

DLD-025

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2527

OMAR SIERRE FOLK,
Appellant

v.

WARDEN ALLENWOOD FCI

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 3-22-cv-00591)
District Judge: Honorable Robert D. Mariani

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

November 9, 2023

Before: JORDAN, PORTER, and PHIPPS, Circuit Judges

(Opinion filed: November 28, 2023)

OPINION*

PER CURIAM

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

Omar Folk appeals the District Court's order dismissing his petition filed pursuant to 28 U.S.C. § 2241. For the reasons that follow, we will summarily affirm the District Court's judgment.

In 2012, Omar Folk was found guilty by a federal jury of drug and firearms offenses. The District Court sentenced Folk to 264 months in prison. We affirmed his conviction and sentence on direct appeal, United States v. Folk, 577 F. App'x 106 (3d Cir. 2014), and his petition for certiorari was denied. In 2016, the Federal Public Defender filed a § 2255 motion on Folk's behalf. Folk eventually proceeded pro se and was permitted to amend the motion. The District Court denied Folk's § 2255 motion. After granting a certificate of appealability and appointing counsel, we affirmed that denial. United States v. Folk, 954 F.3d 597, 600 (3d Cir. 2020).

In 2022, Folk filed a § 2241 petition, arguing that he is actually innocent of distributing cocaine and cocaine base. The District Court dismissed the petition, and Folk filed a timely notice of appeal.

We have jurisdiction under 28 U.S.C. § 1291 and exercise plenary review over the District Court's legal conclusions. Denny v. Schultz, 708 F.3d 140, 143 (3d Cir. 2013). Summary action is appropriate if there is no substantial question presented in the appeal. See 3d Cir. L.A.R. 27.4. We may summarily affirm a District Court's decision "on any basis supported by the record" if the appeal fails to present a substantial question. Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam).

A § 2241 petition filed by a federal prisoner challenging his conviction or sentence may not be entertained unless a § 2255 motion would be “inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e). As noted by the District Court, the Supreme Court recently held that this language, the so-called “savings clause,” is not a means of avoiding the restrictions imposed by § 2255(h) on filing successive § 2255 motions:

We now hold that the saving clause does not authorize such an end-run around AEDPA. In § 2255(h), Congress enumerated two—and only two—conditions in which a second or successive § 2255 motion may proceed. Because § 2255 is the ordinary vehicle for a collateral attack on a federal sentence, the straightforward negative inference from § 2255(h) is that a second or successive collateral attack on a federal sentence is not authorized unless one of those two conditions is satisfied.

Jones v. Hendrix, 599 U.S. 465, 477–78 (2023). Thus, Folk’s remedy is not to file a § 2241 petition but to seek authorization to file a second or successive § 2255 motion.

The District Court did not err in dismissing Folk’s § 2241 petition. For the above reasons, we will summarily affirm the District Court’s order. See 3d Cir. I.O.P. 10.6. Folk’s “Motion for a Briefing Schedule” is denied.

DLD-025

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2527

OMAR SIERRE FOLK,
Appellant

v.

WARDEN ALLENWOOD FCI

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 3-22-cv-00591)
District Judge: Honorable Robert D. Mariani

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

November 9, 2023

Before: JORDAN, PORTER, and PHIPPS, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for Middle District of Pennsylvania and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on November 9, 2023. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered August 7, 2023, be and the same hereby is affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: November 28, 2023

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT
CLERK

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November 28, 2023

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RE: Omar Folk v. Warden Allenwood FCI
Case Number: 23-2527
District Court Case Number: 3-22-cv-00591

ENTRY OF JUDGMENT

Today, November 28, 2023 the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:

14 days after entry of judgment.

45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:

3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).

15 pages if hand or type written.

Attachments:

A copy of the panel's opinion and judgment only.

Certificate of service.

Certificate of compliance if petition is produced by a computer.

No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/Timothy, Case Manager
267-299-4953

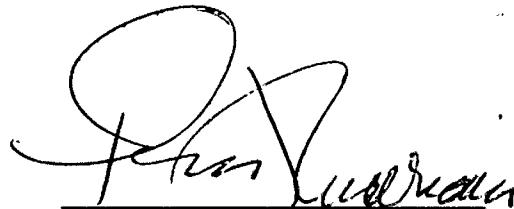
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

OMAR S. FOLK, : Civil No. 3:22-cv-591
Petitioner : (Judge Mariani)
v. :
ACTING WARDEN P. GIBSON, :
Respondent :
:

ORDER

AND NOW, this 7th day of August, 2023, upon consideration of the petition for
writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 (Doc. 1), and in accordance with
the Court's Memorandum of the same date, **IT IS HEREBY ORDERED THAT:**

1. The petition for writ of habeas corpus (Doc. 1) is **DISMISSED**.
2. The Clerk of Court is directed to **CLOSE** this case.



Robert D. Mariani
United States District Judge

OMAR S. FOLK, Petitioner v. Acting WARDEN P. GIBSON, Respondent
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
2023 U.S. Dist. LEXIS 137235
Civil No. 3:22-cv-591
August 7, 2023, Decided
August 7, 2023, Filed

Editorial Information: Subsequent History

Appeal filed, 08/23/2023

Counsel (2023 U.S. Dist. LEXIS 1) Omar Folk, Petitioner, Pro se, Minersville, PA.

For Acting Warden P. Gibson, Respondent: Joseph J. Terz, LEAD ATTORNEY, U.S. Attorney's Office, Harrisburg, PA; Michael A. Consiglio, U.S. Attorney's Office, Federal Building, Harrisburg, PA.

Judges: Robert D. Mariani, United States District Judge.

Opinion

Opinion by: Robert D. Mariani

Opinion

MEMORANDUM

Petitioner Omar S. Folk ("Folk") filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 challenging his sentence entered in the United States District Court for the Middle District of Pennsylvania. (Doc. 1). For the reasons set forth below, the Court will dismiss the petition for lack of jurisdiction.

I. Background

On October 19, 2011, a grand jury returned a three-count indictment charging Folk with drug trafficking and firearms offenses. *United States v. Folk*, No. 1:11-cr-292 (M.D. Pa.), Doc. 1. On July 11, 2012, a superseding indictment was returned charging Folk with distribution and possession with intent to distribute cocaine and 280 grams or more of cocaine base in violation of 21 U.S.C. § 841; two counts of possession of a firearm in furtherance of drug trafficking 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). *Id.*, Doc. 44.

On August 14, (2023 U.S. Dist. LEXIS 2) 2012, a jury convicted Folk on all counts. *Id.*, Doc. 82. Shortly thereafter, he moved for a new trial or alternatively to vacate judgment. *Id.*, Doc. 87. The Court denied that post-trial motion. *Id.*, 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. *Id.*, Doc. 134 at 28-29; Doc. 126.

Exhibit A
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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. *Id.*, 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 United States Supreme Court denied Folk's petition for a writ of certiorari on October 5, 2015. *Folk v. United States*, 577 U.S. 867, 136 S. Ct. 161, 193 L. Ed. 2d 119 (2015) (mem.).

Subsequently, Folk filed his first motion under 28 U.S.C. § 2255 based on the Supreme Court case of *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (holding the residual clause of the Armed Career Criminal Act ("ACCA") unconstitutional void for vagueness). *Id.*, Doc. 139. In February of 2018, the Court denied Folk's § 2255 motion in its entirety. *Id.*, Docs. {2023 U.S. Dist. LEXIS 3} 177, 178.

Folk subsequently filed eight additional motions, including three motions wherein the crux of Folk's argument was that he was inappropriately designated a career offender under the United States Sentencing Guidelines Manual and that counsel was ineffective in post-conviction proceedings. *Id.*, Doc. 192, p. 7. The Court ultimately found that Folk was properly classified as a career offender at sentencing and that counsel was not ineffective. *Id.*, Docs. 192, 193.

Folk then sought a certificate of appealability. The Third Circuit granted a certificate of appealability for one issue, his career offender designation. See *United States v. Folk*, 954 F.3d 597, 601 (3d Cir. 2020). While this appeal was pending, Folk moved to expand the certificate of appealability and to supplement his appeal. See *id.* He argued that his conviction for possession of 280 grams of cocaine base was 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). See *id.* On April 3, 2020, the Third Circuit found that an incorrect career-offender designation under the advisory Sentencing Guidelines is not a cognizable claim under § 2255 and that the *Rowe* claim qualified as a second or subsequent {2023 U.S. Dist. LEXIS 4} § 2255 petition and, under that standard, did not warrant collateral relief. *Id.* at 601, 610.

On July 27, 2022, Folk filed in the Third Circuit a "Motion for an Order Authorizing the District Court to Consider a Successive or Second Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. §§ 2244(b), 2255(h) by a Prisoner in Federal Custody." (See 3d Cir., Case No. 22-2450, Doc. 1-1). The motion requested leave to file a successive § 2255 motion on the grounds that the Supreme Court's 2022 decision in *Kemp v. United States* "overrule[s] previous precedent ruling" by the Circuit and argued that "petitioner[s] direct appeal was October 5, 2015 and was not docket[ed] on Circuit Court or District Court under Supreme Court Rule 16 upon disposition [and] therefore any ruling previously is abrogated by *Kemp v. United States* ... under 60(b)(1) as Folk file[d] a timely 59(e) and 60(b) to correct mistake in law as my one year toll was 10-5-16." (*id.* at 5). By Order dated September 26, 2022, the Third Circuit denied Folk's application. (3d Cir., Case No. 22-2450, Doc. 7). The Third Circuit found that Folk had not met the applicable standard under § 2255 to entitle him to relief and explained:

[Folk] does not rely on newly discovered evidence, nor did the case he purports to rely {2023 U.S. Dist. LEXIS 5} on, *Kemp v. United States*, 142 S. Ct. 1856, 213 L. Ed. 2d 90 (2022), announce a new rule of constitutional law that applies retroactively to cases on collateral review. Folk apparently seeks to challenge his career offender designation, but this Court has already ruled that such a claim is not cognizable in a motion under § 2255. See *United States v. Folk*, 954 F.3d 597, 601 (3d Cir. 2020). Therefore, to the extent that he seeks to raise the claim in a successive § 2255 motion, the claim is dismissed. To the extent that Folk wants to file a motion under Federal Rule of Civil Procedure 60(b) in the District Court, the application is denied as

unnecessary because he does not need the Court's permission to file such a motion. In reaching this determination, we express no opinion as to the merits of any such motion or whether such a motion would be procedurally proper. (*Id.*).

On April 22, 2022, Folk filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Doc. 1). He relies on the Third Circuit's decision in *United States v. Rowe*, 919 F.3d 752 (3d Cir. 2019),¹ and asserts that he is actually innocent of count one of the superseding indictment which charged him with distribution and possession with intent to distribute cocaine and 280 grams or more of cocaine base. (*Id.*).

II. Discussion

Federal prisoners seeking post-conviction relief from their judgment of conviction, or the sentence imposed, {2023 U.S. Dist. LEXIS 6} are generally required to bring their collateral challenges pursuant to 28 U.S.C. § 2255. See 28 U.S.C. § 2255(e). The Third Circuit Court of Appeals has observed that "[m]otions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution." *Okereke v. United States*, 307 F.3d 117, 129 (3d Cir. 2002) (citing *Davis v. United States*, 417 U.S. 333, 343, 94 S. Ct. 2208, 41 L. Ed. 2d 109 (1974)).

Section 2255 provides in relevant part:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(e) An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied relief, unless it also appears that the {2023 U.S. Dist. LEXIS 7} remedy by motion is inadequate or ineffective to test the legality of his detention.

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

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found 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. Subsection (e) is commonly referred to as the "saving clause."

On June 22, 2023, the United States Supreme Court decided *Jones v. Hendrix*, 599 U.S. ___, 143 S. Ct. 1857, 216 L. Ed. 2d 471 (June 22, 2023), which abrogated *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997)² and has significantly changed the landscape for petitioners, such as Folk, seeking to bring a § 2241 habeas petition. In *Jones*, the Supreme Court held that the saving clause of § 2255(e) "does not permit a prisoner asserting an intervening change in statutory interpretation to circumvent

AEDPA's restrictions on second or successive § 2255 motions by filing a § 2241 petition." 143 S. Ct. at 1364. Pursuant to *Jones*, there are only two conditions in which a second or successive § 2255 motion may proceed, those described in § 2255(h). *Id.* The Supreme Court{2023 U.S. Dist. LEXIS 8} explained:

The inability of a prisoner with a statutory claim to satisfy those conditions does not mean that he can bring his claim in a habeas petition under the saving clause. It means that he cannot bring it at all. Congress has chosen finality over error correction...*Id.* at 1839.

In this case, Folk challenges his sentence. However, he has previously filed a § 2255 petition that was denied. Thus, under *Jones*, Folk cannot challenge his sentence with a § 2241 petition unless it fits within the parameters of § 2255(h). *Jones*, 143 S. Ct. at 1364. The Third Circuit has expressly found that Folk's claim does not satisfy § 2255(h). *Folk*, 954 F.3d 597. In its memorandum affirming this Court's memorandum and order denying Folk's § 2255 motion, the Third Circuit found as follows:

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{2023 U.S. Dist. LEXIS 9} Supreme Court-so Folk does not satisfy § 2255(h)'s second prong. Accordingly, we will deny his motion.*Id.* at 610. Thus, Folk's present § 2241 petition-which again seeks relief based on the Supreme Court's decision in *Rowe*-is an unauthorized successive collateral attack on his sentence. See *Jones*, 143 S. Ct. at 1863 ("[a] federal prisoner may not...file a second or successive § 2255 motion based solely on a more favorable interpretation of statutory law adopted after his conviction became final and his initial § 2255 motion was resolved"). Consequently, Folk's petition will be dismissed.

III. Conclusion

The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 will be dismissed for lack of jurisdiction. A separate Order shall issue.

/s/ Robert D. Mariani

Robert D. Mariani

United States District Judge

Dated: August 7, 2023

ORDER

AND NOW, this 7th day of August, 2023, upon consideration of the petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 (Doc. 1), and in accordance with the Court's Memorandum of the same date, **IT IS HEREBY ORDERED THAT:**

1. The petition for writ of habeas corpus (Doc. 1) is **DISMISSED**.
2. The Clerk of Court is directed to **CLOSE** this case.

/s/ Robert D. Mariani

Robert D. Mariani

United States District Judge

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Footnotes

1

In his supplement to the habeas petition, Folk references additional Supreme Court cases of *Kemp v. United States*, 142 S. Ct. 1856, 213 L. Ed. 2d 90 (2022), and *United States v. Taylor*, 142 S. Ct. 2015, 213 L. Ed. 2d 349 (2022). (Docs. 8, 9). In *Kemp*, 142 S. Ct. at 1861-62, the Supreme Court held that a "mistake," pursuant to rule 60(b)(1), included a mistake of law: that is, where a judge makes a legal error, the aggrieved party must move to correct that error under Rule 60(b)(1) rather than the catch-all provision of Rule 60(b)(3). In *Taylor*, 142 S. Ct. at 2025-26, the Supreme Court held that attempted Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A). Thus, these cases did not change the law in a way material to Folk's conviction and sentence and they have no applicability here.

2

Dorsainvil permitted federal prisoners to bring § 2241 habeas petitions in limited circumstances.