

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 17-50607

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

STEPHEN S. HENRY,

Defendant - Appellant

Appeal from the United States District Court  
for the Western District of Texas

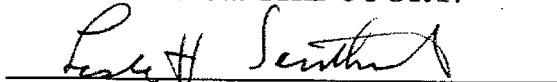
ON PETITION FOR REHEARING EN BANC

Before SOUTHWICK, HAYNES, and HO, Circuit Judges.  
PER CURIAM:

( ) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

  
\_\_\_\_\_  
LESLIE H. SOUTHWICK  
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 17-50607



A True Copy  
Certified order issued Aug 06, 2018

*Jyle W. Clegg*  
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STEPHEN S. HENRY,

Defendant-Appellant

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Appeal from the United States District Court  
for the Western District of Texas

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ORDER:

Stephen S. Henry, federal prisoner # 52075-280, pleaded guilty to production of obscene visual representations of children and possession of child pornography and was sentenced to a total of 240 months of imprisonment. In 2011, Henry filed an unsuccessful motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, arguing that his attorney rendered ineffective assistance by failing to file a motion to suppress evidence seized from his house.

In 2016, Henry filed in the district court a motion to set aside the prior § 2255 judgment pursuant to Federal Rule of Civil Procedure 60(d)(3), based upon fraud on the court. The district court dismissed the motion without prejudice as an unauthorized successive § 2255 motion and denied Henry's motion for reconsideration.

No. 17-50607

Henry now moves for a certificate of appealability (COA) to appeal the district court's dismissal of his Rule 60(d)(3) motion as an unauthorized successive § 2255 motion. He also moves for leave to proceed in forma pauperis (IFP) on appeal.

To obtain a COA, Henry must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make that showing, he must demonstrate that reasonable jurists would find the district court's decision debatable or wrong, *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that his claims "are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Although Henry asserts that his postjudgment motion sought to correct a defect in the prior federal habeas proceedings, the crux of his argument is that the district court's decision to deny him relief on the merits in the prior § 2255 proceeding was erroneous in light of the evidence presented at the evidentiary hearing. Thus, despite his characterization of his claim, Henry's motion attacks the district court's resolution of his prior claim on the merits. Accordingly, he has failed to make the showing required to obtain a COA. *See Slack*, 529 U.S. at 484; *see also Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005).

The motion for a COA is DENIED. The motion for leave to proceed IFP on appeal also is DENIED.

/s/ Leslie H. Southwick  
LESLIE H. SOUTHWICK  
UNITED STATES CIRCUIT JUDGE

**FILED**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT of TEXAS  
SAN ANTONIO DIVISION

UNITED STATES of AMERICA,

Plaintiff-Respondent

v.

STEPHEN S. HENRY,  
BoP # 52075-280,

Defendant-Movant

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Civil Action  
No. SA-11-CA-303-OG

Criminal Case  
No. SA-9-CR-564-OG

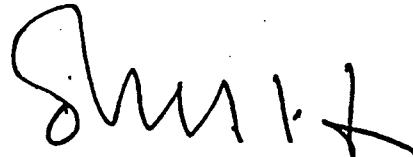
CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY *[Signature]*

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**O R D E R**

Defendant Stephen S. Henry's Motion for Reconsideration, of this Court's Order construing his Motion for Relief from Judgment as a 28 U.S.C. § 2255 motion and dismissing it as successive, is DENIED for the reasons stated in this Court's Order (see Entry #98). Defendant failed to identify an error of law or fact or other grounds warranting relief from judgment pursuant to Fed. R. Civ. P. 60(b).

DATED: *10.4.*, 2017



ORLANDO L. GARCIA  
Chief United States District Judge

FILED

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT of TEXAS  
SAN ANTONIO DIVISION

NOV 06 2017

**DEPUTY CLERK**

**UNITED STATES of AMERICA,**

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**Civil Action  
No. SA-11-CA-303-OG**

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**STEPHEN S. HENRY,  
BoP # 52075-280,**

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**Criminal Case  
No. SA-9-CR-564-OG**

### **Defendant-Movant**

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## ORDER

Defendant Stephen S. Henry's Notice of Appeal, construed as a motion for certificate of appealability (Docket Entry # 100), to appeal this Court's dismissal without prejudice of his 28 U.S.C. § 2255 Motion to Vacate Federal Sentence as successive, is **DENIED** for the reasons stated in this Court's Order (Entry # 98) dismissing the Motion. Defendant's Motion and appeal fail to present "a substantial showing of the denial of a federal right" or a substantial showing this Court's procedural rulings are incorrect as required by Fed. R. App. P. 22 for a certificate of appealability.

*See Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

**DATED:** November

, 2017

**ORLANDO L. GARCIA**  
**Chief United States District Judge**

FILED

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT of TEXAS  
SAN ANTONIO DIVISION

JUN 02 2017

**UNITED STATES of AMERICA,**

## **Plaintiff-Respondent**

V.

**STEPHEN S. HENRY,  
BoP # 52075-280,**

### **Defendant-Movant**

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**Civil Action  
No. SA-11-CA-303-OG**

**Criminal Case  
No. SA-9-CR-564-OG**

## ORDER

Defendant Stephen S. Henry's Motion for Relief From § 2255 Judgment (Docket Entry # 97) and Motion to Take Judicial Notice (Entry # 96), seeking reconsideration of this Court's June 28, 2013 Order denying and dismissing his 28 U.S.C. § 2255 Motion to Vacate Federal Sentence, construed as a successive § 2255 motion, is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction because the Court of Appeals has not authorized Defendant to file a successive § 2255 motion. *See* 28 U.S.C. § 2244(a)(3)(A); *U.S. v. Hernandes*, 708 F.3d 680, 681-82 (5th Cir. 2013) (explaining that a motion for reconsideration re-asserting a § 2255 claim on the merits or presenting a new claim is in effect a successive § 2255 motion).

Defendant's Motion for Leave to Proceed In Forma Pauperis (Entry # 95) is DENIED as not necessary.

**DATED:** June 2, 2017

John L. +