration (Doc. #341) filed December 27, 2017, which the Court construes as a successive petition under 28 U.S.C. § 2255, is **DISMISSED for lack of jurisdiction**

Dated this 25th day of January, 2018 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

³ Defendant relies on the ruling in Bade, but as explained above, that decision was in the context of an initial Section 2255 motion. Moreover, Bade is not a Supreme Court decision or a “new rule of constitutional law” that was previously unavailable. Finally, in the Tenth Circuit, defendant had the opportunity to argue how Bade applied to her request for relief, but she failed to appropriately supplement the record. See Order (Doc. #332) at 2.