

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 27, 2017

Elisabeth A. Shumaker
Clerk of Court

In re: SHELLY LYNN MCELROY,

Movant.

No. 17-8016
(D.C. Nos. 2:16-CV-00074-NDF &
2:15-CR-00021-NDF-3)
(D. Wyo.)

ORDER

Before **KELLY, BRISCOE**, and **LUCERO**, Circuit Judges.

Shelly Lynn McElroy filed her initial 28 U.S.C. § 2255 motion in the district court in April 2016. The district court entered judgment against her in July 2016 and she took an appeal to this court. While her appeal was pending, she filed an “Amendment of Motion 28 U.S.C. § 2255” in the district court, requesting a 3- or 4-level reduction in sentence as a “minimal participant” in her crime of conviction. The district court dismissed this filing as an unauthorized second or successive § 2255 motion. After we denied a certificate of appealability in her pending appeal, Ms. McElroy filed a substantially similar document in this court, still requesting a 4-level sentence reduction. We construe this document on its face as a motion for authorization to file a second or successive § 2255 motion.

To obtain authorization, Ms. McElroy’s proposed § 2255 motion must rely on “(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 [her] guilty of the [challenged] 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). Ms. McElroy must make a prima facie showing that she can satisfy one of these gate-keeping requirements. *See In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012) (per curiam); *see also* 28 U.S.C. § 2244(b)(3)(C).

Ms. McElroy makes no arguments relating to newly discovered evidence or a new rule of constitutional law. She merely seeks a reduction in her sentence on the basis of her minimal involvement in her crime of conviction, which was conspiracy to possess with intent to distribute methamphetamine. Having wholly failed to present any argument that comports with § 2255(h), Ms. McElroy cannot bring a second or successive § 2255 motion. To the extent that the substance of Ms. McElroy’s “Amendment of Motion 28 U.S.C. § 2255” indicates she seeks to reduce her sentence pursuant to 18 U.S.C. § 3582(c)(2), we note that a § 3852(c)(2) motion must be filed in the district court in the first instance.

The motion for authorization is denied. This denial of authorization “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.” 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal line extending to the right.

ELISABETH A. SHUMAKER, Clerk