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United States Court of Appeals
for the Fifth Circuit

No. 22-50100

United States Court of Appeals

Fifth Circuit

FILED

October 4, 2022

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

DAVID ANDREW DIEHL,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Western District of Texas
USDC No. 1:16-CV-1124
USDC No. 1:10-CR-297-1

Before STEWART, DENNIS, and WILLETT, *Circuit Judges.*

PER CURIAM:

David Andrew Diehl, federal prisoner # 53214-018, was convicted of sexual exploitation of a child and production of child pornography and sentenced to 600 months of imprisonment. He moves for a certificate of appealability (COA) to appeal the denial of the Federal Rule of Civil Procedure 60(b) motion that he filed regarding the dismissal of his 28 U.S.C. § 2255 motion. He argues that (i) the district court and appellate court mischaracterized or failed to address certain of his § 2255 claims; (ii) the district court erroneously dismissed as procedurally barred his § 2255 claims

APPENDIX A

regarding the statute of limitations and an alleged violation of the Ex Post Facto clause; and (iii) he is entitled to relief under Federal Rule of Civil Procedure 60(d)(3) because the Government committed fraud by misrepresenting or mischaracterizing evidence or prior court findings. [We will not consider Diehl's claim raised for the first time in his COA motion that his Ex Post Facto claim was erroneously construed as a procedural argument instead of a substantive argument. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018). sentence

A COA may issue if a prisoner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To obtain a COA, he must establish that reasonable jurists would find the decision to deny relief debatable or wrong, *see Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000), or that the issues that he raises "are adequate to deserve encouragement to proceed further," *Miller-El*, 537 U.S. at 327. To obtain a COA from the denial of a Rule 60(b) motion, he must demonstrate that reasonable jurists could debate whether the district court abused its discretion in denying him relief from the judgment. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Diehl has not made the required showing. Accordingly, his motion for a COA is DENIED. His motion for leave to file a supplement brief is GRANTED.

A COA is not required to appeal the denial of a motion to recuse. *Trevino v. Johnson*, 168 F.3d 173, 176-78 (5th Cir. 1999). However, Diehl did not brief, and therefore abandons, any challenge to the district court's denial of his motion to recuse. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). The denial of the motion to recuse is AFFIRMED. Diehl's motion to docket the appeal of the denial of his motion to recuse in separate case is DENIED.

B1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

JAN 3 2022

UNITED STATES OF AMERICA

v.

DAVID ANDREW DIEHL

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CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS

A-10-CR-297-LY
A-16-CV-1124-LY

60 (b) Denied

ORDER

Before the court are Defendant David Andrew Diehl's *pro se* "First Amended Motion for Consideration of Fed. R. Civ. P. Rule 60(b) Claims," (ECF No. 300); the Government's Response in Opposition Thereto (ECF No. 301); Diehl's Reply (ECF No. 303); Diehl's "Motion to Correct Caption for R.60(b)," (ECF No. 304); and Diehl's "First Supplemental Brief for Pending R.60(b) and Memorandum." (ECF No. 305).

In 2010, Diehl was charged with ten counts of sexual exploitation of a child/production of child pornography under 18 U.S.C. § 2251(a).¹ The indictment alleged that in 1999 and 2000, Diehl did knowingly "employ, use, induce, entice, and coerce" three minor females to engage in sexually explicit conduct for the purpose of making visual depictions of such conduct, and that the visual depictions were "transported in interstate and foreign commerce and mailed."

Attorney Stephen Orr represented Diehl. Diehl waived a jury trial and proceeded to a bench trial. He entered into an agreed stipulation of facts and evidence wherein he admitted all of the elements of the offenses, except the required interstate commerce nexus. Diehl stipulated that on multiple occasions he induced three minor victims to engage in sexually explicit conduct for the purpose of producing video depictions. At the conclusion of the Government's case, Diehl moved

¹ The factual background is adapted from the Fifth Circuit Court of Appeals' opinion affirming Diehl's conviction and sentence in all respects. *United States v. Diehl*, 775 F.3d 714 (5th Cir. 2015).

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for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 on the grounds that the Government failed to provide sufficient evidence to establish a nexus to interstate commerce. The court denied the motion and found Diehl guilty on all ten counts. After Diehl's trial, this court granted Mr. Orr's request for leave to withdraw from representing Diehl. E.G. (Gerry) Morris substituted as counsel and represented Diehl at sentencing.

The court determined that the advisory imprisonment range under the 2000 Sentencing Guidelines was 210 to 262 months of imprisonment. The statutory maximum sentence was twenty years of imprisonment on each of the ten counts, or 200 years of imprisonment. The court sentenced Diehl to 600 months of imprisonment and described the reasons for the sentence on the record. Diehl's counsel objected to the sentence as being substantively and procedurally unreasonable.

Diehl filed a timely notice of appeal and elected to proceed *pro se* on appeal. On appeal, Diehl raised multiple challenges to his conviction and sentence, including that his indictment was untimely, his trial counsel was ineffective for failing to raise the statute of limitations as a defense, there was insufficient evidence to prove interstate commerce, and his sentence was procedurally and substantively unreasonable. The Fifth Circuit ruled against Diehl on all points and affirmed his conviction and sentence. *Diehl*, 775 F.3d at 714.

Diehl filed a motion pursuant to 28 U.S.C. § 2255 (Section 2255 motion) asserting ten individual grounds for relief. (ECF No. 209). The court referred the Section 2255 Motion to U.S. Magistrate Judge Mark Lane. Judge Lane issued a Report and Recommendation, to which Diehl filed objections. (ECF Nos. 253 & 259). During the objection period, Diehl sought leave to amend the Section 2255 motion to add three additional claims of ineffective assistance of counsel, and the Government filed no opposition to his motion for leave. (ECF No. 263). The court granted

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leave to amend, dismissed the previous Section 2255 motion as moot, and referred the Amended Section 2255 Motion and several discovery motions to Judge Lane for resolution or report and recommendation. (ECF No. 265).

Judge Lane submitted an Amended Report and Recommendation, to which Diehl filed objections. (ECF Nos. 270 and 274). In the Report and Recommendation, Judge Lane explicitly set forth all thirteen claims asserted in the Amended Section 2255 Motion as follows:

1. The statute of limitations was expired on all counts, and 18 U.S.C. § 3283 does not apply to the offenses.
2. Counsel was ineffective for his failure to know the law, resulting in a wrongful conviction, specifically relating to the differences between the 1999 and 2008 versions of 18 U.S.C. § 2251(a).
3. Counsel was ineffective for failing to object to the indictment being amended.
4. Counsel was ineffective for failing to object to 18 U.S.C. § 2251(a) (2008) being applied to the case.
5. Counsel was ineffective for failing to argue an appropriate defense.
6. Trial counsel was ineffective for making a Rule 29 motion at trial.
7. Trial counsel was ineffective for failing to subject the Government's case to meaningful adversarial testing, specifically counsel's advice to stipulate to all essential facts was *per se* ineffective.
8. *United States v. Austin*, 432 F.3d 598 (5th Cir. 2005) has been abrogated by the Supreme Court.
9. Counsel was ineffective for his failure to object to a pretrial order stating the courtroom would be closed when non-minors testified.
10. The cumulative effect of prosecutorial misconduct at the grand jury proceedings, pretrial, trial, in the PSR, and on appeal resulted in a manifest miscarriage of justice, contributing to the wrongful conviction and thirty-year upward variance.
11. Counsel was ineffective because he failed to have defendant's hardware inspected per 18 U.S.C. § 3509(m)(2)(B).

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12. Counsel was ineffective because he did not challenge the NCMEC reports as hearsay.

13. Counsel was ineffective because he did not challenge the FBI's search warrant at trial.

(ECF No. 270 at 6). The Report and Recommendation divided the claims into three general categories—issues raised on direct appeal, ineffective-assistance-of-counsel issues, and a general argument of prosecutorial misconduct—and addressed each one in turn. Judge Lane recommended that Diehl's Amended Section 2255 Motion be denied.

After undertaking a *de novo* review of the motions, responses, replies, objections, applicable law, and entire record in this case and finding that the Report and Recommendation adequately addressed all issues raised in Diehl's amended objections, the court overruled Diehl's objections and adopted the Report and Recommendation. (ECF Nos. 275 & 276).

Diehl filed a motion in the Fifth Circuit Court of Appeals for a certificate of appealability on claims concerning limitations, the jurisdictional nexus to support his conviction, his sentence, ineffective assistance of counsel, *Brady v. Maryland*, 373 U.S. 83 (1963), and discovery. He also argued that the court erred by not holding an evidentiary hearing. The Fifth Circuit denied a certificate of appealability and affirmed the court's denial of an evidentiary hearing. (ECF No. 293). The United States Supreme Court denied Diehl's petition for a writ of *certiorari*. (ECF No. 296).

On April 29, 2021, the court received Diehl's self-styled "Motion for Consideration of Rule 60(b) Claims." (ECF No. 297). On June 1, 2021, Diehl filed a "First Amended Motion for Consideration of Fed. R. Civ. P. Rule 60(b) Claims." (ECF No. 300). The Government filed a Response to the Motion, and Diehl filed a Reply. (ECF Nos. 301 & 303). Thereafter, Diehl filed a "Motion to Correct Caption for R.60(b)" and "First Supplemental Brief for Pending R.60(b)

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Motion and Memorandum." (ECF No. 305). Collectively, Diehl's filings invoke Federal Rule of Civil Procedure Rule 60(b) to challenge various aspects of his criminal and *habeas* proceedings.

In its Response, the Government argues that Diehl's Rule 60(b) Motion should be denied as untimely. The Government further asserts that, even if the motion is deemed timely filed, Rule 60(b) provides no relief to Diehl as to his criminal case and, as such, the Rule 60(b) Motion constitutes a second or successive Section 2255 motion that Diehl is not authorized to file.

Federal Rule of Civil Procedure 60(b) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief."

In *Gonzalez v. Crosby*, the Supreme Court stated that Rule 60(b) motions cannot "impermissibly circumvent the requirement that a successive *habeas* petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." 545 U.S. 524, 532 (2005) (citing 28 U.S.C. § 2244(b)(3)). *Gonzalez* provides guidance for determining when a Rule 60(b) motion is subject to the requirements for successive petitions. *See id.* at 532-36.²

² The Fifth Circuit has applied *Gonzalez*'s holding in the Section 2255 context. *United States v. Vialva*, 904 F.3d 356, 360 n. 3 (5th Cir. 2018) (citing *United States v. Hernandez*, 708 F.3d 680, 681 (5th Cir. 2013)).

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Specifically, *Gonzalez* states that courts must construe a Rule 60(b) motion as a successive *habeas* petition 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.* at 532. If a motion challenges “not the substance of the federal court’s resolution of a claim on the merits but some defect in the integrity of the federal *habeas* proceedings,” then a Rule 60(b) motion is appropriate. *Id.* Claims of procedural defect must be “narrowly construed” when considering whether motions are subject to the limits on successive *habeas* petitions. *See In re Coleman*, 768 F.3d 367, 371 (5th Cir. 2014).

Claims properly brought under Rule 60(b) include assertions of “[f]raud on the *habeas* court” or challenges to procedural rulings that “precluded a merits determination”—for instance, the denial of *habeas* relief “for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.” *Gonzalez*, 545 U.S. at 532 n.4 & n.5. Accordingly, a district court has jurisdiction to consider a motion that shows “a non-merits-based defect in the district court’s earlier decision on the federal *habeas* petition.” *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010).

But motions that “in effect ask for a second chance to have the merits determined favorably” must be construed as successive *habeas* petitions regardless of whether they are characterized as procedural attacks. *See Gonzalez*, 545 U.S. at 532 n.5. Rule 60(b) motions can legitimately ask a court to reevaluate already-decided claims—as long as the motion credibly alleges a non-merits defect in the prior *habeas* proceedings. *Vialva*, 904 F.3d at 361. Arguments that are characterized as procedural but lead “inextricably to a merits-based attack on the dismissal of the § 2255 motion,” require circuit-court authorization. *Id.* (quoting *In re Lindsey*, 582 F.3d 1173, 1175-76 (10th Cir. 2009)). This court must therefore ascertain which of Diehl’s claims are

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properly characterized as Rule 60(b) claims and what claims are, in substance, successive 2255 claims.

Diehl asserts that the *habeas* court failed to address his claim that the prosecution was involved in cross-circuit fraud by knowingly bringing “expired” charges. (ECF No. 300 at 8-13). After this court accepted the Amended Section 2255 Motion for filing, Diehl sought leave to file an additional brief concerning “statute of limitation corruption” and “ex post facto sentence.” (ECF No. 269). In the Report and Recommendation, Judge Lane denied Diehl’s request to submit the brief for various reasons, including because the claims were procedurally barred. (ECF No. 270 at 22). Judge Lane explained as follows: “in considering Diehl’s direct appeal, the Fifth Circuit conclusively rejected Diehl’s statute of limitations argument and his argument that his sentence violated the Ex Post Facto clause, and issues raised and resolved on direct appeal are not considered in a section 2255 motion.” (*Id.* at 22-23) (citing *United States v. Diehl*, 775 F.3d 714, 719-24 (5th Cir. 2015); *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986)). Insofar as Diehl challenges the *habeas* court’s procedural ruling, this challenge is properly construed as a Rule 60(b) claim because the ruling precluded a merits determination. Diehl, however, has failed to show that he is entitled to Rule 60(b) relief because he fails to demonstrate that the procedural ruling was in error or that there is any merit to his claim of widespread prosecutorial misconduct. Accordingly, Diehl’s request for Rule 60(b) relief is denied.

Diehl next alleges that the *habeas* court failed to properly and comprehensively address Counts Two, Four, Ten, Eleven, and Thirteen of the Amended Section 2255 Motion. (ECF No. 300 at 14-21). However, in the Report and Recommendation, Judge Lane directly addressed these claims as Diehl asserted them in the Amended Section 2255 Motion. Accordingly, because the

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habeas court resolved these claims on the merits, Diehl's challenge is construed as a successive Section 2255 claim for which Diehl has failed to obtain precertification from the Fifth Circuit.

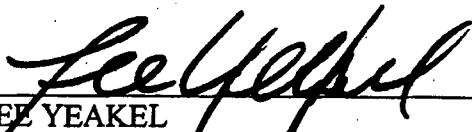
Diehl's remaining allegations, which he characterizes as Rule 60(b) claims, are, in substance, challenges to his criminal proceeding or issues resolved against him on the merits in his *habeas* proceeding. (ECF No. 300 at 22-47). Accordingly, they are construed as successive Section 2255 claims for which Diehl has failed to obtain precertification from the Fifth Circuit. Because Diehl's Rule 60(b) claims are without merit, it is not necessary to address the timeliness of his motion.

It is therefore **ORDERED** that David Andrew Diehl's "First Amended Motion for Consideration of Fed. R. Civ. P. Rule 60(b) Claims" is construed in part as a motion pursuant to Rule 60(b), and in part as a successive Motion to Vacate pursuant to 28 U.S.C. § 2255, as set forth herein. Diehl's properly asserted Rule 60(b) claims are without merit and **DENIED**. Insofar as Diehl alleges claims pursuant to section 2255, the motion is **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction and a certificate of appealability is **DENIED**.

It is further **ORDERED** that David Andrew Diehl's original "Motion for Consideration of Rule 60(B) Claims" is **DISMISSED**, as it was superseded by Diehl's amended motion.

It is finally **ORDERED** that David Andrew Diehl's "Motion to Correct Caption for R.60(b)" is **DISMISSED** as unnecessary.

SIGNED this the 3rd day of January 2022.


LEE YEAKEL
UNITED STATES DISTRICT JUDGE

C1

United States Court of Appeals for the Fifth Circuit

No. 22-50100

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DAVID ANDREW DIEHL,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:16-CV-1124

ON PETITION FOR REHEARING EN BANC

Before STEWART, DENNIS, and WILLETT, *Circuit Judges.*

PER CURIAM:

Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX C