

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3091

UNITED STATES OF AMERICA

v.

FREDERICK H. BANKS,
Appellant

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN,
GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS and PORTER Circuit
Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Theodore McKee

Circuit Judge

Dated: February 8, 2019
JK/cc: Laura S. Irwin, Esq.
Frederick H. Banks

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3091

UNITED STATES OF AMERICA

v.

FREDERICK H. BANKS,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 2-03-cr-00245-001)
District Judge: Honorable Nora Barry Fischer

Submitted for Possible Summary Action
Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
January 3, 2019
Before: MCKEE, SHWARTZ and BIBAS, Circuit Judges
(Opinion filed: January 9, 2019)

OPINION*

PER CURIAM

Frederick Banks appeals pro se from the District Court's order denying his petition

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Appendix A

for a writ of error coram nobis or, in the alternative, a writ of audita querela. He also challenges the District Court's order insofar as it denied his request for a hearing on these claims. For the following reasons, we will summarily affirm.

I.

In October 2004, following a jury trial in the United States District Court for the Western District of Pennsylvania, Banks was convicted of mail fraud, copyright infringement, and additional related offenses. We affirmed. See United States v. Vampire Nation, 451 F.3d 189, 192 (3d Cir. 2006). The District Court later denied Banks's motion under 28 U.S.C. § 2255, and we denied him a certificate of appealability. United States v. Banks, C.A. No. 06-3671 (order entered Dec. 17, 2007). Since then, Banks has filed dozens of other motions and petitions in the District Court challenging his 2004 convictions, and those filings have generated numerous unsuccessful appeals. Banks has now completed serving his sentence and term of supervised release.

At issue here is Banks's August 2018 petition for a writ of error coram nobis, or, in the alternative, a writ of audita querela. In the petition, Banks claimed that: (1) the District Court erred in denying a request he made during his 2014 revocation hearing for evidence allegedly gathered against him under the Foreign Intelligence Surveillance Act (FISA); (2) the District Court lacked jurisdiction over his criminal case for numerous reasons, including: (a) the government obtained evidence against him without the grand jury's authorization; (b) the government failed to prove the

interstate commerce element of the charges against him; (c) the court lacked jurisdiction to prosecute him because he is a Native American; (d) the magistrate judge was not authorized to accept his guilty plea; (e) he was not provided an opportunity to challenge the individuals selected for the grand jury; (f) the arrest warrants were invalid because they did not contain the magistrate judge's official seal; and (g) the grand jury did not properly record its vote.

The District Court denied the petition, concluding that Banks had not demonstrated that he was entitled to the extraordinary relief provided by either of these writs. The District Court also denied Banks's request for a hearing. Banks timely appealed.

II.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and exercise de novo review over legal issues arising from the denial of coram nobis and audita querela relief. See United States v. Rhines, 640 F.3d 69, 71 (3d Cir. 2011) (per curiam); United States v. Richter, 510 F.3d 103, 104 (2d Cir. 2007) (per curiam). We may take summary action if an appeal fails to present a substantial question. See 3d Cir. I.O.P. 10.6.

III.

A motion to vacate sentence under 28 U.S.C. § 2255 is the presumptive means to collaterally challenge a federal conviction or sentence. See Okereke v. United

States, 307 F.3d 117, 120 (3d Cir. 2002). Only if § 2255 relief is “inadequate or ineffective” may a petitioner like Banks resort to the All Writs Act, 28 U.S.C. § 1651, which authorizes coram nobis and audita querela relief in the appropriate circumstances. Because Banks’s claims could have been raised on appeal or under § 2255, the writs of coram nobis and audita querela are not available to him. See Mendoza v. United States, 690 F.3d 157, 159 (3d Cir. 2012) (explaining that the writ of error coram nobis is appropriate only when sound reasons exist for failing to seek relief earlier); Massey v. United States, 581 F.3d 172, 174 (3d Cir. 2009) (explaining that § 2255 is not “inadequate or ineffective” to warrant use of audita querela merely because a petitioner cannot meet the stringent gatekeeping requirements of § 2255).

Accordingly, the District Court properly denied relief. In light of its disposition of these motions, the District Court also properly denied Banks’s requests for a hearing and appointment of counsel and a guardian ad litem.

IV.

For these reasons, we conclude that this appeal presents no substantial question. Therefore, we will summarily affirm the District Court’s orders. See Third Circuit LAR 27.4 and I.O.P. 10.6.

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

UNITED STATES OF AMERICA,)	
)	
v.)	Criminal No. 03-245
)	Judge Nora Barry Fischer
FREDERICK H. BANKS,)	
)	
Defendant.)	

ORDER OF COURT

AND NOW, this 24th day of August, 2018, upon consideration of Defendant Frederick H. Banks' "Petition for Writ of Error Coram Nobis or in the Alternative a Writ of Audita Querela and Motion to Hold Hearing to Determine if Petitioner's Convictions Should be Vacated and/or Expunged; and Notice of Change of Address," (Docket No. [795]), filed in this closed case where Banks has fully served his sentence of incarceration and supervised release,

IT IS HEREBY ORDERED that Defendant Banks' Petition [795] is DENIED as he has not demonstrated that he is entitled to the extraordinarily relief which he once again requests, for the same reasons the Court explained in the March 1, 2017 and July 26, 2017 Orders denying similar petitions, (Docket No. [726], [773]), both of which were affirmed on appeal, *see United States v. Banks*, 723 F. App'x 97 (3d Cir. 2018) and 694 F. App'x 61 (3d Cir. 2018). This Court previously denied numerous motions of this type, with all such rulings being affirmed on appeal. *See e.g., United States v. Banks*, 665 F. App'x 138 (3d Cir. 2016) (affirming denial of petition for coram nobis relief because "Banks has not shown that there was no remedy available at the time of trial for any of the purported errors that he raised, or that there were sound reasons for failing to seek relief earlier"); *United States v. Banks*, 684 F. App'x 128 (3d Cir. 2017) (affirming denial of coram nobis relief because "Banks seeks to attack his revocation proceedings, not the underlying convictions in this matter."). All told, Banks has once again failed to establish all of

the necessary elements to show that he could possibly be entitled to relief. *See United States v. Banks*, 165 F. App'x 987, 987-88, (3d Cir. 2006) (to demonstrate that the "extraordinary remedy" of the issuance of a writ of coram nobis is warranted defendant must demonstrate that: (1) he is suffering from continuing consequences of the allegedly invalid conviction; (2) there was no remedy available for the alleged error at the time of trial; (3) sound reasons exist for his failing to seek relief earlier; and, (4) the alleged error goes "to the jurisdiction of the trial court, thus rendering the trial itself invalid."). There is likewise no basis for a writ of audita querela to issue. *See e.g., United States v. Rodriguez*, 616 F. App'x 515, (3d Cir. 2015) (quoting *Massey v. United States*, 581 F.3d 172, 174 (3d Cir. 2009) ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." (internal quotation omitted))).

Accordingly, Defendant Banks' Petition [795] is denied.

s/Nora Barry Fischer
Nora Barry Fischer
United States District Judge

cc/ecf: All counsel of record

cc: Frederick H. Banks
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(via first class mail)