No_____

IN THE

Supreme Court of the United States

Sean David Pickett,
Petitioner,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to theUnited States Court of Appeals for the Eleventh Circuit

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

APPLICATION TO THE HONORABLE JUSTICE CLARENCE THOMAS

Executed this 13th Day of June, 2022

/s Brian D. Horwitz, Esq.
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Counsel of Record

APPLICATION FOR AN EXTENSION OF TIME

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Sean David Pickett hereby requests a 60-day extension of time within which to file a petition for a writ of certiorari up to and including August 22, 2022.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion for which review is sought is *Sean David Pickett v. United States of America, Case* No. 20-13149 (August 11, 2021) (**attached as Exhibit 1**). The United States Court of Appeals for the 11th Circuit denied Applicant's motion for rehearing or modification on March 24, 2022 (**attached as Exhibit 2**).

JURISDICTION

This Court will have jurisdiction over any timely filed petition for certiorari in this case pursuant to 28 U.S.C. § 1254(1). In accordance with Rule 13.5, this application is being filed 10 days in advance of the filing date for the petition for a writ of certiorari.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicant respectfully requests a 60-day extension of time within which to file a petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the 11th Circuit in this case, up to and including August 22, 2022.

The extension of time is necessary because of the press of the representation of other clients in various ongoing matters, as well as given the difficulties inherent in corresponding with the incarcerated petitioner. The extension of time is also necessary in order to provide effective assistance of counsel on this matter and counsel is in need of the additional time to thoroughly review the voluminous documentation, pleadings and orders in case No. 20-13149.

A 60-day extension for the Applicant would allow counsel the necessary amount of time to effectively contribute to all open matters including Applicant's petition as well as other client business abroad.

Counsel for Petitioner intends to ask this Court to grant review on the question of whether the miscarriage of justice exception permits a rule 60b motion after the one-year limit specified in the rule.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that this Court grant an extension of 60 days, up to and including August 22, 2022, within which to file a petition for a writ of certiorari in this Court.

/s Brian D. Horwitz, Esq.
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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13149
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-24605-WPD,
1:13-cr-20599-WPD-1

SEAN DAVID PICKETT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(August 11, 2021)

Before BRANCH, GRANT and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Sean David Pickett appeals the district court's order dismissing his Federal Rule of Civil Procedure 60(b) motion to reopen his 28 U.S.C. § 2255

proceedings. Pickett's Rule 60(b) motion raised two claims for relief: a claim of actual innocence and a claim challenging the district court's denial of his initial § 2255 motion to vacate, set aside, or correct his sentence without first conducting an evidentiary hearing. The district court construed the Rule 60(b) motion as an impermissibly filed successive § 2255 motion and dismissed for lack of jurisdiction. Alternatively, the court denied the Rule 60(b) motion on the merits. On appeal, Pickett argues that the district court erred in dismissing his Rule 60(b) motion as a construed successive § 2255 motion. Specifically, Pickett asserts that the district court erred in not considering his actual-innocence claim because it relied on an extraordinary circumstance in a substantive change in the law created by *Rehaif v. United States*, 588 U.S. ___, 139 S. Ct. 2191 (2019), and *United States v. Henderson*, 575 U.S. 622, 135 S. Ct. 1780 (2015). Pickett also argues that the district court erred in dismissing his claim relating to the district court's failure to conduct an evidentiary hearing in his previous § 2255 proceedings. After reviewing the record and reading the parties' briefs, we affirm the district court's order of dismissal.

I.

An indictment charged Pickett with three counts of receiving computer images of child pornography, in violation of 18 U.S.C. § 2252(a)(2), (b)(1), and one count of possessing a computer that contained child pornography, in violation

of 18 U.S.C. § 2252(a)(4)(B), (b)(2). A jury found him guilty of the charged offenses, and the district court sentenced him to a total term of 120 months' imprisonment. On direct appeal, we affirmed Pickett's convictions. *United States v. Pickett*, 602 F. App'x 774 (11th Cir. 2015). In 2016, Pickett filed a § 2255 motion to vacate, raising numerous claims of ineffective assistance of counsel. The government responded that the evidence against Pickett was so overwhelming that he could not demonstrate that any of his counsel's alleged deficiencies affected the outcome of the trial. Thus, the government argued that the district court should deny Pickett's § 2255 motion without an evidentiary hearing.

In January 2017, the district court denied Pickett's § 2255 motion without holding an evidentiary hearing, finding that Pickett could not show prejudice from his trial counsel's alleged deficiencies. The district court also denied Pickett a certificate of appealability ("COA"). Pickett appealed the district court's order denying his § 2255 motion and moved for a COA, which this court denied. In June 2020, Pickett filed the present motion to reopen his § 2255 proceedings under Rule 60(b)(4) and Rule 60(b)(6). Pickett argued that the district court's order denying his § 2255 motion without an evidentiary hearing rendered the proceedings defective and denied him an opportunity to be heard, such that the district court did not address his specific claims. Pickett also claimed that intervening changes in the law established an extraordinary circumstance that justified Rule 60(b)(6) relief

because the changes in the law suggested that he was actually innocent of the charges because the government failed to prove that he knew of the pornography on his computer. Pickett further contended that the § 2255 proceedings did not provide him an opportunity to demonstrate ineffective assistance of counsel and present other evidence to support his claim of actual innocence.

The district court dismissed Pickett's motion after construing it as a successive § 2255 motion. The district court found that Pickett's Rule 60(b) motion did not concern a defect in the original § 2255 proceedings and that, thus, it was an improperly filed successive § 2255 motion. The district court stated that its summary denial of Pickett's previous § 2255 motion was proper because Pickett made no good cause showing for discovery, was not entitled to an evidentiary hearing, and did not have any rights violated. The district court also noted that Pickett should have raised his present challenges to the denial of his §2255 motion on appeal after the district court denied the motion. In addition, the district court found that the new changes in the law did not apply to Pickett's case. Alternatively, the district court denied Pickett's motion on the merits and instructed Pickett to petition this court for permission to file a successive §2255 motion. The district court denied a COA, and Pickett then perfected this appeal.

II.

Although we typically review the denial of a Rule 60(b) motion for abuse of discretion, we review *de novo* a district court's decision to construe such a filing as a second or successive § 2255 motion. *See Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003). Upon a motion under Rule 60(b), "the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons:" (1) mistake; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) the judgment has been satisfied; (6) or any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(1)-(6).

Rule 60(b) cannot be used to circumvent restraints on filing second or successive § 2255 motions. *Farris*, 333 F.3d at 1216. (citation omitted). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a prisoner seeking to file a "second or successive" § 2255 motion must "first file an application with the appropriate court of appeals for an order authorizing the district court to consider it." *Id.*; 28 U.S.C. § 2255(h). We will treat a Rule 60(b) motion as a successive § 2255 motion when it presents a new ground for relief from a judgment of conviction or attacks the federal court's previous resolution of a claim on the merits. *Gonzalez v. Crosby*, 545 U.S. 524, 531, 125 S. Ct. 2641, 2647 (2005) (addressing a § 2254 habeas petition). "[A] Rule 60(b) motion based on a purported change in the substantive law governing the claim" is not a reason

justifying relief because it circumvents the successive petition process. *Id.* at 531-32, 125 S. Ct. at 2647-48. A prisoner who has filed a previous § 2255 motion that was denied on the merits must apply for and receive permission from us before filing a second or successive § 2255 motion in the district court. 28 U.S.C. §§ 2244(b), 2255(h). Without our authorization, a district court lacks jurisdiction to consider a second or successive § 2255 motion. *Farris*, 333 F.3d at 1216.

However, a Rule 60(b) motion may raise a "defect in the integrity" of a § 2255 proceeding, such as the court's failure to reach the merits of a claim or allege a fraud on the court. *See Gonzalez*, 545 U.S. at 532, 538, 125 S. Ct. at 2648. The Supreme Court in *Gonzalez* gave several examples of a proper Rule 60(b) challenge to a prior ruling that preluded a merits determination, listing "a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4, 125 S. Ct. at 2648 n.4.

We conclude from the record that the district court properly construed Pickett's actual-innocence claim due to a substantive change in the law as an impermissibly filed successive § 2255 motion. Pickett's claim, predicated on *Rehaif* and *Henderson*, does not address a defect in the original proceedings and only serves to present a new ground for relief. Allowing Pickett to raise this claim would circumvent the statutory requirement to file an application with us before filing a successive habeas petition on a new rule of law. Accordingly, the district

court correctly concluded that it lacked jurisdiction over the claim, and we affirm in that respect.

III.

"[A] certificate of appealability is required for the appeal of any denial of a Rule 60(b) motion for relief from a judgment in a 28 U.S.C. § 2254 or 28 U.S.C. § 2255 proceeding." *Jackson v. Crosby*, 437 F.3d 1290, 1294 (11th Cir. 2006) (quotation marks and brackets removed). We lack jurisdiction to consider an appeal when the petitioner is not entitled to a COA. *Id.* "[I]n cases involving denials of Rule 60(b) motions on procedural grounds without reaching the merits of any constitutional claims, . . . a petitioner will be granted a [COA] only if he makes *both* a substantial showing that he had a valid claim of a denial of a constitutional right, *and* a substantial showing that the procedural ruling is wrong." *Id.* at 1295 (quotation marks and brackets omitted). This requires that the issue "must be debatable among reasonable jurists." *Id.* (quotation marks omitted).

In a § 2255 proceeding, "[a] petitioner is entitled to an evidentiary hearing if he alleges facts that, if true, would entitle him to relief." *Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) (quotation marks omitted); *see also* 28 U.S.C. § 2255(b). But "a district court need not hold a[n evidentiary] hearing if the allegations are patently frivolous, based upon unsupported generalizations, or

affirmatively contradicted by the record." *Winthrop-Redin*, 767 F.3d at 1216 (quotation marks omitted).

We conclude from the record that the district court erred in construing Pickett's challenge to the district court's decision not to hold an evidentiary hearing as an impermissibly successive § 2255 motion. This challenge is not a new ground for relief but is a challenge to a defect in the original § 2255 proceedings. Thus, it can permissibly be brought in a Rule 60(b) motion.

Nevertheless, because the district court alternatively denied Pickett's evidentiary-hearing claim on the merits, we lack jurisdiction over the appeal as to this portion of the Rule 60(b) motion unless we determine that Pickett is entitled to a COA on the issue. *See Jackson*, 437 F.3d at 1294. We conclude that reasonable jurists would not debate the district court's denial of the evidentiary-hearing claim because Pickett was not entitled to an evidentiary hearing on any of his claims in the original § 2255 motion, as the claims were unsupported, speculative, and frivolous. *See Winthrop-Redin*, 767 F.3d at 1216. Accordingly, for the aforementioned reasons, we deny a COA, and dismiss for lack of jurisdiction in that respect.

AFFIRMED IN PART, DISMISSED IN PART.

 EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 11, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-13149-DD
Case Style: Sean Pickett v. USA
District Court Docket No: 1:16-cv-24605-WPD
Secondary Case Number: 1:13-cr-20599-WPD-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against the appellant.

Please use the most recent version of the Bill of Costs form available on the court's website at www.ca11.uscourts.gov.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Bradly Wallace Holland, DD at 404-335-6181.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1A Issuance of Opinion With Costs

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 24, 2022

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-13149-DD
Case Style: Sean Pickett v. USA
District Court Docket No: 1:16-cv-24605-WPD
Secondary Case Number: 1:13-cr-20599-WPD-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Bradly Wallace Holland, DD/lt
Phone #: 404-335-6181

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13149-DD

SEAN DAVID PICKETT,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

BEFORE: BRANCH, GRANT and DUBINA, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Sean David Pickett is DENIED.

ORD-41