

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

DEREK FOLLEY,

Petitioner,

: Case No. 3:22-cv-065

- vs -

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

KEITH J. FOLEY, Warden,

Respondent.

DECISION AND ORDER

This habeas corpus case, brought *pro se* by Petitioner Derek Folley under 28 U.S.C. § 2254, is before the Court on Folley's Motion Not to Dismiss on "IN RE AMIRA SALEM" RIGHTS OF THE PETITIONER (ECF No. 58).

Essentially Petitioner alleges that his Petition in this case is not a second or successive habeas corpus petition requiring circuit court approval before its filing here. See 28 U.S.C. § 2244(b). Because a district court does not have jurisdiction to consider a second or successive petition without circuit court permission, the Magistrate Judge considered that question before issuing the Order for an answer (ECF No. 38).

The prior habeas action by Petitioner in this District challenged his pretrial detention under 28 U.S.C. § 2241 whereas the instant Petition challenges under 28 U.S.C. § 2254 his imprisonment upon conviction. Had the prior petition challenged the conviction, the Court would not have dismissed the instant Petition as second or successive, but would have transferred the case to the

Sixth Circuit for its decision on whether the case could proceed. But as this is not a second or successive petition, that transfer was not called for.

This conclusion is, of course, tentative because the Warden has not yet answered the Petition and may possibly know of other habeas corpus cases filed by Petitioner. The Court reserved its authority to reconsider this decision if needed to properly exercise its jurisdiction.

March 31, 2022.

s/ Michael R. Merz
United States Magistrate Judge