UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1865

UNITED STATES OF AMERICA

v.

OMAR SIERRE FOLK,
Appellant

(D.C. No. 1-11-cr-00292-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY and PHIPPS, 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/ David J. Porter
Circuit Judge

Date: May 7, 2020
PDB/cc: Omar Sierre Folk
Michael A. Consiglio, Esq.

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UNITED STATES OF AMERICA

v.

OMAR SIERRE FOLK,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 1-11-cr-00292-001)
District Judge: Honorable John E. Jones, III

Submitted Under Third Circuit L.A.R. 34.1(a):
January 14, 2020

Before: HARDIMAN, PORTER, and PHIPPS,
Circuit Judges.

JUDGMENT

This cause came to be heard on the record of the United States District Court for the Middle District of Pennsylvania and was submitted on January 14, 2020. On consideration whereof, it is now ORDERED and ADJUDGED by this Court

that the District Court's order dated February 16, 2018, is hereby AFFIRMED. All of the above in accordance with the Opinion of this Court. No costs shall be taxed.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: April 3, 2020

PRECEDENTIAL

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Circuit Judges.

(Filed: April 3, 2020)

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OPINION OF THE COURT

PORTER, *Circuit Judge*

Omar Sierre Folk appeals the District Court's order denying his Rule 59(e) motion to alter or amend the judgment denying his motion under 28 U.S.C. § 2255. He argues that the District Court enhanced his sentence based on an incorrect career-offender designation under the advisory Sentencing Guidelines. He also moves to expand his certificate of appealability. Because Folk's claim is not cognizable under 28 U.S.C. § 2255, we will affirm the District Court's order and deny his motion to expand the certificate of appealability.

I

Folk was convicted by a federal jury of one count of distribution and possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 841; two counts of using a firearm to further a drug trafficking offense, in violation of 18 U.S.C. § 924(c); and one count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

Before sentencing, the Presentence Investigation Report ("PSR") deemed Folk a career offender under U.S.S.G.

§ 4B1.1 because he had at least two prior felony convictions for "crimes of violence."[1] As a result, the PSR recommended enhancing Folk's Guidelines range from a sentence between 384 and 465 months' imprisonment to a sentence between 420 months and life imprisonment.

At sentencing, the District Court discussed Folk's four previous convictions with the parties and whether the convictions constituted crimes of violence. The convictions included two robberies in 2001, simple assault in 2003, and terroristic threats in 2003. The District Court adopted the PSR's recommended Guidelines range but sentenced Folk to 264 months' imprisonment—120 months less than the bottom of the unenhanced Guidelines range and 156 months less than the bottom of the enhanced Guidelines range. Folk appealed his conviction, but we affirmed. *See United States v. Folk*, 577 F. App'x 106 (3d Cir. 2014). Importantly, Folk *did not* challenge his sentence or his career-offender designation.

Then, the Federal Public Defender filed a timely § 2255 motion on Folk's behalf. In his § 2255 motion, Folk argued that his career-offender designation was invalid because *Johnson v. United States*, 135 S. Ct. 2551 (2015), rendered § 4B1.2(a) void for vagueness. Folk decided to proceed pro se and filed several motions to amend his § 2255 motion. The District Court ultimately denied Folk's § 2255 motion.

Finally, Folk filed a notice of appeal and a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). We stayed his appeal pending the District Court's resolution of the Rule 59(e) motion. Folk's Rule 59(e) motion argued that his robbery, simple assault, and terroristic threats convictions do not constitute crimes of violence, so the District Court erroneously designated him as a career offender.

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[1] U.S.S.G. § 4B1.1(a) (2012) provides that "[a] defendant is a career offender if . . . [he] has at least two prior felony convictions of either a crime of violence or a controlled substance offense." A "crime of violence" is an offense punishable by more than one year of imprisonment that involves "the use, attempted use, or threatened use of physical force against the person of another," or is an otherwise specified offense. U.S.S.G. § 4B1.2(a) (2012).

The District Court denied the motion. Folk then filed an amended notice of appeal.

Folk's certificate of appealability identified two issues for review: (1) whether an erroneous career-offender designation is cognizable under § 2255; and (2) whether he was correctly designated as a career offender.[2]

After we issued the certificate of appealability, Folk moved to expand the certificate of appealability and to supplement his appeal. Folk argued that his conviction for possession of 280 grams of cocaine is invalid under *United States v. Rowe*, 919 F.3d 752, 759 (3d Cir. 2019) (holding that separate acts of distribution of controlled substances are distinct offenses rather than a continuing crime). The motion to expand the certificate of appealability was referred to this panel and remains pending.

II

The District Court had subject-matter jurisdiction over Folk's § 2255 motion under 28 U.S.C. §§ 1331 and 2255. We have appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). We review legal conclusions de novo and factual findings for clear error. *United States v. Doe*, 810 F.3d 132, 142 (3d Cir. 2015).

III

The first issue we must address is whether a challenge to an incorrect career-offender designation under the advisory Sentencing Guidelines is cognizable under § 2255. Folk says that it is.[3] We disagree.

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[2] The parties identified other issues in their briefs on appeal, including an ineffective-assistance-of-counsel claim. But the certificate of appealability designated only two issues for review, and we need not consider uncertified issues. *See* 3d Cir. L.A.R. 22.1(b)–(c); *see also* 28 U.S.C. § 2253(c).

[3] For this analysis, we assume without deciding that the District Court incorrectly designated Folk as a career offender.

A

Under § 2255, a federal prisoner may move to vacate, set aside, or correct his federal sentence if: (1) "the sentence was imposed in violation of the Constitution or laws of the United States"; (2) the court lacked "jurisdiction to impose" the sentence; (3) the sentence exceeded "the maximum authorized by law"; or (4) the sentence is "otherwise subject to collateral attack[.]" 28 U.S.C. § 2255(a).

The statute's language "is somewhat lacking in precision" but "afford[s] federal prisoners a remedy identical in scope to federal habeas corpus [under 28 U.S.C. § 2254]." *Davis v. United States*, 417 U.S. 333, 343 (1974). The scope of relief does not reach "every asserted error of law." *Id.* at 346. Rather, § 2255 provides relief for jurisdictional and constitutional claims, as well as for certain nonconstitutional claims.

Folk's career-offender Guideline claim does not satisfy the first three bases for § 2255 relief. He does not assert that his sentence violates the Constitution or federal law. Folk does not argue that the District Court lacked jurisdiction to impose the sentence. Nor can he argue that his sentence exceeds the maximum authorized by law because each of his federal convictions permitted a maximum of life imprisonment. *See* 21 U.S.C. § 841(b); 18 U.S.C. § 924(c)(1)(A)(i) (permitting any sentence exceeding five years); 18 U.S.C. § 924(e)(1) (requiring a sentence to exceed 15 years). So, to justify receiving § 2255 relief, Folk's nonconstitutional claim—based on an incorrect career-offender enhancement—must "otherwise subject" his sentence to collateral attack. 28 U.S.C. § 2255(a); *see Bullard v. United States*, 937 F.3d 654, 658 (6th Cir. 2019).

Nonconstitutional claims that otherwise subject a sentence to collateral attack fall between two poles. *See Doe*, 810 F.3d at 155. At one end are plainly cognizable claims, such as a federal prisoner's claims that he is "either actually innocent of his crime" or that his "prior conviction used to enhance his sentence has been vacated[.]" *Spencer v. United States*, 773 F.3d 1132, 1139 (11th Cir. 2014) (en banc) (referencing *Davis*, 417 U.S. at 346–47 and *Johnson v. United States*, 544 U.S. 295, 303 (2005)); *see also Doe*, 810 F.3d at

155 (citing *Davis*, 417 U.S. at 343). On the other end are plainly noncognizable claims, which include technical procedural violations that do not prejudice a defendant. *See, e.g.*, *Peguero v. United States*, 526 U.S. 23, 27–28 (1999) (holding that a district court's failure to notify a defendant of his right to appeal was not cognizable when the defendant knew of the right and was not prejudiced).

Supreme Court precedent recognizes that § 2255 may remedy a nonconstitutional claim such as a flawed sentence in two circumstances. *See Doe*, 810 F.3d at 155 (noting that *Reed v. Farley*, 512 U.S. 339 (1994), explains how to fill the narrow space "between [the] poles"). First, if a sentencing error resulted in "an omission inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 783 (1979) (citation omitted). Second, if a sentencing error constitutes "a fundamental defect which inherently results in a complete miscarriage of justice[.]" *Id.*[4]

B

A misapplication of the career-offender Guideline is not an omission inconsistent with the rudimentary demands of fair procedure. Sentencing errors that qualify as "omission[s] inconsistent with" fair procedure include procedural errors that prejudice a defendant. *Doe*, 810 F.3d at 155 (quoting *Reed*, 512 U.S. at 348 (plurality opinion)). Ordinarily, the procedural error is the failure "to give a defendant advice required by the Federal Rules [of Criminal Procedure]." *Peguero*, 526 U.S. at 27–28 (holding that a district court's failure to notify a defendant of his right to appeal was not cognizable when the

[4] Relying on the plurality opinion in *Reed v. Farley*, this Court suggested that "aggravating circumstances" amount to a third standalone basis for § 2255 relief for nonconstitutional claims. *See Doe*, 810 F.3d at 155. The Supreme Court has not "expressly adopted [the aggravating circumstances] exception or defined its parameters." *Pethtel v. Ballard*, 617 F.3d 299, 305 (4th Cir. 2010). But we need not resolve that tension here because Folk does not argue that aggravating circumstances exist. Nor would his claim meet the requirements for relief under an aggravating-circumstances theory. *See, e.g.*, *Reed*, 512 U.S. at 357 (Scalia, J. concurring).

defendant knew of the right and was not prejudiced by the failure); *see also Timmreck*, 441 U.S. at 784–85 (declining to find cognizable a procedural error under Federal Rule of Criminal Procedure 11 absent aggravating circumstances); *Hill v. United States*, 368 U.S. 424, 428 (1962) (holding that a district court's failure to notify a defendant of his right to speak at his sentencing did not prejudice him and was not a cognizable claim under § 2255); *cf. Reed*, 512 U.S. at 349–51 (plurality opinion) (holding that, in a § 2254 proceeding, a state court's failure to observe speedy trial requirements was not cognizable when the failure did not prejudice the defendant).

Peguero, *Timmreck*, and *Hill* each involved a district court's failure to notify a defendant of certain rights under the Federal Rules of Criminal Procedure. *Reed* involved a district court's failure to follow certain procedural timing rules. Folk does not complain that the District Court failed to notify him of his rights under the Federal Rules of Criminal Procedure. Nor does he assert any other procedural error. His case is therefore not analogous to *Peguero*, *Hill*, and *Timmreck*, which recognized that a prejudicial procedural violation may be cognizable under § 2255.[5]

In *Doe*, a panel of this Court held that a misapplication of the career-offender designation under the *mandatory* Guidelines was cognizable. *Doe*'s holding relied, in part, on *Peguero*. This Court said that "the incorrect computation of a mandatory Guidelines range" based on an erroneous career-offender designation "is at least as serious as the error

[5] A miscalculation of a Guidelines range is a procedural error. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 51 (2007). The District Court's designation of Folk as a career offender—a substantive decision—increased Folk's Guidelines range. *See, e.g.*, *Doe*, 810 F.3d at 159 (noting that a "substantive error"—like a career-offender designation—results in "more time in prison"); *see also Narvaez v. United States*, 674 F.3d 621, 627 n.11 (7th Cir. 2011) ("The misapplication of the career-offender status—which increased Mr. Narvaez's sentencing range—is certainly a substantive error."); *United States v. Jayyousi*, 657 F.3d 1085, 1116–17 (11th Cir. 2011) (noting that a sentence was substantively unreasonable because it failed to account for a defendant's career-offender status).

discussed in *Peguero* and thus should also be cognizable [when] the mistake prejudices the defendant." *Doe*, 810 F.3d at 159.

Doe involved a substantive error. *Peguero* (and its predecessor cases at the Supreme Court) involved *procedural* errors that potentially caused prejudice. *Doe* thus blended the two avenues of § 2255 relief. Relying on *Doe*, Folk argues that the District Court's allegedly erroneous career-offender designation prejudiced him. For example, Folk parrots *Doe* and argues that the alleged "*substantive* error, like more time in prison, is doubtless more serious than *procedural* error, like failure by the [sic] court to advise someone of appellate rights[.]" Appellant's Reply Br. 3 (quoting *Doe*, 810 F.3d at 159).

But the Supreme Court has never conducted a prejudice inquiry when deciding whether a substantive nonconstitutional error—rather than a procedural error—is cognizable under § 2255. We decline Folk's invitation to do so here.[6] Because Folk does not complain of a prejudicial *procedural* error, his claim is not cognizable under § 2255 as "an omission

[6] Even if we analyzed the prejudice to Folk as *Doe* suggested, Folk still would not prevail. Folk notes that the career-offender designation increased his advisory Guidelines range by one level. His resulting range was 420 months to life imprisonment. Without the increase, his Guidelines range would have been 384 to 465 months' imprisonment. He argues that he therefore "suffered prejudice because he was sentenced under an incorrect Guidelines range regardless of whether the ultimate sentence falls within the correct Guideline[s] range upon remand." Appellant's Reply Br. 4. But the District Court sentenced Folk to 264 months' imprisonment—*ten years* below the bottom end of the Guidelines range *without* the career-offender enhancement. Folk is hard pressed to show that his below-the-Guidelines-range sentence constitutes a complete miscarriage of justice. *See, e.g.*, *United States v. Hoskins*, 905 F.3d 97, 104–05 (2d Cir. 2018) (finding that a federal prisoner lacked a cognizable § 2255 claim for his within-Guidelines sentence).

inconsistent with the rudimentary demands of fair procedure." *Reed*, 512 U.S. at 348 (plurality opinion).

C

In *Doe*, we held that an incorrect career-offender designation under the *mandatory* Guidelines is a fundamental defect inherently resulting in a complete miscarriage of justice cognizable under § 2255. *See* 810 F.3d at 160. But *United States v. Booker*, 543 U.S. 220, 246 (2005), made the Guidelines advisory. We have not yet addressed whether an incorrect career-offender designation under the *advisory* Guidelines is cognizable under § 2255.

Nearly every other circuit court of appeals has held or suggested that such a claim is not cognizable.[7] Today, we join

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[7] *See Snider*, 908 F.3d at 189 (holding that the defendant's nonconstitutional "challenge to his advisory guidelines range suffers from a great defect: it is not cognizable under § 2255"); *United States v. Foote*, 784 F.3d 931, 940 (4th Cir. 2015) (same); *Spencer*, 773 F.3d at 1144 (en banc) (same); *Hawkins v. United States*, 706 F.3d 820, 823–24 (7th Cir. 2013), *opinion supplemented on denial of reh'g*, 724 F.3d 915 (same); *Sun Bear v. United States*, 644 F.3d 700, 704–05 (8th Cir. 2011) (en banc) (holding that because applying the career-offender Guideline is an ordinary question of Guidelines interpretation, the error is not a fundamental defect resulting in a complete miscarriage of justice and is not cognizable under § 2255).

The Fifth Circuit has held that "[§] 2255 motions may raise *only* constitutional errors and other injuries that could not have been raised on direct appeal that will result in a miscarriage of justice if left unaddressed." *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999) (emphasis added) (citations omitted). Because "[m]isapplications of the Sentencing Guidelines fall into neither category . . . [they] are not cognizable in § 2255 motions." *Id.* Because of this blanket prohibition, the Fifth Circuit has not expansively delineated the rule, unlike other circuits.

Two other circuits have faced the issue. The Second Circuit avoided drawing a "categorical conclusion," but identified "the advisory nature of the challenged career offender Guidelines as one factor, among others," that

our sister circuits and hold that an incorrect career-offender enhancement under the advisory guidelines is not cognizable under § 2255 because it is not a fundamental defect that inherently results in a complete miscarriage of justice.

Our conclusion is buttressed by four rationales: (1) the lawfulness of a sentence within the statutory limit; (2) the advisory nature of the Guidelines; (3) an interest in finality; and (4) a concern about workable standards.

1

Even when based on an incorrect advisory career-offender enhancement, a sentence within the statutory maximum is lawful. *See Spencer*, 773 F.3d at 1138 (noting that a sentence is lawful if it is "less than the statutory maximum sentence prescribed by Congress" (citing *United States v. Addonizio*, 442 U.S. 178, 186–87 (1979)); *cf. United States v. Payano*, 930 F.3d 186, 193 (3d Cir. 2019) (explaining that statutory ranges "set the floor and the ceiling within which a district court must sentence, thereby . . . limit[ing] the extent to which a district court may permissibly stray from the Guidelines range" (citations omitted)). And a lawful sentence is not a complete miscarriage of justice. *See Addonizio*, 442 U.S. at 186–87. So an incorrect career-offender designation that results in a sentence within the statutory maximum is not a fundamental defect inherently resulting in a complete miscarriage of justice and cannot be cognizable under § 2255.

District courts possess "broad discretion in imposing a sentence within a statutory range." *Booker*, 543 U.S. at 233. When sentencing defendants, district courts must consider the factors in 18 U.S.C. § 3553(a), which includes the kinds of

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precludes showing that a below- or within-Guidelines sentence is a "complete miscarriage of justice." *Hoskins*, 905 F.3d at 104 n.7. The First Circuit avoided the issue entirely by deciding a case on alternative grounds. *See Cuevas v. United States*, 778 F.3d 267, 272 (1st Cir. 2015) (declining to address "the cognizability of a claim, like the one at issue in [Folk's case], that the sentencing court legally erred in applying the Guidelines").

sentences and the sentencing range suggested for certain violations. *See* 18 U.S.C. § 3553(a)(4).

So long as a district court considers the § 3553(a) factors and imposes a sentence within the statutory limits for an offense, the criminal proceeding will not be "infected with any error of fact or law of the 'fundamental' character." *See Addonizio*, 442 U.S. at 186. Such a sentence is lawful and cannot be a complete miscarriage of justice.

Even if a sentencing error affects "the way in which the [sentencing] court's judgment and sentence [will] be performed," it does not "affect the lawfulness of the judgment itself—then or now." *Foote*, 784 F.3d at 937 (quoting *Addonizio*, 442 U.S. at 187); *see also Hawkins*, 706 F.3d at 821–22, 824, *opinion supplemented on denial of reh'g*, 724 F.3d 915 (noting that a "sentence that is well below the ceiling imposed by Congress" is not a complete miscarriage of justice *even if* the imposed sentence were "far above the [G]uidelines range that would have been applicable had the career offender guideline not been in play").

For example, in *Addonizio*, the district court sentenced the defendant under the belief that the defendant would be eligible for parole after serving one-third of his sentence. 442 U.S. at 186. After the defendant was sentenced, the parole commission changed its rules, which subjected the defendant to more time in prison before he would be eligible for parole. The district court's incorrect assumption did not infect the proceeding "with any error of fact or law of the 'fundamental' character" and did not merit § 2255 relief. *Id.*

Based on *Addonizio*, other circuit courts have concluded that a sentencing error is not a fundamental defect requiring § 2255 relief when a prisoner is sentenced below the statutory maximum. *See Foote*, 784 F.3d at 937; *see also Spencer*, 773 F.3d at 1138 (citing *Addonizio*, 442 U.S. at 186–87) (noting that a sentence "less than the statutory maximum sentence prescribed by Congress" is lawful, and thus not a fundamental defect); *Hawkins*, 706 F.3d at 822, 824; *Sun Bear*, 644 F.3d at 705; *cf. Snider*, 908 F.3d at 191 (citing *Addonizio*, 442 U.S. at 187) (noting that the defendant's corrected sentence would fall within the same Guidelines range). We agree.

Because the Guidelines are advisory and merely one factor considered within a sentencing court's discretion, an incorrect career-offender enhancement is not a fundamental defect inherently resulting in a complete miscarriage of justice.

First, oddities may arise if a court "declare[s] that a fundamental defect or a complete miscarriage of justice has occurred in a situation in which" a defendant could receive the same sentence "under an *advisory* Guidelines scheme requiring individualized analysis of the sentencing factors set forth in . . . § 3553(a)." *Foote*, 784 F.3d at 941. Even if a court provided § 2255 relief for an erroneous career-offender designation, "the district court could [still] impose the same sentence again." *Spencer*, 773 F.3d at 1140 (collecting cases); *see also Sun Bear*, 644 F.3d at 705 (noting that the same sentence could be reimposed); *Hawkins*, 706 F.3d at 824–25 (acknowledging that the district court might have imposed a lower sentence but did not have to do so).

Second, the advisory Guidelines merely inform "the exercise of a [sentencing] court's discretion in choosing an appropriate sentence within the statutory range." *Beckles v. United States*, 137 S. Ct. 886, 892 (2017). It is true that the advisory Guidelines are the "starting point and the initial benchmark for sentencing." *Id.* at 894 (quoting *Gall*, 552 U.S. at 49 (internal quotation marks omitted)). But "the advisory Guidelines do not fix the permissible range of sentences." *Id.* at 892. "[A] sentencing court may no longer rely exclusively on the Guidelines range; rather, the court must make an individualized assessment based on the facts presented and the other statutory factors." *Id.* at 894 (quoting *Gall*, 552 U.S. at 49 (internal quotation marks omitted)).

Holding otherwise would transform the "advisory" Guidelines into more than a discretionary guide and undermine *Booker*. The Guidelines lack legal force and are not "tantamount to the laws of Congress" because they are *advisory* and therefore not binding on a district court. *Spencer*, 773 F.3d at 1142 (citing *Mistretta v. United States*, 488 U.S. 361, 395 (1989)); *see also Pepper v. United States*, 562 U.S. 476, 501 (2011) (noting that "a district court may in appropriate cases impose a non-Guidelines sentence based on

a disagreement with the [Sentencing] Commission's views"). So, a Guidelines error is not a fundamental defect like a "violation of a statute or constitutional provision" and does not inherently result in a complete miscarriage of justice. *See Foote*, 784 F.3d at 942.

3

An interest in finality cautions against finding that an erroneous career-offender enhancement is a fundamental defect inherently resulting in a complete miscarriage of justice. Section 2255 does not provide relief for "every asserted error of law." *Davis*, 417 U.S. at 346. It strikes a balance "between the interest in finality and the injustice of a possibly mistaken sentence," such as one imposed after an incorrect career-offender designation. *Hawkins*, 706 F.3d at 825. Allowing collateral challenges based on sentencing errors under the advisory Guidelines "would deal a wide-ranging blow to the judicial system's interest in finality." *Foote*, 784 F.3d at 943 (citing *Addonizio*, 442 U.S. at 184). Given a district court's discretion and the advisory nature of the Guidelines, an incorrect career-offender designation is not the type of defect that supports undermining finality. *See Spencer*, 773 F.3d at 1144; *Foote*, 784 F.3d at 943.

4

There is no manageable limit to the types of sentencing errors that would be cognizable under § 2255 if an incorrect career-offender enhancement were found to be cognizable. "[I]t is hard to fathom what the dividing line would be between a fundamental defect and mere error" when applying the advisory Guidelines. *Foote*, 784 F.3d at 943. Courts may struggle "to catalog the subset of miscalculations of advisory [G]uidelines that are miscarriages of justice that can be corrected in [federal] postconviction proceedings." *Hawkins*, 706 F.3d at 825.

Perhaps we could establish a rule that an incorrect career-offender enhancement qualifies for § 2255 relief because it is more serious than other sentencing errors. After all, the miscalculation increases the Guidelines range. But nearly all Guidelines errors will affect the range. *See Spencer*, 773 F.3d at 1142 (citation omitted). On one hand, limiting

§ 2255 relief only to misapplications of the career-offender designation would be underinclusive. *See Foote*, 784 F.3d at 943. But, if *any* sentencing error is cognizable on collateral review, then the rule would be overinclusive and disrupt finality. *Id.*; *see also Hawkins*, 706 F.3d at 825 (noting that the defendant's argument requires "all [sentencing] errors (except, presumably, harmless ones) [to be] miscarriages of justice"). The breadth of such a rule would make the limited relief offered by § 2255 a boundless opportunity for criminal defendants to re-challenge their sentences.

D

Folk argues that this Court's decision in *Doe* and Supreme Court opinions discussing the advisory Guidelines require a different outcome. We disagree.

In *Doe*, we held that an erroneous career-offender designation under the *mandatory* Guidelines is cognizable under § 2255. 810 F.3d at 160. We reasoned that the "misclassification of the defendant as a career offender [was] at least as serious as the error discussed in *Peguero*" and "should also be cognizable [when] the mistake prejudices the defendant." *Id.* at 159. When discussing prejudice to the defendant, *Doe* noted that the career-offender status applies to "a subgroup of defendants . . . that traditionally has been treated very differently from other offenders." *Id.* (internal quotation mark and citation omitted). *Doe* then concluded that the "misapplication of the mandatory career-offender Guideline, when such a misapplication prejudices the [d]efendant, results in a sentence substantively not authorized by law and is therefore subject to attack on collateral review." *Id.* at 160.

To reach the conclusion, this Court noted that "sentencing decisions are anchored by the Guidelines" and even the advisory Guidelines "exert controlling influence on the sentence that the [sentencing] court will impose." *Id.* (quoting *Peugh v. United States*, 569 U.S. 530, 541, 545 (2013)). We emphasized that the mandatory Guidelines carry "even greater force." *Id.* (citing *Booker*, 543 U.S. at 234). *Doe* also rejected the suggestion that a sentence within a statutory limit that violates the mandatory Guidelines is lawful and thus

cannot be challenged under § 2255. *Id.* We stated that *Peugh* and *Booker* rendered this conclusion "implausible." *Id.*

Folk adopts *Doe*'s approach and relies on *Peugh* and *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), to argue that *Doe*'s holding applies to the advisory Guidelines. Folk emphasizes that *Doe* looked to "the actual world of sentencing." *Doe*, 810 F.3d at 160. He argues that "the determinative role the advisory Guidelines continue to hold at federal sentencing, which is *de facto* similar to the role held by the mandatory Guidelines" requires us to apply *Doe* here. Appellant's Br. 48. Folk's argument is incorrect for several reasons.

First, *Doe*'s narrow holding specifically did not extend to the advisory Guidelines. *See* 810 F.3d at 160 ("Our holding is narrow, and we do not consider challenges to the advisory Guidelines[.]").

Second, the advisory Guidelines do not have "the force and effect of laws." *See Booker*, 543 U.S. at 234. They are but one factor among many statutory factors that a district court considers when exercising its discretion at sentencing. So a district court may have multiple possible rationales supporting a sentence. *See United States v. Evans*, 526 F.3d 155, 165 (4th Cir. 2008). A sentencing court is free to deviate from a Guidelines range within its discretion and after consideration of the mandatory factors in § 3553(a). Indeed, the District Court sentenced Folk to a term of imprisonment ten years below the bottom end of the Guidelines range without the career-offender enhancement.

What's more, a sentencing court cannot presume the reasonableness of a within-Guidelines sentence. *See Nelson v. United States*, 555 U.S. 350, 352 (2009) ("The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." (emphasis in original)). In sum, the Guidelines are a "system of guided discretion" that advises sentencing courts in "choos[ing] a sentence within [the] *statutory limits*." *Beckles*, 137 S. Ct. at 894–95 (emphasis added).

Third, Folk's reliance on *Peugh* and *Molina-Martinez* is misplaced. Both cases involved direct appeals and not

postconviction collateral attacks. *See Spencer*, 773 F.3d at 1144 (discussing *Peugh*'s differences); *see also Molina-Martinez*, 136 S. Ct. at 1341. The standards employed in both cases were "far less demanding than the standard" Folk "must satisfy: that an error in the application of [the] advisory [G]uidelines 'inherently results in a complete miscarriage of justice.'" *See Spencer*, 773 F.3d at 1144 quoting *Hill*, 368 U.S. at 428). In *Peugh*, the petitioner had to show that "a change in law create[d] a significant risk of a higher sentence." *Hawkins*, 724 F.3d at 917 (internal quotation marks omitted) (quoting *Peugh*, 569 U.S. at 550). And in *Molina-Martinez*, the petitioner had to demonstrate error creating a "reasonable probability of a different outcome." 136 S. Ct. at 1346. Finally, *Peugh* involved a constitutional error—a violation of the Ex Post Facto Clause. 569 U.S. at 538–39. Thus, the constitutional error—and not a nonconstitutional error misapplying a Sentencing Guideline—"invalidated the sentence." *Hawkins*, 724 F.3d at 916 (discussing *Peugh*).

Molina-Martinez established a mere "rebuttable presumption of prejudice" on direct appeal when a sentencing court miscalculates a Guidelines range, *see Payano*, 930 F.3d at 193, which suggests that the error does not inherently result in a complete miscarriage of justice.

Essentially, Folk contends that *perhaps* the District Court would impose an even lower sentence on remand. And because that possibility exists, Folk asserts that he is prejudiced and the incorrect career-offender designation is a fundamental defect inherently resulting in a complete miscarriage of justice. But it is also possible that, after further review of the § 3553(a) factors, the District Court would resentence Folk to the same sentence—or perhaps a higher one. We will not speculate about how a district court *might* resentence a criminal defendant were we to grant collateral relief. Even if one hypothetical judge might lower a sentence upon remand, another judge may not. And the theoretical possibility of a lower sentence does not demonstrate the type of prejudice necessary to show that the criminal defendant's current sentence rests on a fundamental defect inherently resulting in a complete miscarriage of justice. *Cf. Foote*, 784 F.3d at 942; *Spencer*, 773 F.3d at 1142–43; *Hawkins*, 724 F.3d at 917; *Sun Bear*, 644 F.3d at 706.

* * *

In sum, we hold that a nonconstitutional claim based on an incorrect career-offender enhancement under the advisory Guidelines is not cognizable under § 2255. Because Folk's career-offender claim is not cognizable, we need not address whether his previous convictions are "crimes of violence" under the career-offender Guideline.

IV

Folk has moved to expand the certificate of appealability to include his argument under our decision in *Rowe*, 919 F.3d 752. To resolve the motion, we must decide whether (a) Folk's motion to expand the certificate of appealability is properly construed as a motion to amend his § 2255 motion or as a second or successive habeas motion,[8] and (b) Folk's motion survives the resulting standard. Based on our precedent, Folk's motion to expand the certificate of appealability is a second or successive habeas motion. We also conclude that it fails to satisfy § 2255's standard for second or successive habeas motions. So we will deny Folk's motion to expand the certificate of appealability.

A

If a federal prisoner "has expended the 'one full opportunity to seek collateral review'" that § 2255 affords him, then a later-filed motion to expand the scope of his § 2255 motion is a second or successive motion. *Santarelli*, 929 F.3d at 105 (quoting *Blystone v. Horn*, 664 F.3d 397, 413 (3d Cir. 2011)). A federal prisoner has expended his opportunity for collateral review if he "has exhausted all of [his] appellate remedies with respect to [his] initial habeas petition." *Id.* But if a federal prisoner's first § 2255 motion has not been resolved, then a motion to expand the scope of his § 2255 motion is a motion to amend. *Id.* at 105–06.

---

[8] Even though Folk filed his motion to expand the certificate of appealability with this Court, we may still find that it is a motion to amend. *See, e.g.*, *United States v. Santarelli*, 929 F.3d 95, 106 (3d Cir. 2019) (construing a petition filed with this Court during an appeal as a motion to amend).

Thus, whether Folk's motion to expand the certificate of appealability is a motion to amend or a second or successive § 2255 motion depends on whether his incorrect career-offender enhancement claims is cognizable. *See id.* It is not, so Folk's motion to expand the certificate of appealability is a second or successive habeas petition because Folk has "expended the 'one full opportunity to seek collateral review'" that § 2255 affords him. *See id.* (quoting *Blystone*, 664 F.3d at 413).[9]

B

Having determined that Folk's motion to expand the certificate of appealability is a second or successive § 2255 motion, we must now decide whether to certify it. We must certify a federal prisoner's second or successive § 2255 motion if the motion contains: (1) "newly discovered evidence ... 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(h)(1)–(2).

Folk's motion to expand the certificate of appealability presents neither newly discovered evidence nor a new rule of constitutional law, so we will not certify Folk's motion as a second or successive § 2255 motion. As Folk concedes, "*Rowe* . . . is not 'new evidence.'" *See* Appellant's Reply to Gov't's Resp. to Mot. By Appellant to Expand the Certificate of Appealability and Permit Suppl. Briefing 5 n.3 (June 18, 2019). So he fails to satisfy § 2255(h)'s first prong. And *Rowe* was a decision of this Court—and not the Supreme Court—so Folk does not satisfy § 2255(h)'s second prong. Accordingly, we will deny his motion.

V

Today we join every other circuit court of appeals in deciding that an incorrect career-offender enhancement under

[9] If we had decided to vacate or reverse the District Court, "the district court would again be vested with jurisdiction to consider" the motion to expand the certificate of appealability as a motion to amend. *Santarelli*, 929 F.3d at 106.

the advisory Guidelines does not present a cognizable claim under 28 U.S.C. § 2255. Thus, we will affirm the District Court's order denying Folk's § 2255 motion. We will also deny Folk's motion to expand the certificate of appealability because he does not satisfy the standard for a second or successive § 2255 motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	1:11-cr-292
	:	
v.	:	Hon. John E. Jones III
	:	
OMAR SIERRE FOLK,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 22nd day of June, 2018, upon consideration of the various motions (Docs. 179, 180, 183, 184, 186, 189, 190) filed by defendant Omar Sierre Folk, and in accord with the accompanying memorandum, it is ORDERED that these motions are DENIED. Folk is further ORDERED to provide written clarification as to the meaning of his June 11, 2018 motion (Doc. 191), as well as the relief he seeks in that motion.

s/ John E. Jones III
John E. Jones III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	1:11-cr-292
	:	
v.	:	Hon. John E. Jones III
	:	
OMAR SIERRE FOLK,	:	
	:	
Defendant.	:	

MEMORANDUM

June 22, 2018

Defendant Omar Sierre Folk ("Folk") has filed the following motions: a motion (Doc. 179) for an evidentiary hearing; a motion (Doc. 180) to amend judgment pursuant to Federal Rule of Civil Procedure 59(e) and for reconsideration pursuant to Federal Rule of Civil Procedure 60(b)(1); a motion (Doc. 183) to amend and supplement Folk's previously filed motion for relief under 28 U.S.C. § 2255 ("2255 motion"); another motion (Doc. 184) to amend and supplement his 2255 motion; a motion (Doc. 186) "under status quo in light of motion's after Doc. 181 clerical error"; a motion (Doc. 189) for an order to show cause; and a motion (Doc. 190) for judgment on the pleadings. For the following reasons, these motions will be denied.

I. BACKGROUND[1]

We previously explained the complicated procedural history of this matter in our February 16, 2018 memorandum, but to understand the instant motions the background bears repeating:

> On August 14, 2012, a jury convicted Folk of various drug and firearms offenses. (Docs. 82, 84). Shortly thereafter, he moved for a new trial or alternatively to vacate judgment. (Doc. 87). The court denied that post-trial motion. (Doc. 90).
>
> Folk was found to be a career offender under the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"), and his resultant sentencing Guideline range was 420 months to life. (Presentence Investigation Report ("PSR") ¶¶ 29-31, 79). On September 26, 2013, the court granted a significant downward variance and sentenced Folk to 264 months' imprisonment. (Doc. 134 at 28-29; Doc. 126).
>
> Folk appealed the denial of a motion for a mistrial made during trial, as well as the denial of his post-trial motion for a new trial. (Doc. 127); *United States v. Folk*, 577 F. App'x 106, 106 (3d Cir. 2014) (nonprecedential). On September 17, 2014, the Third Circuit affirmed the judgment. *Folk*, 577 F. App'x at 107. The Supreme Court of the United States denied Folk's petition for a writ of certiorari on October 5, 2015. *Folk v. United States*, 136 S. Ct. 161 (2015) (mem).
>
> On June 5, 2016, Folk—through counsel from the Federal Public Defender's Office—filed his first motion under 28 U.S.C. § 2255 based on the recent Supreme Court case of *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding the residual clause of the Armed Career Criminal Act ("ACCA") unconstitutionally void for vagueness). (Doc. 139). It appears as though the Federal Public Defender, appointed under a Middle District standing order

[1] On February 5, 2018, this case was reassigned from the Honorable William W. Caldwell to the undersigned due to Judge Caldwell's retirement.

(*see* Doc. 141 (M.D. Pa. Standing Order 15-06)), identified Folk as a potential candidate for relief under *Johnson* and filed the 2255 motion on his behalf pursuant to the standing order. Evidently, due to the looming deadline established by the gatekeeping requirements of 28 U.S.C. § 2255(f) and *Johnson*'s date of decision of June 26, 2015,[2] the Federal Public Defender's policy was to file the 2255 motion on the defendant's behalf and subsequently communicate with the defendant, withdrawing the motion if the defendant did not want it filed. (Doc. 143 at 2). This practice appears to have been followed in the instant case. (*Id.* at 2-3).

On June 8, 2016, the Federal Public Defender moved to appoint counsel from the Criminal Justice Act ("CJA") panel to represent Folk in his *Johnson*-based 2255 motion. (Doc. 143). The request for appointment of CJA counsel was the result of a conflict of interest with Folk stemming from a civil case he filed against the Federal Public Defender's Office. (*Id.* at 3). The court granted this motion the following day, and CJA counsel was appointed. (Doc. 144; Doc. 149 at 1).

On August 30, 2016, the court issued an order for the Government to show cause why relief should not be granted on Folk's 2255 motion. (Doc. 145). Because his *Johnson* claim implicated the residual clause of the career offender portion of the Guidelines, *see* U.S.S.G. § 4B1.2(a)(2) (2013), rather than the residual clause of the ACCA, the Government moved to stay the case in light of relevant cases pending in the Third Circuit as well as the Supreme Court's grant of certiorari in *Beckles v. United States*, 616 F. App'x 415 (11th Cir. 2015) (per curiam), *cert. granted*, 136 S. Ct. 2510 (2016) (mem.) (granting certiorari to determine, *inter alia*, whether advisory Guideline[s'] residual clause found in U.S.S.G. § 4B1.2(a)(2) was void for vagueness

[2] 28 U.S.C. § 2255(f)(3) provides for a one-year statute of limitations that begins to run "on the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]" For most defendants who had not filed a previous 2255 motion, and whose judgments of conviction became final more than a year prior to the *Johnson* decision, Section 2255(f)(3) provided the only means to file a timely initial 2255 motion to assert a *Johnson* claim.

after *Johnson*). (Doc. 147 at 2). Folk's counsel concurred in the stay. (*Id.* at 3). On September 19, 2016, the court granted the unopposed motion to stay the case in light of the grant of certiorari in *Beckles*. (Doc. 148).

After the September 19, 2016 imposition of a stay, no entries appear on the docket until February 27, 2017, when Folk's CJA counsel filed an unopposed motion to withdraw as counsel, (Doc. 149). In her motion to withdraw, which contained little detail, CJA counsel cited an inability to communicate effectively with Folk and his explicit request that she withdraw from his case. (*Id.* at 2). The court granted the motion to withdraw on April 7, 2017, noting that Folk would proceed *pro se* in the post-conviction matters. (Doc. 153).

On April 3, 2017, four days prior to the court granting CJA counsel's motion to withdraw, Folk filed a *pro se* "motion to amend under 15(c)(2)(B)[3] in regards to original 2255." (Doc. 151). Within this motion to amend his initial 2255 motion, Folk referenced a "motion [for] leave [to] amend under [Rule] 15(a)" that he purportedly filed in October of 2016. (*Id.* at 1). As explained above, however, no motion to amend—or any other motion or document—appears on this case's docket in October of 2016. Folk also mentioned this October 2016 motion to "amend under 15(a)" in his reply brief (Doc. 158), averring that the motion was deposited in the prison mail system on October 5, 2016.[4] (Doc. 158 at 1, 2).

Importantly, Folk attached, as "Exhibit (A)" to his reply brief, the cover page of this October 5, 2016 *pro se* motion to

[3] The court construed Folk's motion to amend "under Rule 15(c)(2)(B)" as a motion for leave to amend pursuant to Federal Rule of Civil Procedure 15(c)(1)(B), as Rule 15 does not contain a subsection "(c)(2)(B)." (*See* Doc. 161 at 4 n.2); FED. R. CIV. P. 15(c).

[4] This mailed-by date is important. Under the prisoner mailbox rule, documents placed in the prison mailbox system are deemed filed on the date they are mailed, not the date they are received by the court. *See Pabon v. Mahanoy*, 654 F.3d 385, 391 n.8 (3d Cir. 2011). Moreover, as will be discussed in more detail below, October 5, 2016, was the deadline for Folk to raise claims for relief in an initial 2255 motion pursuant to the one-year statute of limitations set forth in 28 U.S.C. § 2255(f)(1).

> "amend under 15(a)," which contains a "FILED" time-stamp of October 7, 2016, and initials of a staff member from the clerk's office. (*See* Doc. 158-1 at 1). Upon investigation, it appears that—without this court's knowledge—the clerk's office had initially stamped the motion to "amend under 15(a)" as filed, but instead of filing it on the docket, mailed the *pro se* motion back to Folk after discovering that he was represented by CJA counsel.
>
> In his reply brief, Folk further averred that he explicitly asked his CJA counsel to raise other issues for relief, beyond the *Johnson* claim, within the one-year statute of limitations set forth in Section 2255(f)(1). (*See* Doc. 158 at 1). CJA counsel corroborated this averment in her telephonic communications with this court prior to her withdrawal from the case, stating that Folk had wanted to raise additional claims but that she was having significant difficulty deciphering what those claims entailed.
>
> On August 2, 2017, the court permitted Folk to file the entire October 5, 2016 motion to "amend under 15(a)" so that it could be properly considered. (*See* Doc. 162). . . . One week later, Folk filed the full October 5, 2016 motion as requested. (*See* Doc. 163).
>
> On August 23, 2017, the Government filed its brief in opposition to Folk's motion to "amend under 15(a)." (Doc. 166). The Government appear[ed] to concede that leave to amend should be granted, but challenge[d] the merits of the additional claims raised in the motion. (*Id.* at 2-19).

(Doc. 177 at 1-7).

While Folk's initial motion to "amend under 15(a)" was under consideration, he filed two additional motions to amend his 2255 motion. The first additional motion to amend was filed on August 17, 2017, and the second was filed on November 3, 2017. (Docs. 165, 169). Then, on November 30,

2017, Folk filed a motion (Doc. 170) to appoint counsel, as well as a motion (Doc. 171) for an evidentiary hearing.

On February 16, 2018, we issued a memorandum and order addressing Folk's outstanding motions. (Docs. 177, 178). We noted that because Folk's initial motion to "amend under 15(a)" was filed on October 5, 2016, exactly one year from the date his judgment of conviction became final, it was filed within the one-year statute of limitations provided by 28 U.S.C. § 2255(f)(1). (Doc. 177 at 8-9). We also found that amendment of his 2255 motion would cause little, if any, prejudice to the government. (*Id.*) Thus, we granted his initial motion to amend and treated the seven claims raised therein as part of his original 2255 motion. However, we ultimately denied the 2255 motion in its entirety, rejecting the *Johnson*-based claim asserted in the original motion, as well as the seven additional claims raised by amendment. (*See id.* at 9-21). Additionally, we denied Folk's August 17, 2017 and November 3, 2017 motions to amend, his November 30, 2017 motion to appoint counsel, and his November 30, 2017 motion for an evidentiary hearing. (*See id.* at 21-24).

Since the issuance of our February 16, 2018 decision, Folk has filed eight additional motions. We have reviewed the first seven of these motions, and for the reasons set forth below, find that none has merit. We will also request clarification from Folk regarding his eighth motion, "Movant's File a Motion

Upon FRP Fine Inregards [sic] to Doc. 172 Still Not Answer Under U.S.S.G. 5E1.2(a) and 5E1.2(d)" (Doc. 191), as it is completely incomprehensible.

II. DISCUSSION

As with Folk's previous *pro se* filings, all of the instant motions are extremely difficult to decipher. Because the first three motions appear to raise similar arguments, we will address them together.

A. February 26, 2018 Motion for an Evidentiary Hearing; March 1, 2018 Motion to Alter Judgment and for Reconsideration; and March 13, 2018 Motion to Amend and Supplement 2255 Motion

In these three motions, it appears that the crux of Folk's argument is that he was inappropriately designated a career offender under the United States Sentencing Guidelines Manual ("U.S.S.G." or "Guidelines") and that his CJA counsel, Attorney Jennifer Wilson ("Attorney Wilson"), was ineffective for failing to raise this argument in post-conviction proceedings. Also, in his March 1, 2018 Motion to Alter Judgment and for Reconsideration, Folk contends that Attorney Wilson was ineffective for failing to oppose the government's motion to stay his 2255 proceedings.

Initially, we note that both Federal Rule of Civil Procedure 59(e) and Rule 60(b) impose extremely high bars for obtaining relief. Moreover, in order to assert a new claim for relief in an out-of-time motion to amend a Section 2255 filing, the movant must be able to show that the claim relates back to the original

2255 motion. *See Mayle v. Felix*, 545 U.S. 644, 662-64 (2005). Nonetheless, because Folk has been attempting to assert these career offender challenges in one form or another since the initial 2255 motion was filed without his consultation, we will address the merits of Folk's arguments to finally put to rest his claim that he was wrongfully sentenced as a career offender.

1. Career Offender Designation Under the Guidelines

A defendant is considered a career offender if (1) he was at least eighteen years old at the time he committed the instant offense of conviction; (2) the instant offense is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1(a).[5] At the time of Folk's sentencing, the Guidelines defined "crime of violence" as any offense under state or federal law that is punishable by a term of imprisonment exceeding one year, and which either:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious risk of physical injury to another.

[5] Unless otherwise specified, all references to the Guidelines Manual reflect the 2012 edition, as this was the manual utilized for Folk's PSR and sentencing. (*See* PSR ¶ 17).

U.S.S.G. § 4B1.2(a).[6]

It is undisputed that Folk was at least eighteen years old when he committed the instant offense of conviction and that the offense qualified as a "controlled substance offense." The only career offender element in question is whether Folk had two qualifying predicate convictions.

At sentencing, the parties identified four prior Pennsylvania state-court convictions that could potentially qualify as career offender crimes of violence. They included two robbery convictions from 2001, a 2003 simple assault conviction, and a 2003 terroristic threats conviction. (*See* Doc. 134 at 3-9; PSR ¶¶ 42-44).

Because the 2001 robbery convictions involved two robberies that purportedly occurred within five minutes and 150 feet of each other, Folk's counsel argued at sentencing that the robberies could not be treated as two separate episodes for purposes of counting predicate offenses. (Doc. 134 at 3-4). Folk's counsel, however, appeared to concede that the simple assault and terroristic threats convictions, in light of then-current Third Circuit law, qualified as crimes of violence. *(Id.* at 7-9). Thus, Folk's counsel conceded, and Judge Caldwell agreed, that Folk qualified as a career offender under the Guidelines

[6] Section 4B1.2 was amended in 2016 to, *inter alia*, remove the "residual clause," the final clause in Section 4B1.2(a)(2) stating "or otherwise involves conduct that presents a serious risk of physical injury to another." *See* U.S.S.G. app. C amend. 798 (Supp. Nov. 1, 2016). This amendment does not affect the analysis of the instant motions.

regardless of whether the two robberies could be treated as separate episodes. (*Id.*)

Folk contends that he was wrongfully designated a career offender. He argues that crimes under Pennsylvania's robbery, simple assault, and terroristic threats statutes do not qualify as federally defined "crimes of violence," and, therefore, do not constitute predicate offenses under the career offender Guideline.

In determining whether a prior conviction is a federally defined "crime of violence," the court typically employs one of two methods: the "categorical approach," or the "modified categorical approach." *See United States v. Harris*, 205 F. Supp. 3d 651, 660 (M.D. Pa. 2016). When "a statute sets out a single (or 'indivisible') set of elements to define a single crime," a sentencing court must employ the "categorical approach" to determine whether the crime constitutes a "crime of violence." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). In applying the categorical approach, a court "may look only to the elements of a crime, not 'to the particular facts underlying those convictions.'" *United States v. Abbott*, 748 F.3d 154, 157 (3d Cir. 2014) (quoting *Descamps v. United States*, 570 U.S. 254, 257 (2013)). Under the categorical approach, a court "compare[s] the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood."

United States v. Brown, 765 F.3d 185, 189 (3d Cir. 2014) (quoting *Descamps*, 570 U.S. at 257).

A prior conviction qualifies as a predicate for purposes of career offender designation "only if the statute's elements are the same as, or narrower than, those of the generic offense." *Id.* In an ordinary case employing the categorical approach, "a court simply asks 'whether the state crime has the use or threat of physical force [against the person of another] as an element of the offense.'" *Id.* (quoting *United States v. Remoi*, 404 F.3d 789, 794 (3d Cir. 2005)). "If the state statute 'sweeps more broadly' than the federal definition, a conviction under it is not a career offender predicate even if the defendant actually committed the offense in a way that involved the use (or threatened use) of physical force against another." *Id.* (citing *Descamps*, 570 U.S. at 261).

If a statute, however, is "'divisible" in that it "comprises multiple, alternative versions of the same crime," a sentencing court must employ the "modified categorical approach." *Descamps*, 570 U.S. at 261-62. Under the modified categorical approach, "a sentencing court may look to a limited class of extra-statutory documents to determine which version of the offense was the basis of the conviction." *Brown*, 765 F.3d at 189 (citing *Descamps*, 570 U.S. at 261-62). The court, however, should "apply the modified approach to a divisible statute and examine extra-statutory documents only when 'at least one, but not

all' of the separate versions of the offense is, by its elements, a predicate offense." *Id.* at 191 (citing *Descamps*, 570 U.S. at 264).

If a conviction resulted from a jury trial, the sentencing court may consult "the charging paper and jury instructions." *Id.* at 189 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)). On the other hand, if the conviction followed a guilty plea, a court may consult "the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 189-90 (quoting *Shepard v. United States*, 544 U.S. 12, 16 (2005)). After determining which version of the offense was the basis of a defendant's conviction, a court "can then compare that crime, as the categorical approach commands, with the relevant generic offense." *Mathis*, 136 S. Ct. at 2249.

a. Folk's Terroristic Threats Conviction

On November 3, 2003, Folk pleaded guilty to making terroristic threats in violation of 18 PA. CONS. STAT. § 2706. That statute provides, in relevant part:

> (a) A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:
>
> > (1) commit any crime of violence with intent to terrorize another;
> >
> > (2) cause evacuation of a building, place of assembly or facility of public transportation; or

> (3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.

18 PA. CONS. STAT. § 2706(a) (2003).

Folk cites *United States v. Brown*, 765 F.3d 185 (3d Cir. 2014),[7] in support of his argument that his terroristic threats conviction does not qualify as a career offender predicate. In *Brown*, the Third Circuit considered whether a conviction under Pennsylvania's terroristic threats statute could constitute a federally defined "crime of violence" for purposes of the career offender Guideline. *See generally id.* The court answered this question in the negative. *Id.*

The 2014 *Brown* decision thus dictates that a terroristic threats conviction under 18 PA. CONS. STAT. § 2706 cannot qualify as a career offender predicate, regardless of the subsection under which a defendant was convicted. Folk's career offender designation, however, was not solely dependent upon his prior terroristic threats conviction.

[7] We are cognizant that *Brown* was not decided until September 2, 2014, eleven months *after* Folk was sentenced as a career offender. Nevertheless, because the Third Circuit did not decide Folk's direct appeal until September 17, 2014, we assume the *Brown* holding would have been available to Folk had his career offender designation been challenged on direct appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final[.]"). We also agree with Folk that, as the *Brown* court recognized, binding Supreme Court precedent in *Descamps v. United States*, 570 U.S. 254 (2013), was available at sentencing to argue that a conviction under Pennsylvania's terroristic threats statute could not qualify as a career offender predicate.

b. Folk's Simple Assault Conviction

On November 3, 2003, Folk also pleaded guilty to simple assault in violation of 18 PA. CONS. STAT. § 2701. Section 2701 provides, in pertinent part, that a person is guilty of simple assault if he:

> (1) attempts to cause or intentionally, knowingly, or recklessly causes bodily injury to another;
>
> (2) negligently causes bodily injury to another with a deadly weapon;
>
> (3) attempts by physical menace to put another in fear of imminent serious bodily injury; or
>
> (4) conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer during the course of an arrest or any search of the person.

18 PA. CONS. STAT. § 2701(a) (2002). This statute is divisible, and requires the application of the modified categorical approach. *See United States v. Doe*, 810 F.3d 132, 147 (3d Cir. 2015) ("[Pennsylvania] [s]imple assault is not categorically a crime of violence under the Sentencing Guidelines[.]").

According to the pertinent charging document and transcript of Folk's guilty plea colloquy, Folk's 2003 conviction for simple assault involved a violation of subsection (a)(3) of Pennsylvania's simple assault statute. (PSR Ex. 2 at 1, 17-19). In *Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006), the Third Circuit held that a violation of § 2701(a)(3) constitutes a "crime of violence" as

that term is defined in 18 U.S.C. § 16(a). The court of appeals reasoned as follows:

> [Section] 2701(a)(3) is a crime of violence within 18 U.S.C. § 16(a) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Under Pennsylvania law, simple assault as set forth in § 2701(a)(3) is a specific intent crime. The language of (a)(3) dictates this result: the word "attempt" necessarily involves a mental state of specific intent. . . . Furthermore, the requirement . . . that the elements of a "crime of violence" include "use, attempted use, or threatened use of physical force" plainly encompasses the term "physical menace" as in § 2701(a)(3). Under Pennsylvania law, "physical menace" requires some physical act by the perpetrator intended to cause "fear of imminent serious bodily injury" in the victim. . . . . "Physical menace" refers to physical acts committed to threaten another with corporeal harm. . . . We cannot reasonably conceive of a situation wherein such an act of "physical menace," intended to place another in fear of imminent serious bodily injury, would not, at the very least, constitute the attempted or threatened use of physical force contemplated by 18 U.S.C. § 16(a).

Singh, 432 F.3d at 539-40.

Although *Singh* specifically discussed the definition of "crime of violence" set forth in 18 U.S.C. § 16(a), *Singh*'s holding is applicable to cases involving the identically worded "elements clause" of the career offender definition of crime of violence. *See, e.g.*, *United States v. Jones*, 552 F. App'x 185, 187-88 (3d Cir. 2014) (nonprecedential) (recognizing Third Circuit's holding in *Singh* and noting that "[it cannot] be disputed that [a § 2701(a)(3)] offense is a 'crime of violence' as that term is defined in the Sentencing Guidelines"); *United States v. Jackson*,

No. CV 16-602, CR 10-235, 2016 WL 6839467, at *2 (W.D. Pa. Nov. 21, 2016) ("Although *Singh* addressed 18 U.S.C. § 16(a), the definition of 'crime of violence' in Section 4B1.2(a)(1) [of the Guidelines] mirrors that in Section 16(a), and thus authority interpreting one is generally applied to the other, unless pertinent distinctions—none of which are present here—are present.").

In light of the foregoing, Folk's 2003 conviction for simple assault under 18 PA. CONS. STAT. § 2701(a)(3) is properly considered a crime of violence for purposes of the career offender Guideline. Folk, therefore, would need one more qualifying predicate conviction to be properly designated a career offender.

c. Folk's Robbery Convictions

We lastly turn to Folk's prior robbery convictions. On January 8, 2001, Folk pleaded guilty in state court to two separate counts of robbery. At all pertinent times, Pennsylvania's robbery statute provided, in relevant part, as follows:

> (1) A person is guilty of robbery if, in the course of committing a theft, he:
>
> (i) inflicts serious bodily injury upon another;
>
> (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
>
> (iii) commits or threatens immediately to commit any felony of the first or second degree;

> (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or
>
> (v) physically takes or removes property from the person of another by force however slight.

18 PA. CONS. STAT. § 3701(a) (2000). Under this statute, a robbery under subsection (a)(1)(iv) is designated as a felony of the second degree, a robbery under subsection (a)(1)(v) is designated as a felony of the third degree, and robberies under all other subsections are designated as felonies of the first degree. *Id.* § 3701(b).

Acknowledging the divisibility of Pennsylvania's robbery statute, this court has recently held that convictions under subsections (a)(1)(i), (a)(1)(ii), and (a)(1)(iv) qualify as violent felonies. *See United States v. Harris*, 205 F. Supp. 3d 651, 673 (M.D. Pa. 2016) (Caldwell, J.). On the other hand, convictions under subsections (a)(1)(iii) and (a)(1)(v) do not qualify as violent felonies. *Id.* And although *Harris* concerned the definition of "violent felony" in the ACCA, jurisprudence regarding "violent felony" under the ACCA has consistently been applied to cases involving the career offender Guideline's definition of "crime of violence." *See Brown*, 765 F.3d at 189 n.2 (citation omitted); *United States v. Hopkins*, 577 F.3d 507, 511 (3d Cir. 2009) ("[T]he definition of a violent felony under the ACCA is sufficiently similar to the definition of a crime of violence

under the Sentencing Guidelines that authority interpreting one is generally applied to the other[.]" (footnote omitted)).

Because Pennsylvania's robbery statute is divisible, we must apply the modified categorical approach to Folk's prior robbery convictions. Based on a review of the pertinent *Shepard* documents, it appears that Folk's January 8, 2001 robbery convictions arose out of two separate robberies, both of which Folk committed on July 2, 2000. (PSR Ex. 1 at 5-6).

According to the transcript of Folk's January 8, 2001 guilty plea colloquy, the first robbery occurred when Folk simply grabbed a silver chain and cross off the victim's neck, and, therefore, the offense constituted a robbery by "force, however slight." (PSR Ex. 1 at 6). Consequently, the offense was a violation of 18 PA. CONS. STAT. § 3701(a)(1)(v). *Harris* recognized that a conviction under subsection (a)(1)(v) does not qualify as a violent felony under the ACCA. 205 F. Supp. 3d at 673. Accordingly, because this particular robbery conviction does not qualify as an ACCA violent felony, it cannot be considered a predicate crime of violence for purposes of career offender designation. *Brown*, 765 F.3d at 189 n.2; *Hopkins*, 577 F.3d at 511.

As for the second July 2, 2000 robbery, the charging information explained the incident as follows:

> [Folk] . . . in the course of committing a theft . . . inflicted bodily injury upon the victim, and put him in fear of immediate serious

> bodily injury, by grabbing the victim by the throat and asking the victim if he would like to feel a slug in his throat in the course of taking money from the victim did knock him to the ground and then kick him about the head area, resulting in injury to the victim . . . .

(PSR Ex. 1 at 10). Importantly, the charging information also indicated that the robbery was a felony of the *second degree*. (*Id.*)

Based on the foregoing description of Folk's second robbery, it is clear that this conviction fell under subsection (a)(1)(iv). Indeed, an offense under subsection (a)(1)(iv) was the *only* robbery offense designated as a second-degree felony per the Pennsylvania robbery statute in effect at the time of Folk's conviction. 18 PA. CONS. STAT. § 3701(b) (2000).

Harris held that convictions under subsection (a)(1)(iv) qualify as federally defined violent felonies. 205 F. Supp. 3d at 673. Consequently, Folk's July 2, 2000 robbery—whether determined to be one event or two—counts as a predicate crime of violence for purposes of his career offender designation. *See Brown*, 765 F.3d at 189 n.2; *Hopkins*, 577 F.3d at 511.

In sum, it appears that Folk is correct that several of his prior Pennsylvania crimes—the offense of robbery by force however slight under subsection (a)(1)(v), and the offense of terroristic threats—do not qualify as predicate crimes of violence under the Guidelines' career offender provision. Unfortunately for Folk, two of his prior convictions *do* qualify as crimes of violence—namely, the

simple assault by physical menace under 18 PA. CONS. STAT. § 2701(a)(3) (2002), and the robbery conviction under 18 PA. CONS. STAT. § 3701(a)(1)(iv) (2000). Consequently, since a defendant need only have two predicate crimes of violence to meet the third element of the career offender definition, and the other two elements are not in dispute, Folk was properly classified as a career offender at sentencing.[8]

2. CJA Counsel's Failure to Oppose Government's Motion to Stay

In his March 1, 2018 Motion to Amend Judgment and for Reconsideration, Folk also contends that Attorney Wilson was ineffective for failing to oppose the government's motion to stay his 2255 proceedings. Folk's reasoning behind this ineffectiveness claim is unclear. It appears that Folk may be attempting to raise one of two arguments, both of which are meritless.

First, Folk may be attempting to argue that counsel should have opposed the stay because at the time the government requested the stay, there was Third Circuit precedent holding that the residual clause of the career offender Guideline was unconstitutionally vague. *See United States v. Calabretta*, 831 F.3d 128 (3d Cir. 2016), *abrogated in part by Beckles v. United States*, 137 S. Ct. 886 (2017). The problem with this argument is that regardless of whether Attorney Wilson

[8] Because Folk qualifies as a career offender, his claim that Attorney Wilson was ineffective for failing to properly challenge his career offender designation necessarily fails because Folk cannot establish prejudice under *Strickland*.

opposed the stay, the case would have undoubtedly been stayed while the Supreme Court of the United States was considering the constitutionality of the career offender Guideline's residual clause in *Beckles*.

It has long been recognized that "a court may hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." *Bechtel Corp. v. Local 215, Laborers' Int'l Union of N. Am.*, 544 F.2d 1207, 1215 (3d Cir. 1976). This was the exact situation in Folk's case. Folk's 2255 motion claimed that the *Johnson* decision was applicable to the similarly worded residual clause of the Guidelines—an issue that was expressly before the Supreme Court in *Beckles*. Thus, the decision to stay Folk's 2255 motion in light of the pending *Beckles* decision was entirely appropriate, and would not have changed even if Attorney Wilson had opposed the government's motion to stay.

On the other hand, Folk may be arguing that Attorney Wilson should have opposed the stay because the issues before the Court in *Beckles* were irrelevant to many of the claims Folk wished to pursue. Specifically, it appears that Folk may be arguing that his prior convictions neither involved the residual clause of the Guidelines nor qualified as predicate crimes of violence. Therefore, as the argument may go, his classification as a career offender was erroneous regardless of whether the Guidelines' residual clause was deemed unconstitutional by

Beckles. Under this line of reasoning, the court did not need to postpone the disposition of Folk's claims until *Beckles* was decided.

As we determined above, however, Folk was correctly classified as a career offender because two of his predicate convictions qualify as crimes of violence irrespective of the residual clause. Therefore, to the extent that the stay of Folk's 2255 motion postponed consideration of the non-*Johnson* claims involving his career offender status, Folk was not prejudiced in any way. Folk's inability to demonstrate prejudice means that he cannot succeed on his ineffectiveness claim. *See Jacobs v. Horn,* 395 F.3d 92, 105 (3d Cir. 2005) (citing *Strickland v. Washington,* 466 U.S. 668, 692 (1984)) (explaining that defendant must show both deficient performance and prejudice to succeed on a Sixth Amendment ineffective-assistance claim).

In sum, none of the substantive claims within Folk's first three motions (Docs. 179, 180, & 183) has merit. Consequently, these motions will be denied.

B. March 19, 2018 Motion to Amend

In Folk's difficult-to-decipher March 19, 2018 Motion to Amend, he raises four additional claims for post-conviction relief. First, he contends that his trial counsel, Attorney Heidi Freese, was ineffective for failing to file pretrial motions to suppress certain evidence. Second, Folk claims that Attorney Freese was ineffective for failing to request a medical continuance of various proceedings,

including Folk's trial and a pretrial hearing. Third, Folk appears to claim that Attorney Freese was ineffective for failing to properly investigate witnesses and challenge a superseding indictment that was filed on July 11, 2012, and that appellate counsel was ineffective for failing to raise these issues on appeal. Fourth, Folk asserts that Attorney Freese was ineffective for failing to move for a bill of particulars.

A Section 2255 movant can seek to amend his motion for relief pursuant to the Federal Rules of Civil Procedure. *See United States v. Thomas*, 221 F.3d 430, 434 (3d Cir. 2000) ("The Federal Rules of Civil Procedure apply to habeas corpus proceedings 'to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions.'" (quoting FED. R. CIV. P. 81(a)(2))); *see also* 28 U.S.C. § 2242 ("[Application for a writ of habeas corpus] may be amended or supplemented as provided in the rules of procedure applicable to civil actions."). Under Federal Rule of Civil Procedure 15, if more than twenty-one days have elapsed after service of a pleading or service of a responsive pleading, a party may amend only with the opposing party's written consent or with leave of court. FED. R. CIV. P. 15(a)(1), (2). Leave to amend should be freely given by the court when justice so requires. FED. R. CIV. P. 15(a)(2).

A motion to amend, however, may not be used to circumvent the statute of limitations Congress provided in 28 U.S.C. § 2255(f). *United States v. Duffus*, 174 F.3d 333, 338 (3d Cir. 1999) ("A prisoner should not be able to assert a claim otherwise barred by the statute of limitations merely because he asserted a separate claim within the limitations period."). Therefore, if a motion to amend, which raises new claims for relief, is filed outside of the one-year statute of limitations, the new claims must relate back under Federal Rule of Civil Procedure 15(c) to the timely filed claims or else they will be time-barred. *See Mayle v. Felix*, 545 U.S. 644, 662 (2005).

In the instant matter, Folk's judgment of conviction became final on October 5, 2015, when the Supreme Court denied his timely filed petition for a writ of certiorari. *See Kapral v. United States*, 166 F.3d 565, 570 (3d Cir. 1999). Thus, his deadline for raising post-conviction claims in a 2255 motion would have been October 5, 2016. 28 U.S.C. § 2255(f)(1). Folk's March 19, 2018 motion to amend, therefore, was filed well beyond the one-year statute of limitations, and any claims contained therein are time-barred unless they relate back under Federal Rule of Civil Procedure 15(c). *See Mayle*, 545 U.S. at 662-64.

In order for an amendment to relate back to an original pleading and thus be considered timely, the amendment must assert "a claim . . . that arose out of

the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading[.]" FED. R. CIV. P. 15(c)(1)(B). Consequently, to avoid being time-barred, any new claims raised in Folk's March 19, 2018 motion to amend must arise from same "conduct, transaction, or occurrence" or be "tied to a common core of operative facts" as those in his original 2255 motion. *See Mayle*, 545 U.S. at 662-64.

Upon review of Folk's March 19, 2018 motion to amend, the only claim therein that could possibly relate back to his original 2255 motion is his claim that trial counsel was ineffective for failing to request a medical continuance of various proceedings. In his original 2255 motion, Folk claimed that the trial court erred in failing to grant a medical continuance, and, therefore, we liberally construe the related claim in his March 19, 2018 motion to arise out of the same transaction or occurrence. The three other claims Folk attempts to raise by amendment do not relate back to his original 2255 motion and thus are time-barred. *Mayle*, 545 U.S. at 662; *Duffus*, 174 F.3d at 338.

Claims of ineffective assistance of counsel in violation of the Sixth Amendment are governed by *Strickland v. Washington,* 466 U.S. 668 (1984). The burden is on the defendant to prove such a claim. *Strickland*, 466 U.S. at 687.

Strickland sets forth a two-prong test to assess ineffectiveness claims. First, counsel's performance must be deficient. *Jacobs v. Horn,* 395 F.3d 92, 102 (3d Cir. 2005) (citing *Strickland*, 466 U.S. at 687). "Performance is deficient if counsel's efforts 'fell below an objective standard of reasonableness' under 'prevailing professional norms.'" *Shotts v. Wetzel*, 724 F.3d 364, 375 (3d Cir. 2013) (quoting *Strickland*, 466 U.S. at 688). However, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Grant v. Lockett*, 709 F.3d 224, 234 (3d Cir. 2013) (quoting *Strickland*, 466 U.S. at 689).

Second, counsel's deficient performance must have prejudiced the defendant. *Jacobs*, 395 F.3d at 105 (citing *Strickland*, 466 U.S. at 692). "To demonstrate prejudice, 'a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Shotts*, 724 F.3d at 375 (quoting *Strickland*, 466 U.S. at 694). A habeas court can forego an analysis of the *Strickland* performance prong if it finds that the defendant has failed to establish prejudice. *Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 477 (3d Cir. 2017) (quoting *United States v. Lilly*, 536 F.3d 190, 196 (3d Cir. 2008)).

Folk avers that shortly before his trial, he seriously injured his right knee, causing him to suffer excruciating pain prior to and during his trial. Folk's disjointed argument then strays into a different type of claim that seems to question the constitutionality of his plea agreement process. (*See* Doc. 184 at 6-8).

First, we reject as time-barred any type of plea agreement ineffectiveness claim, regardless of whether that claim invokes an impaired mental state due to a knee injury. Such a claim does not arise from the same transaction or occurrence, or same set of operative facts, as the due process medical-continuance claim raised in the original 2255 motion. Folk has never timely asserted any post-conviction ineffectiveness challenge to his rejection of a proffered plea deal, and he cannot do so now. *Mayle*, 545 U.S. at 662; *Duffus*, 174 F.3d at 338.

Second, as to the claim that Attorney Freese was ineffective for failing to move for a trial continuance, this contention also fails. Approximately one week before trial, Folk decided to represent himself. (*See generally* Docs. 63, 132). Judge Caldwell granted Folk's request to proceed *pro se* and appointed Attorney Freese to act as standby counsel. (Doc. 132 at 13, 20-21). During the pretrial hearing regarding the request to proceed *pro se*, Folk also moved to continue trial. (*Id.* at 13-19). This request for a continuance was completely unrelated to

his medical condition, and instead appears to have been based on Folk's desire for more time to prepare for trial. (*Id.*) Judge Caldwell denied that continuance request. (*Id.* at 19).

Folk does not explain how his trial attorney, whom he removed from representation, acted in a way that fell below Sixth Amendment constitutional standards. There is no record evidence that Folk asked Attorney Freese to move for a medical continuance or that a motion from counsel would have been any more effective than Folk's own motion during the pretrial hearing.

Furthermore, as to the second *Strickland* prong, Folk fails to provide any explanation regarding how the outcome of his trial likely would have been different if counsel had requested a medical continuance. The record reveals that Folk ably represented himself for the first part of his trial, and then chose to have standby counsel take over for the second half. (*See* Doc. 135 at 109-11). Folk has not shown how he was prejudiced in any way by the alleged ineffectiveness of Attorney Freese. In other words, Folk has not demonstrated that but for appointed counsel's alleged ineffectiveness in failing to move for a medical continuance, there is a "reasonable probability" that the result of his trial "would have been different." *Shotts*, 724 F.3d at 375 (quoting *Strickland*, 466 U.S. at 694).

Considering the foregoing, Folk's March 19, 2018 motion to amend will be denied. Three of the four claims raised therein are time-barred, and the other claim is meritless and thus amendment would be futile.

C. Folk's "Motion Under Status Quo in Light of Motion's After Doc. 181 Clerical Error"

We next turn to Folk's "Motion Under Status Quo in Light of Motion's After Doc. 181 Clerical Error," which he filed on April 18, 2018. (Doc. 186). In this "motion," Folk does not raise any new substantive claims. Instead, it appears that he is merely inquiring as to the status of his other pending motions. Because we addressed all of those pending motions in the above discussion, Folk's April 18, 2018 motion for a status update will be dismissed as moot.

D. Folk's Motion for an Order to Show Cause and Motion for Judgment on the Pleadings

Finally, we address Folk's Motion for an Order to Show Cause and his Motion for Judgment on the Pleadings. (Docs. 189, 190). These motions will be denied. In his show-cause request, Folk demands a response from the Government on his pending motions, but no Government response is required. We can, and have, addressed the outstanding motions in the foregoing discussion without need for government briefing.

Folk's motion for judgment on the pleadings is also meritless. Despite the Government's lack of response to the pending motions, we have determined that

no Government response is necessary. That is because, even liberally construed, Folk's substantive motions lack merit and must be denied. Consequently, Folk's motion for judgment on the pleadings is likewise denied.

III. CONCLUSION

For the foregoing reasons, Folk's pending motions (Docs. 179, 180, 183, 184, 186, 189, 190) will all be denied. Folk will also be ordered to provide clarification regarding his most recent motion (Doc. 191). An appropriate order will follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	1:11-cr-292
	:	
v.	:	Hon. John E. Jones III
	:	
OMAR SIERRE FOLK,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 16th day of February, 2018, upon consideration of defendant Omar Sierre Folk's motion (Doc. 172), which appears to challenge the amount of the fine imposed at judgment, (*see* Doc. 126 at 1, 6-7), it is ORDERED that:

1. The Government shall respond to Folk's motion (Doc. 172) within twenty-one (21) days from the date of this order.

2. Folk, if he desires, may file a reply brief within fourteen (14) days after the Government's brief in response is filed.

s/ John E. Jones III
John E. Jones III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	1:11-cr-292
	:	
v.	:	Hon. John E. Jones III
	:	
OMAR SIERRE FOLK,	:	
	:	
Defendant.	:	

MEMORANDUM

February 16, 2018

Presently before the court are defendant Omar Sierre Folk's motion (Doc. 139) for relief under 28 U.S.C. § 2255 ("2255 motion"), as well as a motion (Doc. 163) to amend his 2255 motion. Folk has also filed two additional motions to amend, (Docs. 165, 169), two motions for a hearing, (Docs. 168, 171), and a motion to appoint counsel, (Doc. 170). For the reasons that follow, the court will grant Folk's first motion to amend (Doc. 163), but will deny all of his other motions, including his motion for relief under 28 U.S.C. § 2255.

I. BACKGROUND

On August 14, 2012, a jury convicted Folk of various drug and firearms offenses. (Docs. 82, 84). Shortly thereafter, he moved for a new trial or alternatively to vacate judgment. (Doc. 87). The court denied that post-trial motion. (Doc. 90).

Folk was found to be a career offender under the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"), and his resultant sentencing Guideline range was 420 months to life. (Presentence Investigation Report ("PSR") ¶¶ 29-31, 79). On September 26, 2013, the court granted a significant downward variance and sentenced Folk to 264 months' imprisonment. (Doc. 134 at 28-29; Doc. 126).

Folk appealed the denial of a motion for a mistrial made during trial, as well as the denial of his post-trial motion for a new trial. (Doc. 127); *United States v. Folk*, 577 F. App'x 106, 106 (3d Cir. 2014) (nonprecedential). On September 17, 2014, the Third Circuit affirmed the judgment. *Folk*, 577 F. App'x at 107. The Supreme Court of the United States denied Folk's petition for a writ of certiorari on October 5, 2015. *Folk v. United States*, 136 S. Ct. 161 (2015) (mem).

On June 5, 2016, Folk—through counsel from the Federal Public Defender's Office—filed his first motion under 28 U.S.C. § 2255 based on the recent Supreme Court case of *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding the residual clause of the Armed Career Criminal Act ("ACCA") unconstitutionally void for vagueness). (Doc. 139). It appears as though the Federal Public Defender, appointed under a Middle District standing order (*see* Doc. 141 (M.D. Pa. Standing Order 15-06)), identified Folk as a potential

candidate for relief under *Johnson* and filed the 2255 motion on his behalf pursuant to the standing order. Evidently, due to the looming deadline established by the gatekeeping requirements of 28 U.S.C. § 2255(f) and *Johnson*'s date of decision of June 26, 2015,[1] the Federal Public Defender's policy was to file the 2255 motion on the defendant's behalf and subsequently communicate with the defendant, withdrawing the motion if the defendant did not want it filed. (Doc. 143 at 2). This practice appears to have been followed in the instant case. (*Id.* at 2-3).

On June 8, 2016, the Federal Public Defender moved to appoint counsel from the Criminal Justice Act ("CJA") panel to represent Folk in his *Johnson*-based 2255 motion. (Doc. 143). The request for appointment of CJA counsel was the result of a conflict of interest with Folk stemming from a civil case he filed against the Federal Public Defender's Office. (*Id.* at 3). The court granted this motion the following day, and CJA counsel was appointed. (Doc. 144; Doc. 149 at 1).

On August 30, 2016, the court issued an order for the Government to show cause why relief should not be granted on Folk's 2255 motion. (Doc. 145).

[1] 28 U.S.C. § 2255(f)(3) provides for a one-year statute of limitations that begins to run "on the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]" For most defendants who had not filed a previous 2255 motion, and whose judgments of conviction became final more than a year prior to the *Johnson* decision, Section 2255(f)(3) provided the only means to file a timely initial 2255 motion to assert a *Johnson* claim.

Because his *Johnson* claim implicated the residual clause of the career offender portion of the Guidelines, *see* U.S.S.G. § 4B1.2(a)(2) (2013), rather than the residual clause of the ACCA, the Government moved to stay the case in light of relevant cases pending in the Third Circuit as well as the Supreme Court's grant of certiorari in *Beckles v. United States*, 616 F. App'x 415 (11th Cir. 2015) (per curiam), *cert. granted*, 136 S. Ct. 2510 (2016) (mem.) (granting certiorari to determine, *inter alia*, whether advisory Guideline's residual clause found in U.S.S.G. § 4B1.2(a)(2) was void for vagueness after *Johnson*). (Doc. 147 at 2). Folk's counsel concurred in the stay. (*Id.* at 3). On September 19, 2016, the court granted the unopposed motion to stay the case in light of the grant of certiorari in *Beckles*. (Doc. 148).

After the September 19, 2016 imposition of a stay, no entries appear on the docket until February 27, 2017, when Folk's CJA counsel filed an unopposed motion to withdraw as counsel, (Doc. 149). In her motion to withdraw, which contained little detail, CJA counsel cited an inability to communicate effectively with Folk and his explicit request that she withdraw from his case. (*Id.* at 2). The court granted the motion to withdraw on April 7, 2017, noting that Folk would proceed *pro se* in the post-conviction matters. (Doc. 153).

On April 3, 2017, four days prior to the court granting CJA counsel's motion to withdraw, Folk filed a *pro se* "motion to amend under 15(c)(2)(B)[2] in regards to original 2255." (Doc. 151). Within this motion to amend his initial 2255 motion, Folk referenced a "motion [for] leave [to] amend under [Rule] 15(a)" that he purportedly filed in October of 2016. (*Id.* at 1). As explained above, however, no motion to amend—or any other motion or document—appears on this case's docket in October of 2016. Folk also mentioned this October 2016 motion to "amend under 15(a)" in his reply brief (Doc. 158), averring that the motion was deposited in the prison mail system on October 5, 2016.[3] (Doc. 158 at 1, 2).

Importantly, Folk attached, as "Exhibit (A)" to his reply brief, the cover page of this October 5, 2016 *pro se* motion to "amend under 15(a)," which contains a "FILED" time-stamp of October 7, 2016, and initials of a staff member from the clerk's office. (*See* Doc. 158-1 at 1). Upon investigation, it appears that—without this court's knowledge—the clerk's office had initially

[2] The court construed Folk's motion to amend "under Rule 15(c)(2)(B)" as a motion for leave to amend pursuant to Federal Rule of Civil Procedure 15(c)(1)(B), as Rule 15 does not contain a subsection "(c)(2)(B)." (*See* Doc. 161 at 4 n.2); FED. R. CIV. P. 15(c).

[3] This mailed-by date is important. Under the prisoner mailbox rule, documents placed in the prison mailbox system are deemed filed on the date they are mailed, not the date they are received by the court. *See Pabon v. Mahanoy*, 654 F.3d 385, 391 n.8 (3d Cir. 2011). Moreover, as will be discussed in more detail below, October 5, 2016, was the deadline for Folk to raise claims for relief in an initial 2255 motion pursuant to the one-year statute of limitations set forth in 28 U.S.C. § 2255(f)(1).

stamped the motion to "amend under 15(a)" as filed, but instead of filing it on the docket, mailed the *pro se* motion back to Folk after discovering that he was represented by CJA counsel.

In his reply brief, Folk further averred that he explicitly asked his CJA counsel to raise other issues for relief, beyond the *Johnson* claim, within the one-year statute of limitations set forth in Section 2255(f)(1). (*See* Doc. 158 at 1). CJA counsel corroborated this averment in her telephonic communications with this court prior to her withdrawal from the case, stating that Folk had wanted to raise additional claims but that she was having significant difficulty deciphering what those claims entailed.

On August 2, 2017, the court permitted Folk to file the entire October 5, 2016 motion to "amend under 15(a)" so that it could be properly considered. (*See* Doc. 162). In particular, the court directed as follows:

> After [Folk] provides the court with the full October 5, 2016 motion to amend, the Government will have an opportunity to respond to that motion. *Once the court addresses the October 5, 2016 motion to amend*, [Folk] will be free to renew his additional motions if he so desires. He will also be permitted to re-assert his Rule 15(c) relation back claims contained in the instant motion to amend that this court has deferred on addressing at the present time.

(Doc. 162 at 7) (emphasis added). One week later, Folk filed the full October 5, 2016 motion as requested. (*See* Doc. 163).

On August 23, 2017, the Government filed its brief in opposition to Folk's motion to "amend under 15(a)." (Doc. 166). The Government appears to concede that leave to amend should be granted, but challenges the merits of the additional claims raised in the motion. (*Id.* at 2-19).

As noted, Folk has repeatedly ignored this court's directions by continuing to file various motions in this case, including multiple other motions to amend, before we have ruled on his initial motion to amend.[4] Therefore, we will first address Folk's initial 2255 motion and the October 5, 2016 motion to "amend under 15(a)." The remaining pending motions will then be considered.

II. DISCUSSION

A Section 2255 movant can seek to amend his motion for relief pursuant to the Federal Rules of Civil Procedure. *See United States v. Thomas*, 221 F.3d 430, 434 (3d Cir. 2000) ("The Federal Rules of Civil Procedure apply to habeas corpus proceedings 'to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions.'" (quoting FED. R. CIV. P. 81(a)(2))); *see also* 28 U.S.C. § 2242 ("[Application for a writ of habeas corpus] may be amended or supplemented as provided in the rules of procedure applicable to civil actions."). Under Federal

[4] On February 5, 2018, shortly after Folk had filed his last additional motion, this case was reassigned from the Honorable William W. Caldwell to the undersigned due to Judge Caldwell's retirement.

Rule of Civil Procedure 15, if more than twenty-one days have elapsed after service of a pleading or service of a responsive pleading, a party may amend only with the opposing party's written consent or with leave of court. FED. R. CIV. P. 15(a)(1), (2). Leave to amend should be freely given by the court when justice so requires. FED. R. CIV. P. 15(a)(2).

A motion to amend, however, may not be used to circumvent the statute of limitations Congress provided in 28 U.S.C. § 2255(f). *United States v. Duffus*, 174 F.3d 333, 338 (3d Cir. 1999) ("A prisoner should not be able to assert a claim otherwise barred by the statute of limitations merely because he asserted a separate claim within the limitations period."). Therefore, if a motion to amend, which raises new claims for relief, is filed outside of the one-year statute of limitations, the new claims must relate back under Federal Rule of Civil Procedure 15(c) to the timely filed claims or else they will be time-barred. *See Mayle v. Felix*, 545 U.S. 644, 662 (2005).

Here, it appears that Folk first moved to amend his initial 2255 motion on October 5, 2016, exactly one year from the date his judgment of conviction became final.[5] Through no fault of his own, that motion to amend was errantly returned to him instead of being docketed. At that time, Folk's 2255 motion was

[5] Folk's judgment of conviction became final on October 5, 2015, when the Supreme Court denied his timely filed petition for certiorari. *See Kapral v. United States*, 166 F.3d 565, 570 (3d Cir. 1999).

stayed, and the court had neither required a substantive response from the Government nor made a determination on the 2255 motion's merits. As such, amendment of that 2255 motion to add additional claims would have caused little, if any, prejudice to the Government. Moreover, the October 5, 2016 motion to amend was filed within the one-year statute of limitations provided by 28 U.S.C. § 2255(f)(1), and therefore relation back is not at issue. Finally, Folk's initial 2255 motion was filed by the Federal Public Defender without consultation regarding whether Folk wanted to include other grounds for relief beyond the *Johnson* claim, and, as discussed above, Folk clearly wanted to include additional claims.

Accordingly, we will grant Folk's October 5, 2016 motion to "amend under 15(a)" (Doc. 163) and will thus treat the claims raised in that motion as part of his original 2255 motion. The court now turns to the merits of Folk's grounds for relief under 28 U.S.C. § 2255.

A. *Johnson* Claim

After the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), Folk's *Johnson*-based claim for relief fails. In *Beckles*, the Court explained that its decision in *Johnson* did not extend to the residual clause of the advisory career-offender Guideline. 137 S. Ct. at 890. The Court specifically held that Section 4B1.2(a)(2) of "the advisory Guidelines [is] not subject to

vagueness challenges under the Due Process Clause." *Id.* Distinguishing its holding in *Johnson*, the Court in *Beckles* relied on the distinction between the effect at sentencing of the discretionary nature of the advisory Guidelines and mandatory statutes like the ACCA:

> Unlike the ACCA, however, the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range. Accordingly, the [advisory] Guidelines are not subject to a vagueness challenge under the Due Process Clause. The residual clause in § 4B1.2(a)(2) therefore is not void for vagueness.

Id. at 892.

Folk was sentenced as a career offender under the advisory Guidelines. (*See* PSR ¶¶ 17, 26, 29-31). Thus, even if his career-offender status was based on the residual clause of the advisory Guidelines, *Beckles* dictates that Folk's *Johnson*-based collateral challenge to the constitutionality of his sentence must be rejected.

B. Claims Added by October 5, 2016 Amendment

In his *pro se* motion to "amend under 15(a)," which is extremely difficult to decipher, Folk appears to raise seven additional grounds for relief: (1) entrapment by state and federal law enforcement, as well as sentencing entrapment; (2) a Fourth Amendment claim based on a theory of forced abandonment; (3) an alleged Federal Rule of Evidence 608(b) error during trial;

(4) alleged improper court involvement in plea negotiations; (5) overly prejudicial testimony from a government witness; (6) ineffective assistance of counsel for failure to raise selective and vindictive prosecution claims; and (7) trial-court error in failing to grant Folk a medical continuance. (Doc. 163). The primary problem for Folk is that only one of these seven additional grounds for relief—ground six—is cognizable in the instant Section 2255 proceedings.

A Section 2255 motion is the appropriate procedural vehicle to challenge a federal sentence that the movant claims "was imposed in violation of the Constitution or laws of the United States[.]" 28 U.S.C. § 2255. But it is not intended to be a substitute for a direct appeal. *See United States v. Travillion*, 759 F.3d 281, 288 n.11 (3d Cir. 2014) (citing *United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993)). Claims that should have been raised on direct appeal, but were not, are not cognizable in a 2255 motion unless the movant can establish cause and prejudice, or actual innocence. *Massaro v. United States*, 538 U.S. 500, 504 (2003) (citations omitted); *Hodge v. United States*, 554 F.3d 372, 378-79 (3d Cir. 2009) (citations omitted). "Cause for a procedural default exists where something *external* to the [movant], something that cannot fairly be attributed to him[,] . . . impeded [his] efforts" to raise the claim at trial or on direct appeal. *Maples v. Thomas*, 565 U.S. 266, 280 (2012) (second and third alterations in original) (citations and internal quotation marks omitted). To

establish prejudice, a movant must show not merely that there were errors that created a possibility of prejudice, but that they "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Holland v. Horn*, 519 F.3d 107, 112 (3d Cir. 2008) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).

1. Entrapment & Sentencing Entrapment

Folk did not raise a claim of entrapment or sentencing entrapment at the trial-court level or on direct appeal. He has also not made any showing of cause—let alone prejudice—to excuse the procedural default of these claims. Accordingly, we cannot consider these claims on collateral review. *Massaro*, 538 U.S. at 504.

2. Fourth Amendment Claim Alleging Forced Abandonment

Folk next appears to argue that, due to "forced abandonment" of drugs, his Fourth Amendment rights were violated. (Doc. 163 at 4-6). He does not, however, specify what relief should follow from this alleged constitutional violation. No discussion on relief is necessary, though, because this claim is meritless.

First, no such Fourth Amendment claim was raised at trial or on direct appeal. Therefore, this claim is procedurally defaulted and cannot be considered

in a 2255 motion unless cause and prejudice are established. *Massaro*, 538 U.S. at 504. Folk has shown neither.

Second, such a free-standing Fourth Amendment claim is most likely not cognizable on Section 2255 collateral review. Federal courts of appeal that have considered this issue have expressly barred free-standing Fourth Amendment claims from being raised in 2255 motions when there was an opportunity for "full and fair litigation" of the claim at trial or on direct appeal. *See Ray v. United States*, 721 F.3d 758, 762 (6th Cir. 2013); *Brock v. United States*, 573 F.3d 497, 500 (7th Cir. 2009); *United States v. Ishmael*, 343 F.3d 741, 742 (5th Cir. 2003); *United States v. Cook*, 997 F.2d 1312, 1317 (10th Cir. 1993); *United States v. Hearst*, 638 F.2d 1190, 1196 (9th Cir. 1980). Although the Third Circuit has not yet directly addressed this issue, it has at least questioned whether such claims are reviewable. *See United States v. Britton*, C.A. No. 17-1389, 2017 WL 3630168, at *1 (3d Cir. May 16, 2017) (nonprecedential) (citing *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) and *Ray*, 721 F.3d at 761); *see also Huggins v. United States*, 69 F. Supp. 3d 430, 458 (D. Del. 2014) (following other courts of appeal by extending *Stone v. Powell* to bar free-standing Fourth Amendment claims raised in 2255 motion when movant had earlier opportunity to litigate those claims).

3. Alleged Federal Rule of Evidence 608(b) Error at Trial

Folk also contends the trial court impermissibly foreclosed cross-examination of Trooper Shawn Wolfe ("Trooper Wolfe") about a civil lawsuit alleging that Trooper Wolfe used excessive force. During the portion of the trial when Folk was representing himself, Folk questioned Trooper Wolfe about the lawsuit and the Government objected on the basis of relevancy. (Doc. 135 at 103). The court sustained the objection, finding the excessive-force lawsuit irrelevant. (Id. at 103-04). Folk now contends this was an error under Federal Rule of Evidence 608(b). This claim fails procedurally and on the merits.

As an initial matter, Folk procedurally defaulted on this claim by not raising it on direct appeal. Again, Folk has not demonstrated cause or prejudice to permit review of this claim, and therefore it must be denied. *Massaro*, 538 U.S. at 504.

Even if the court could entertain the claim, it is meritless. Federal Rule of Evidence 608(b) permits the court, in its discretion, to allow cross-examination of a witness regarding "specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness" if those acts are "probative of the [witness's] character for truthfulness or untruthfulness[.]" FED. R. EVID. 608(b). Folk has failed to show—both at trial and in his 2255 motion—why the civil lawsuit alleging excessive force is in any way probative of the truthfulness

of Trooper Wolfe. Therefore, excluding such cross-examination was an appropriate exercise of the trial court's discretion under Rule 608(b).

4. Alleged Court Participation in Plea Discussions

Folk next asserts that the trial court impermissibly involved itself with the negotiations of an 11(c)(1)(C) plea agreement during trial. We decline to reach the merits of this claim. Folk did not raise it on direct appeal, nor has he established cause or prejudice to excuse the procedural default. Accordingly, this claim must be denied. *Massaro*, 538 U.S. at 504.[6]

5. Alleged Prejudicial Testimony of Melanie Schill

In Folk's fifth ground for relief, he appears to argue that the testimony from a government witness during trial was incurably prejudicial and requires a new trial. Our colleague Judge Caldwell found it not to be such, and we agree with his sound conclusion.

During trial, Melanie Schill ("Schill")—Folk's ex-girlfriend and mother of his daughter—testified about events that took place while she and Folk were living together. In particular, Schill described an incident where she and Folk got

[6] We also reject the additional and unrelated claims Folk raises in this section and the following section of his 2255 motion. He appears to assert that *Johnson*'s holding requires dismissal of Counts 2 and 3—the charges related to Section 924(c). (Doc. 163 at 11-12, 14-15). The court assumes that Folk is arguing that his Section 924(c) convictions implicate the residual clause found in 18 U.S.C. § 924(c)(3)(B), and are now unconstitutional after *Johnson*. These claims are meritless because Folk's charges under Section 924(c) were based on his use of a firearm in relation to or in furtherance of drug trafficking crimes. (*See* Doc. 44 at 2-3 (superseding indictment)). They were not related to "crime[s] of violence" defined in part by the residual clause found in Section 924(c)(3)(B).

into an argument about his drug-dealing activities, and Folk, while holding their then-infant daughter, pointed a handgun at Schill and threatened to kill her. (Doc. 135 at 116-18). Defense counsel repeatedly objected to this testimony, (*id.* at 118-19), and eventually moved for a mistrial, (*id.* at 134-35). The motion for a mistrial was denied. (*Id.* at 138).

After the trial concluded, Folk moved for a new trial based in part on this testimony, arguing it was incurably prejudicial. (Doc. 87 at 5). That motion was also denied. (Doc. 90 at 5-7). Folk then appealed to the Third Circuit, which affirmed the denial of the mistrial. *United States v. Folk*, 577 F. App'x 106, 107 (3d Cir. 2014) (nonprecedential).

Folk now raises the same issue in his 2255 motion. But issues that have already been decided on direct appeal are not permitted to be relitigated in a 2255 motion. *United States v. Travillion*, 759 F.3d 281, 288 (3d Cir. 2014) ("[I]ssues resolved in a prior direct appeal will not be reviewed again by way of a § 2255 motion[.]" (citing *United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993))). Consequently, this claim must be denied.[7]

[7] Folk also appears to challenge a sentencing enhancement he received for obstruction of justice under U.S.S.G. § 3C1.1. (*See* Doc. 163 at 12-13). This claim, like most of his other claims, was not raised on direct appeal and therefore is procedurally defaulted. Folk has not demonstrated cause or prejudice to excuse the default, so this claim must also be denied. *Massaro*, 538 U.S. at 504. We further note that this enhancement had no effect on Folk's ultimate Guideline calculations because he was found to be a career offender. (*See* PSR ¶¶ 26, 28, 29-31).

6. *Ineffective Assistance of Counsel for Failure to Assert Selective and Vindictive Prosecution Claims*

Folk next contends that his appointed trial counsel was constitutionally ineffective for failing to raise claims of selective and vindictive prosecution. (Doc. 163 at 15-18). This claim is the only ground asserted in his motion to "amend under 15(a)" that is cognizable in the instant Section 2255 proceedings. Nonetheless, it is without merit.

Claims of ineffective assistance of counsel in violation of the Sixth Amendment are governed by *Strickland v. Washington,* 466 U.S. 668 (1984). The burden is on the defendant to prove such a claim. *Strickland*, 466 U.S. at 687.

Strickland sets forth a two-prong test to assess ineffectiveness claims. First, counsel's performance must be deficient. *Jacobs v. Horn,* 395 F.3d 92, 102 (3d Cir. 2005) (citing *Strickland*, 466 U.S. at 687). "Performance is deficient if counsel's efforts 'fell below an objective standard of reasonableness' under 'prevailing professional norms.'" *Shotts v. Wetzel*, 724 F.3d 364, 375 (3d Cir. 2013) (quoting *Strickland*, 466 U.S. at 688). However, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Grant v. Lockett*, 709 F.3d 224, 234 (3d Cir. 2013) (quoting *Strickland*, 466 U.S. at 689).

Second, counsel's deficient performance must have prejudiced the defendant. *Jacobs*, 395 F.3d at 105 (citing *Strickland*, 466 U.S. at 692). "To demonstrate prejudice, 'a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Shotts*, 724 F.3d at 375 (quoting *Strickland*, 466 U.S. at 694). A habeas court can forego an analysis of the *Strickland* performance prong if it finds that the defendant has failed to establish prejudice. *Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 477 (3d Cir. 2017) (quoting *United States v. Lilly*, 536 F.3d 190, 196 (3d Cir. 2008)).

Here, Folk has failed to show prejudice; i.e., he has not demonstrated that but for appointed counsel's alleged ineffectiveness in failing to raise claims of selective and vindictive prosecution, there is a "reasonable probability" that the result of his trial "would have been different." *Shotts*, 724 F.3d at 375 (quoting *Strickland*, 466 U.S. at 694). That is because his underlying claims of selective and vindictive prosecution are meritless.

To make out a claim for unconstitutional selective prosecution, a defendant "must 'provide evidence that persons similarly situated have not been prosecuted' and that 'the decision to prosecute was made on the basis of an unjustifiable standard, such as race, religion, or some other arbitrary factor.'" *United States v.*

Taylor, 686 F.3d 182, 197 (3d Cir. 2012) (quoting *United States v. Schoolcraft*, 879 F.2d 64, 67 (3d Cir. 1989)). The defendant, who bears the burden of proof on such claims, must establish both elements "with clear evidence sufficient to overcome the presumption of regularity that attaches to decisions to prosecute." *Id.* (citation and internal quotation marks omitted).

In this case, Folk asserts that Brandon Beatty and Darren McMillan were similarly situated but were not prosecuted. Folk, however, has failed to make even a prima facie showing of the second element of selective prosecution. That is, Folk has not explained, let alone provided "clear evidence" of, how the decision to prosecute him but not Beatty and McMillan was based on an unjustifiable standard like "race, religion, or some other arbitrary factor." *Taylor*, 686 F.3d at 197 (citations omitted). Consequently, Folk's selective prosecution claim is without merit, and raising such a claim would have had no effect on the trial proceedings.

Folk also contends that his appointed counsel should have raised a vindictive prosecution claim. A defendant claiming vindictive prosecution bears the burden of proof and must show that the United States Attorney penalized him for "invoking legally protected rights" rather than simply prosecuted him "based on the usual determinative factors." *Schoolcraft*, 879 F.2d at 67-68 (citations omitted).

Folk's vindictive prosecution argument is difficult, if not impossible, to follow. (*See, e.g.*, Doc. 163 at 17). He appears to argue that the superseding indictment, which included additional charges, was obtained vindictively by the government. But Folk does not explain what legally protected right he invoked that caused the allegedly improper retaliation from the United States Attorney. He also fails to demonstrate why the federal prosecutor's actions were vindictive and not simply based on the usual determinative factors. Thus, because Folk fails to even plead a vindictive prosecution claim, to say nothing of proving it, he has fallen far short of demonstrating that not raising this claim caused him prejudice.

Folk has not established prejudice under *Strickland*'s second prong for either of his ineffective-assistance-of-counsel claims. His sixth ground for relief, therefore, must be denied.

7. Failure to Grant Medical Continuance

Folk's final additional ground for relief appears to contend that the trial court erred by not granting Folk a medical continuance. (Doc. 163 at 18-19). Folk points to a *pro se* post-trial document (Doc. 92) he filed in which he claimed that his medical conditions required a trial continuance, and that it was a due process violation to deny the continuance. As with most of his other claims, however, Folk procedurally defaulted on this claim when he did not raise it on

direct appeal. And, because he has failed to establish cause or prejudice to excuse his default, this claim must be denied. *Massaro*, 538 U.S. at 504.

C. Folk's Additional Motions to Amend

While Folk's initial motion to "amend under 15(a)" was under consideration, he filed two additional motions to amend his 2255 motion. (Docs. 165, 169). We will briefly address each of these motions to amend and explain why they must be denied.

The first additional motion to amend is titled "Motion [for] Leave [to] Amend Under 15(c) Relating Back to Second Filing Under 15(c)(1)(B) In Regards to Original 15(a) 28 U.S.C. [§] 2255(f)(1)." (Doc. 165). The second is titled "Motion [for] Leave [to] Amend Fourth Petition Under 15(c)(1)(B) Relating Back to Third Petition Under 15(c) and Doc. 151 In Regards to Original Doc. 163 15(a) 28 U.S.C. [§] 2255(f)(1)." (Doc. 169). The titles of these motions demonstrate Folk's misconceptions about amending 2255 motions and relation back under Federal Rule of Civil Procedure 15(c).

Folk seems to believe that so long as his additional, out-of-time proposed amendments relate back to a previous motion to amend, they can properly amend his initial 2255 motion and be considered timely. But that is not how relation back works. In order for an amendment to relate back to an original pleading and thus be considered timely, the amendment must assert "a claim . . . that arose out

of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading[.]" FED. R. CIV. P. 15(c)(1)(B).

As explained above, we have determined what claims were timely raised under Section 2255 and therefore constitute the original pleading (hereinafter the "original 2255 motion"). Those claims are the *Johnson*-based claim and the seven additional grounds for relief comprising Folk's motion to "amend under 15(a)." These eight grounds for relief were raised within the one-year statute of limitations provided in Section 2255(f), and thus represent the baseline for any out-of-time motion to amend that seeks to assert new claims for relief.

If Folk desires to further amend his original 2255 motion to add new claims, those new claims must relate back to the claims in the original 2255 motion or else they will be time-barred by Section 2255(f). *See Mayle v. Felix*, 545 U.S. 644, 662-63 (2005). In other words, to avoid being time-barred, any new claims raised in Folk's additional motions to amend must arise from same "conduct, transaction, or occurrence" or be "tied to a common core of operative facts" as those in his original 2255 motion. *See id.* at 662-64.

We turn to Folk's first additional motion to amend. In this motion, he raises two new grounds for relief: (1) ineffective assistance of counsel for failing to request jury instructions on constructive possession and a lesser-included offense of simple possession, and (2) a challenge to his sentence seemingly based

on the factors found in 18 U.S.C. § 3553(a). (Doc. 165 at 2-8). Neither of these claims meets the requirements for relation back. They are entirely distinct and novel grounds for relief unrelated in any way to the claims or operative facts of his original 2255 motion. Consequently, this motion to amend will be denied.

Folk's second additional motion to amend fares no better. In this motion, Folk raises five new grounds for relief: (1) ineffective assistance of counsel for failing to challenge Folk's career-offender status at sentencing and on direct appeal under then-relevant Third Circuit case law; (2) ineffective assistance of counsel for "not challenging [that Folk] was entitled to mandatory 15 years minimum," a claim in which Folk appears to misunderstand that a mandatory minimum is simply the lowest possible sentence he could receive upon conviction rather than the sentence he must receive; (3) ineffective assistance of counsel for failing to object to, and to appeal, allegedly prejudicial prosecutorial closing remarks; (4) ineffective assistance of counsel for failing to move to suppress evidence that was obtained from an allegedly unlawful search of his car and house; and (5) ineffective assistance of counsel for failing to challenge the quantity of cocaine base at trial.

Once again, none of these claims meets the requirements for relation back. Each new claim raised in Folk's second additional motion to amend is wholly distinct from the claims, and operative facts, raised in his original 2255 motion.

Consequently, these five claims are time-barred under Section 2255(f), and this motion to amend must also be denied.

D. Motions for Hearing; Motion to Appoint Counsel

In light of the above discussion, we will deny Folk's motions for an evidentiary hearing, (Docs. 168, 171). None of the claims raised in Folk's 2255 motion, or any other motion discussed above, requires an evidentiary hearing. For the same reasons, we will also deny Folk's motion (Doc. 170) to appoint counsel.

III. CONCLUSION

For the foregoing reasons, we will grant Folk's October 5, 2016 motion to "amend under 15(a)," (Doc. 163), but will deny all of his other motions, including his motion for relief under 28 U.S.C. § 2255. We will also deny a certificate of appealability. An appropriate order will follow.