No. 22-7031

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ANDREW DIEHL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly determined that petitioner is not entitled to relief on his motion under Federal Rule of Civil Procedure 60(b).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Diehl, No. 1:10-cr-297 (Oct. 25, 2011)

United States v. Diehl, No. 1:10-cr-297 (Oct. 15, 2015)

United States v. Diehl, No. 1:10-cr-297 (Feb. 4, 2019)

United States v. Diehl, No. 1:10-cr-297 (Jan. 3, 2022)

United States v. Diehl, No. 1:10-cr-297 (Feb. 28, 2022)

United States Court of Appeals (5th Cir.):

United States v. Diehl, No. 11-51076 (Jan. 7, 2015)

United States v. Diehl, No. 13-50103 (June 13, 2013)

United States v. Diehl, No. 15-51061 (Feb. 13, 2017)

United States v. Diehl, No. 16-51455 (Nov. 28, 2017)

United States v. Diehl, No. 19-50165 (May 6, 2020)

United States v. Diehl, No. 22-50100 (Oct. 4, 2022)

Supreme Court of the United States:

Diehl v. United States, No. 15-5256 (Oct. 5, 2015)

Diehl v. United States, No. 17-8214 (Apr. 23, 2018)

Diehl v. United States, No. 20-6673 (Jan. 25, 2021)

In re David A. Diehl, No. 20-7346 (Apr. 5, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is available at 2022 WL 19073965. The order of the district court (Pet. App. B1-B8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2022. A petition for rehearing was denied on December 9, 2022 (Pet. App. C1). The petition for a writ of certiorari was filed on March 8, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Texas, petitioner was convicted on ten counts of producing child pornography, in violation of 18 U.S.C. 2251(a). Judgment 1. The district court sentenced him to 600 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. On direct review, the court of appeals affirmed his convictions and sentence, 775 F.3d 714, and this Court denied a petition for a writ of certiorari, 577 U.S. 890 (No. 15-5256).

Petitioner subsequently filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255, which the district court denied. D. Ct. Doc. 275, at 1-2 (Feb. 4, 2019). The court of appeals denied petitioner a certificate of appealability, 803 Fed. Appx. 800, and this Court denied a petition for a writ of certiorari, 141 S. Ct. 1282 (No. 20-6673). Petitioner then filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b), which the district court denied in part and dismissed in part. Pet. App. B1-B8. The court of appeals denied a certificate of appealability. Pet. App. A1-A2.

1. a. Between 1999 and 2000, petitioner "recorded encounters in which he sexually assault[ed] three minor female victims" -- ages 3, 8, and 10 -- "on multiple separate occasions, including scenes of oral sex, digital penetration, penile penetration, sodomy, lascivious exhibition of the genitals and

pubic area of the minors, and masturbation." 775 F.3d at 717. In 2010, a federal grand jury issued a superseding indictment charging petitioner with ten counts of producing child pornography, in violation of 18 U.S.C. 2251(a). Superseding Indictment 1-11.

Petitioner "waived a jury trial and proceeded to a bench trial before the district court." 775 F.3d at 717. He also "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." Ibid.; see ibid. (emphasizing that petitioner "stipulated that on multiple occasions he induced three minor victims to engage in sexually explicit conduct for the purpose of producing video depictions"). Petitioner further stipulated that the videos he created were all "available on the internet" and "had been found on electronic media outside the state of Texas, including in Arizona, Maryland, New Jersey, Indiana, and Australia." Ibid.; see ibid. (observing that "the images produced by [petitioner] were identified over 3,000 times in child pornography investigations conducted by law enforcement in the United States").

The district court found petitioner guilty on all counts. 775 F.3d at 718. Among other things, the court "found that the facts showed beyond a reasonable doubt that the production of the child pornography occurred within Texas and that it appeared in other states on the internet, which was sufficient to show a nexus to interstate commerce under [Section] 2251(a)." Ibid. The court

sentenced petitioner to 600 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

b. The court of appeals affirmed. 775 F.3d 714. The court first rejected petitioner's contention that his trial counsel was ineffective for failing to raise a statute of limitations defense, explaining that petitioner's "indictment was timely" under 18 U.S.C. 3282. 775 F.3d at 721; see id. at 719-721. The court next rejected petitioner's assertion of insufficient evidence to establish the interstate commerce nexus requirement. Id. at 721-722. Finally, the court affirmed petitioner's sentence as procedurally and substantively reasonable and consistent with the Ex Post Facto Clause. Id. at 722-726.

This Court denied a petition for a writ of certiorari. 577 U.S. 890 (No. 15-5256); see 577 U.S. 1024 (No. 15-5256) (denying petition for rehearing).

2. a. In October 2016, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. D. Ct. Doc. 209 (Oct. 6, 2016). Petitioner was subsequently granted leave to amend his Section 2255 motion, and the amended motion was referred to a magistrate judge. See D. Ct. Doc. 265 (Jan. 7, 2019).

The magistrate judge recommended that petitioner's motion be denied. See D. Ct. Doc. 270, at 1-25 (Jan. 11, 2019). The magistrate judge noted that petitioner asserted 13 separate grounds for relief that could "generally be placed into three categories: issues raised on direct appeal, ineffective-

assistance-of-counsel issues, and a general argument of prosecutorial misconduct." Id. at 9.

With respect to the issues that had already been raised on petitioner's direct appeal, the magistrate judge observed that "issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in [Section] 2255 Motions." D. Ct. Doc. 270, at 12 (citation omitted). The magistrate judge accordingly found that, for example, petitioner's renewed challenges premised on a statute-of-limitations defense must fail because the court of appeals had already "unequivocally decided the statute of limitations issue against" him. Ibid. Similarly, the magistrate judge explained that petitioner's renewed challenges based on the Ex Post Facto Clause and alleged jurisdictional defects in the charges had already been considered and rejected by the court of appeals. See, e.g., id. at 12-13 ("On his direct appeal, the Fifth Circuit directly addressed and rejected [petitioner]'s argument that his sentence is a violation of the Ex Post Facto clause."); id. at 13-14 (recounting the court of appeals' rejection of petitioner's jurisdictional and interstate commerce nexus arguments on direct appeal).

The magistrate judge next addressed six "new" claims of ineffective assistance of counsel. See D. Ct. Doc. 270, at 14-21. As to each claim, the magistrate judge found that the performance of petitioner's trial counsel did not fall below an objective standard of reasonableness and that, in any event,

petitioner did not suffer any prejudice. See, e.g., id. at 14-17 (analyzing and rejecting claims by petitioner that his trial counsel was ineffective "for making a Rule 29 motion at trial, advising him to stipulate to essential facts and failing to test the government's case, and failing to object to the courtroom's closure when non-minors testified"); id. at 17-21 (analyzing and rejecting claims that his trial counsel was ineffective because "counsel failed to have [petitioner]'s hardware inspected," "counsel did not challenge the [National Center for Missing and Exploited Children] reports as hearsay, and counsel did not challenge the FBI's search warrant at trial").

Finally, the magistrate judge rejected petitioner's claims of various forms of prosecutorial misconduct. See D. Ct. Doc. 270, at 21-22. Among other things, the court observed that "many of the statements [petitioner] allegedly quotes from the Sentencing Transcript [as evidence of misconduct] cannot be found in the Sentencing Transcript." Id. at 21. The magistrate judge further determined that, even if any statements were improperly made, petitioner "has not shown that they unfairly prejudiced the District Judge." Ibid. And the magistrate judge observed that petitioner "did not raise these issues in his direct appeal, and did not offer any arguments as to why he could not have done so." Id. at 22.

The magistrate judge further recommended that a certificate of appealability (COA) be denied because "reasonable jurists could

not debate the denial of Petitioner's section 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed." D. Ct. Doc. 270, at 24 (citing Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)).

In February 2019, the district court overruled petitioner's objections; accepted and adopted the magistrate judge's report and recommendation; and denied petitioner's Section 2255 motion. See D. Ct. Doc. 275, at 1-2 (Feb. 4, 2019). The court also denied petitioner a COA. See id. at 3.

b. Petitioner moved in the court of appeals for a COA "on claims concerning limitations, the jurisdictional nexus to support his conviction, his sentence, ineffective assistance of counsel, * * * and discovery." 803 Fed. Appx. at 800 (citation omitted). In May 2020, the court of appeals denied that request, finding that petitioner had failed to "make 'a substantial showing of the denial of a constitutional right.'" Id. at 800-801 (quoting 28 U.S.C. 2253(c)(2)).

This Court denied a petition for a writ of certiorari. 141 S. Ct. 1282 (No. 20-6673); see 141 S. Ct. 2665 (No. 20-6673) (denying petition for rehearing); see also 141 S. Ct. 2478 (2021) (No. 20-7346) (denying petition for a writ of mandamus concerning the court of appeals' treatment of petitioner's request for en banc rehearing).

3. a. In June 2021, petitioner filed a motion that he titled "First Amended Motion for Consideration of Fed. R. Civ. P. 60(b) Claims." D. Ct. Doc. 300, at 3 (June 7, 2021). The district court denied petitioner's motion in part and dismissed it in part. Pet. App. B1-B8.

The district court observed that petitioner "invoke[s] Federal Rule of Civil Procedure 60(b) to challenge various aspects of his criminal and habeas proceedings." Pet. App. B5 (emphasis omitted). And the court explained that this Court, in Gonzalez v. Crosby, 545 U.S. 524 (2005), "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.'" Pet. App. B5 (citation and emphasis omitted). More specifically, the court explained that, under Gonzalez, "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,'" but a Rule 60(b) motion can be appropriate if it 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.'" Id. at B6 (quoting Gonzalez, 545 U.S. at 532) (emphasis omitted); see id. at B5 n.2 (noting that courts have "applied Gonzalez's holding in the Section 2255 context").

Applying those standards here, the district court determined that only one of petitioner's allegations -- namely, that "the habeas court failed to address his claim that the prosecution was involved in a cross-circuit fraud by knowingly bringing 'expired' charges" -- could properly be considered under Rule 60(b). Pet. App. B7 (citation and emphasis omitted). The court observed that the allegation arose from the magistrate judge's denial, during the Section 2255 proceedings, of petitioner's request to submit "an additional brief concerning 'statute of limitations corruption' and 'ex post facto sentence' * * * for various reasons, including because the claims were procedurally barred." Ibid. (citing D. Ct. Doc. 269 (Jan. 7, 2019); D. Ct. Doc. 270, at 22). And it recognized that "[i]nsofar as [petitioner] 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." Ibid. (emphasis omitted). Evaluating the claim on the merits, however, the district court determined that petitioner was not 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." Ibid.

The district court found that the other assertions in petitioner's Rule 60(b) motion amounted to successive Section 2255 claims, which the court could only consider if petitioner obtained "precertification from the Fifth Circuit." Pet. App. B7-B8.

Because petitioner had not obtained such precertification, the court dismissed those claims without prejudice. Id. at B8. The court did not address the government's alternative argument that petitioner's Rule 60(b) motion was untimely. See ibid.; see also D. Ct. Doc. 301, at 4-6 (June 30, 2021) (explaining why petitioner's Rule 60(b) claims were untimely).

c. The court of appeals denied a COA in an unpublished, per curiam opinion. Pet. App. A1-A2.

The court of appeals observed that petitioner sought to press three claims on appeal: (1) that "the district court and appellate court mischaracterized or failed to address certain of his [Section] 2255 claims"; (2) that the district court incorrectly dismissed "his [Section] 2255 claims regarding the statute of limitations and an alleged violation of the Ex Post Facto clause" as procedurally barred; and (3) that "he is entitled to relief under [Rule] 60(d)(3) because the Government committed fraud by misrepresenting or mischaracterizing evidence or prior court findings." Pet. App. A1-A2.

The court of appeals observed that, "[t]o obtain a COA from the denial of a Rule 60(b) motion, [petitioner] must demonstrate that reasonable jurists could debate whether the district court abused its discretion in denying him relief from the judgment." Pet. App. A2. And the court determined that petitioner had "not made the required showing" as to any of the three claims he sought to press on appeal. Ibid. The court additionally declined to

entertain petitioner'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." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 6-34) that he is entitled to challenge the denial of his earlier Section 2255 motion under Federal Rule of Civil Procedure 60(b) and to have his conviction and sentence for production of child pornography set aside. The lower courts correctly rejected that contention, and petitioner would not be entitled to relief in any other circuit. The petition for a writ of certiorari should be denied.

1. Petitioner first contends (Pet. 5) that the court of appeals erred by asking whether he had satisfied the standard for a COA, rather than performing a "de novo review" of his claims. See Pet. 5-8. The court of appeals applied the correct standard, and petitioner would in any event not be entitled to relief under the alternative standard he proposes.

a. "[C]oncerned with the increasing number of frivolous habeas corpus petitions," Miller-El v. Cockrell, 537 U.S. 322, 337 (2003), Congress created an exception in postconviction proceedings to the typical rule (see 28 U.S.C. 1291) that a party is automatically entitled to appellate review. Specifically, Congress established a "jurisdictional prerequisite" to appeals in such cases, Miller-El, 537 U.S. at 336, by requiring an applicant for postconviction relief to obtain a COA to appeal "the final

order in a proceeding under section 2255." 28 U.S.C. 2253(c)(1)(B).

The plain terms of the statute require a COA here. First, the district court's "order rejecting [petitioner's] Rule 60(b) motion is a 'final order'"; indeed, that is "why it is appealable" in the first place. West v. Schneiter, 485 F.3d 393, 394 (7th Cir.), cert. dismissed, 552 U.S. 988 (2007). And second, that order is plainly one "in a proceeding under [S]ection 2255." 28 U.S.C. 2253(c)(1)(B); see West, 485 F.3d at 394. Accordingly, Section 2253(c)(1)(B) required petitioner to obtain a COA before appealing the district court's denial of his Rule 60(b) motion. See Bracey v. Superintendent Rockview SCI, 986 F.3d 274, 281 (3d Cir. 2021) (describing "a near-consensus of * * * circuits" adopting that interpretation); see also Kellogg v. Strack, 269 F.3d 100, 103 (2d Cir. 2001) (per curiam), cert. denied, 535 U.S. 932 (2002); Storey v. Lumpkin, 8 F.4th 382, 388 (5th Cir. 2021), cert. denied, 142 S. Ct. 2576 (2022); United States v. Hardin, 481 F.3d 924, 926 (6th Cir. 2007); West, 485 F.3d 394 (7th Cir.); United States v. Lambros, 404 F.3d 1034, 1036 (8th Cir.), cert. denied, 545 U.S. 1135 (2005); United States v. Winkles, 795 F.3d 1134, 1139 (9th Cir. 2015); Spitznas v. Boone, 464 F.3d 1213, 1218 (10th Cir. 2006); Hamilton v. Secretary, 793 F.3d 1261, 1265-1266 (11th Cir. 2015) (per curiam); United States v. Vargas, 393 F.3d 172, 173-175 (D.C. Cir. 2004), cert. denied, 546 U.S. 1011 (2005).

b. Petitioner contends that the court of appeals' application of the COA requirement conflicts with the Tenth Circuit's decision in Spitznas v. Boone, as well as the Fifth Circuit's own prior decisions in Storey v. Lumpkin, and United States v. Fulton, 780 F.3d 683 (2015). That contention is incorrect.

Those decisions reasoned that when a district court transfers a prisoner's Rule 60(b) motion to the court of appeals in order for the court of appeals to determine whether to authorize a second or successive Section 2255 application, "[a]n appeal of such a transfer order does not require a COA." Storey, 8 F.4th at 390 (citing Fulton, 780 F.3d at 688); see Spitznas, 464 F.3d at 1218 ("[N]o COA is required if the district court correctly treats a 60(b) motion as a second or successive petition and transfers it to us for authorization."). Here, however, the district court's order did not purport to transfer any part of petitioner's Rule 60(b) motion to the court of appeals, but instead denied one claim and dismissed the others. See Pet. App. B7-B8. Requiring a COA as a prerequisite to appeal of that order was thus fully consistent with Spitznas and the Fifth Circuit's prior precedent. See Spitznas, 464 F.3d at 1218 ("[I]t would be illogical that a COA would be required to appeal from a habeas judgment, but not from the district court's order denying Rule 60(b) relief from such a judgment"); Storey, 8 F.4th at 388 (holding that a prisoner is "required to obtain a COA to appeal the district court's dismissal

of his Rule 60(b) motion as a 'second or successive' habeas petition filed without authorization") (citation omitted).

c. Petitioner also would not be entitled to relief under the approach that the Fourth Circuit followed in United States v. McRae, 793 F.3d 392 (2015). See Pet. 6.

In McRae, the Fourth Circuit took the view that "the COA requirement in [Section] 2253(c) allow[ed] [us] to review, without first issuing a COA, an order dismissing a Rule 60(b) motion as an improper successive habeas petition." 795 F.3d at 398. And it reversed and remanded a dismissal that "[t]he parties agree[d]" had improperly treated a Rule 60(b) motion "as an impermissible successive [Section] 2255 petition" so that the district court could consider the claims on the merits in the first instance. Id. at 400.

This case, in contrast, does not involve any agreement that the district court mistakenly dismissed a Rule 60(b) motion as an impermissible second or successive Section 2255 motion that lacked authorization. And the court of appeals' determination that petitioner had not "demonstrate[d] that reasonable jurists could debate whether the district court abused its discretion in denying him relief from judgment," Pet. App. A2, necessarily means that petitioner would not obtain relief even if his claims were entitled to merits consideration. See Buck v. Davis, 580 U.S. 100, 116 (2017) ("Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even

debatable, that necessarily means the prisoner has failed to show that his claim is meritorious.").

2. Petitioner's remaining challenges to the decision below (Pet. 8-34) all appear to be contentions that the district court correctly recognized as, "in substance, challenges to his criminal proceeding or issues resolved against him on the merits in his habeas proceeding." Pet. App. B8. For example, petitioner alleges that "his trial counsel was ineffective for having no viable legal strategy, and for making several severe legal mistakes" (Pet. 9); that "[i]n the Fifth Circuit's improper, generalized sufficiency of [the] evidence finding, the court relied on illegally s[e]ized hard drives that were never admitted as evidence to find there was interstate commerce" (Pet. 14); and that his prosecution should have been barred by the statute of limitations (Pet. 20-31). The lower courts correctly determined that petitioner could not use Rule 60(b) to relitigate such claims, which have been reviewed by the court of appeals and this Court on multiple occasions already. Petitioner identifies no sound basis for further review of that determination by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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