

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-10329
Non-Argument Calendar

D.C. Docket Nos. 6:19-cv-02435-JA-LRH,
6:15-cr-00048-JA-LRH-1

WILLIAM HENRY KEEHN, II,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(September 1, 2020)

Before MARTIN, JILL PRYOR, and BRASHER, Circuit Judges.

PER CURIAM:

William Henry Keehn, II, is serving a total 450-month federal sentence after pleading guilty in 2015 to receipt and production of child pornography. In 2016, Keehn filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. Keehn's § 2255 motion argued that his sentence violated the Eighth Amendment because the district court presumed that his applicable range under the U.S. Sentencing Guidelines was reasonable instead of assessing the facts individually. The district court denied Keehn's § 2255 motion on the merits in 2018. The following year, Keehn moved for leave to file a supplemental § 2255 motion alleging ineffective assistance of counsel. The district court construed the motion as a second § 2255 motion and dismissed it without prejudice.

Later that year, Keehn filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(4). Rule 60(b)(4) permits a district court to "relieve a party or its legal representative from a final judgment, order, or proceeding" if "the judgment is void." Fed. R. Civ. P. 60(b)(4). Keehn's motion argued his conviction for child-pornography production under 18 U.S.C. § 2251(a) and (e) exceeded the district court's subject-matter jurisdiction, and thus his conviction for that offense was void. The district court dismissed the motion as an unauthorized second or successive § 2255 motion. Keehn appeals from that dismissal.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal prisoners are entitled to a "single collateral attack" on their conviction or

sentence “unless the conditions of [28 U.S.C. §] 2255(h) have been met.”

McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1090 (11th Cir. 2017) (en banc) (quotation marks omitted and alteration adopted). Section 2255(h) permits a federal prisoner to file a “second or successive” motion for relief, provided he receives certification from a panel of the Court of Appeals. In other words, a prisoner may file his first collateral motion seeking relief from his judgment or sentence with the district court. After that, every additional motion seeking such relief must be directed in the first instance to our Court.

The “second or successive” bar applies to standard § 2255 motions as well as § 2255 motions made under the guise of Rule 60(b). See Gonzalez v. Sec’y for Dep’t of Corr., 366 F.3d 1253, 1263 (11th Cir. 2004) (en banc), aff’d sub nom. Gonzalez v. Crosby, 545 U.S. 524, 125 S. Ct. 2641 (2005). The bar does not apply to “true” Rule 60(b) motions, which seek “relief on a traditional Rule 60(b) ground for relief from a prior judgment, or at least on a ground that was sometimes used during the pre-AEDPA era.” Id. However, a Rule 60(b) motion that “seeks to add a new ground for [habeas] relief” or “attacks the federal court’s previous resolution of a claim on the merits” is “of course” barred. Gonzalez, 545 U.S. at 532, 125 S. Ct. at 2648 (emphasis omitted).

The district court correctly dismissed Keehn’s Rule 60(b) motion as an impermissible second or successive § 2255 motion. His motion asks for relief

from the underlying criminal judgment based on a jurisdictional defect in those proceedings. This request falls squarely within the traditional ambit of § 2255. See Gonzalez, 366 F.3d at 1260 (“A § 2255 motion is aimed at having a judgment of conviction and sentence set aside because of some constitutional violation, jurisdictional defect, or other ground that makes the judgment subject to collateral attack.”); cf. Gilbert v. United States, 640 F.3d 1293, 1323 (11th Cir. 2011) (en banc) (explaining that a Rule 60(b) motion is not second or successive when it “asserts or reasserts no claim but instead attacks some defect in the integrity of the federal habeas proceedings” (quotation marks omitted)), overruled on other grounds by McCarthan, 851 F.3d 1076. To the extent Keehn wants to challenge his conviction for child-pornography production because of a defect in the district court’s jurisdiction, he must first receive permission from our Court to make such a § 2255 motion. See 28 U.S.C. § 2244(b)(3).

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

WILLIAM KEEHN,

Petitioner,

v.

Case No: 6:19-cv-2435-Orl-28LRH
(6:15-cr-48-Orl-28KRS)

UNITED STATES OF AMERICA,

Respondent.

ORDER

This case is before the Court on the following matters:

1. Petitioner's Motion to Vacate Judgment (Doc. 1) is **DISMISSED WITHOUT PREJUDICE** to allow Petitioner to seek authorization from the Eleventh Circuit to file a successive § 2255 motion. Petitioner seeks relief pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure and requests the Court to vacate his conviction for production of child pornography (Count Two). (*Id.* at 2-6.) In support of the motion, Petitioner argues that the Court lacked jurisdiction to convict him of production of child pornography in violation of 18 U.S.C. § 2251(a). (*Id.*).

Rule 60(b) "cannot be used to circumvent the prohibition on filing unauthorized successive post-conviction challenges." *United States v. Bueno-Sierra*, 723 F. App'x 850, 853 (11th Cir. 2018) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005) and *Franqui v. Florida*, 638 F.3d 1368, 1371-73 (11th Cir. 2011)). "A Rule 60(b) motion from a denial of a § 2255

motion is considered a successive motion if it 'seeks to add a new ground for relief' or 'attacks the federal court's previous resolution of a claim on the merits.'" *Id.* (quoting *Gonzalez*, 545 U.S. at 532).

The Court denied Petitioner's § 2255 motion on the merits on September 5, 2018. *See* Case No. 6:16-cv-2107-Orl-28KRS, Doc. 6. The argument made in the present motion raises a new ground for relief, and the motion is merely an attempt to assert a claim of error as to Petitioner's federal conviction. Under the circumstances, the Rule 60(b) motion should be treated as a second or successive § 2255 motion.

Before Petitioner may file a second or successive § 2255 motion in this Court, he must move in the Eleventh Circuit Court of Appeals for an order authorizing the district court to consider the motion. *See* 28 U.S.C. §§ 2244 and 2255. Consequently, this motion is dismissed without prejudice to allow Petitioner the opportunity to seek authorization from the Eleventh Circuit Court of Appeals.¹ Petitioner should be aware that § 2255 limits the circumstances under which the Court of Appeals will authorize the filing of a second or successive § 2255 motion.


2. The Clerk of the Court is directed to send Petitioner an "Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence 28

¹ Alternatively, Petitioner's Motion to Vacate Judgment (Doc. 1) is denied on the merits. Pursuant to Rule 60(b)(4), a court may relieve a party from a final judgment if the judgment is void. "A judgment is void for Rule 60(b)(4) purposes 'if the rendering court was powerless to enter it.'" *Campbell v. Sec'y for Dep't of Corr.*, 370 F. App'x 5, 7 (11th Cir. 2010) (quoting *Burke v. Smith*, 252 F.3d 1260, 1263 (11th Cir. 2001)). Petitioner has not established that the Court was powerless to enter judgment or any other basis warranting relief.

U.S.C. § 2255 By a Prisoner in Federal Custody" form.

3. This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, a Certificate of Appealability is **DENIED** in this case.

DONE and ORDERED in Orlando, Florida on January 8th, 2020.



JOHN ANTOON II
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Unrepresented Party