A

In Re Joseph R. Dickey, Petitioner.
SUPREME COURT OF THE UNITED STATES
2024 U.S. LEXIS 2047
No. 23-7199.
May 13, 2024, Decided

Judges: {2024 U.S. LEXIS 1}Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson.

Opinion

Petition for writ of habeas corpus denied.

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[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-10337

Non-Argument Calendar

JOSEPH R. DICKEY,

Petitioner-Appellant,

versus

FCI MARIANNA WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 5:22-cv-00084-TKW-ZCB

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Before WILSON, JORDAN, and BLACK, Circuit Judges.

PER CURIAM:

Joseph Reuben Dickey appeals following the district court's dismissal of his *pro se* petition[1] for habeas relief, filed pursuant to 28 U.S.C. § 2241, and the denial of his post-judgment motion for reconsideration. FCI Marianna Warden (the Government), in turn, moves for summary affirmance and to stay briefing. After review, we grant the Government's motion for summary affirmance.

Under 28 U.S.C. § 2241, a prisoner may receive habeas relief if he is "in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2241(c)(3). A federal prisoner may attack his convictions and sentences through § 2241 under the "savings" clause of 28 U.S.C. § 2255 if a remedy under § 2255 is inadequate or ineffective. 28 U.S.C. § 2255(e). However, procedural bars, such as the restriction on successive § 2255 motions,[2] do not make § 2255 inadequate or ineffective. *See Wofford v. Scott*, 177 F.3d 1236, 1245 (11th Cir. 1999), *overruled on other grounds by*

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[1] We liberally construe *pro se* pleadings. *See United States v. Cordero*, 7 F.4th 1058, 1068 n.11 (11th Cir. 2021).

[2] Ordinarily, a federal prisoner who wishes to file a second or successive motion to vacate, set aside, or correct sentence is required to move the court of appeals for an order authorizing the district court to consider such a motion. *See* 28 U.S.C. § 2255(h), *cross-referencing* 28 U.S.C. § 2244. A claim presented in a second or successive post-conviction proceeding that was presented in a prior application, however, "shall be dismissed." 28 U.S.C. § 2244(b)(1).

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McCarthan v. Dir. Of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1100 (11th Cir. 2017) (*en banc*).

Summary affirmance is warranted. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969)[3] (explaining summary disposition is appropriate where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous"). First, Dickey's requested relief—that § 2244(b)(1) be declared as unconstitutional "as applied" to him—falls outside the scope of a § 2241 petition. The purpose of § 2241 is to allow a prisoner to challenge the execution of his sentence, and as the district court acknowledged, even if it granted Dickey the declaratory relief that he sought, his total sentence would remain unchanged. *See Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1351 n.1, 1352 (11th Cir. 2008) (stating § 2241 provides a limited basis for habeas actions for federal prisoners in that it allows prisoners to attack the execution of a sentence rather than the sentence or conviction themselves).

Moreover, Dickey provided no explanation as to why he was eligible for § 2241 relief under § 2255's "savings" clause. Dickey failed to argue or show that a remedy under § 2255 was inadequate or ineffective. 28 U.S.C. § 2255(e). The primary justification that Dickey asserted for bringing a § 2241 petition, as opposed to a

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

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§ 2255 motion, was based on § 2244(b)(1)'s bar on previously brought claims in successive applications. Specifically, in his petition, he asserted he was "without any realistic access to habeas corpus based on new evidence," and he had "new evidence of innocence and constitutional violations which can never be addressed because of the erroneous unconstitutional application of [§] 2244(b)(1)." This Court, however, has held that § 2244(b)(1)'s bar on successive applications does not make pursuit of relief under § 2255 inadequate or ineffective. *Wofford*, 177 F.3d at 1245. Dickey, therefore, also failed to demonstrate he was eligible for § 2241 relief under § 2255's "savings" clause. *See McGhee v. Hanberry*, 604 F.2d 9, 10 (5th Cir. 1979) (stating a petitioner bears the burden of demonstrating eligibility under the "savings" clause of § 2255).

Even if Dickey's claim fell within the scope of § 2241, binding precedent foreclosed both of his underlying arguments. Although he contended that § 2244(b)(1)'s bar did not apply to § 2255, this Court is bound to its prior panel decision where we held that the bar does apply to § 2255 motions. *See In re Bradford*, 830 F.3d 1273, 1277-78 (11th Cir. 2016) (clarifying that § 2244(b)(1)'s requirement is jurisdictional and holding § 2244(b)(1) applies to § 2255 motions); *In re Baptiste*, 828 F.3d 1337, 1339-40 (11th Cir. 2016) (holding § 2244(b)(1)'s mandate applies to applications for leave to file a second or successive § 2255 motion); *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (stating under our prior panel precedent rule, a prior panel's holding is binding unless it has been overruled or abrogated by the Supreme Court or by this Court sitting *en banc*).

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Similarly, the Supreme Court has held that § 2244(b)(1) does not violate the Suspension Clause.[4] *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (holding § 2244(b)(1)'s "restrictions . . . do not amount to a 'suspension' of the writ contrary to [the Suspension Clause]"). Despite Dickey's classification of his claim as an "as applied" challenge, such a classification does not change *Felker*'s application to his case when *Felker*'s rule is equally applicable across all habeas cases. *See id.* Therefore, his underlying arguments are foreclosed by binding precedent.[5]

Accordingly, because the Government's position is clearly correct as a matter of law, we GRANT the Government's motion for summary affirmance and DENY as moot its motion to stay the briefing schedule. *Groendyke Transp., Inc.*, 406 F.2d at 1162.

AFFIRMED.

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[4] The Constitution's Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

[5] Although Dickey also appealed the district court's denial of his motion for reconsideration, he does not address the motion on appeal, and any related argument is accordingly abandoned. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). He also mentions that § 2244(b)(1) violates the separation of powers, but he failed to preserve such an argument for appellate review by not raising it before the district court. *See United States v. Edwards*, 728 F.3d 1286, 1295 (11th Cir. 2013).

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CORRECTED

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-13668-B

IN RE: JOSEPH DICKEY,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before: ROSENBAUM, JILL PRYOR, and GRANT, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Joseph Dickey has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
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> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

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28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a *prima facie* showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357–58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

As factual background, Dickey pled guilty to possession of child pornography, transporting child pornography, traveling in interstate commerce to engage in sexual acts with a minor, and conspiracy to produce child pornography. The district court sentenced him to 1,620 months' imprisonment.

In 2007, Dickey filed his original § 2255 motion, which the district court denied with prejudice. In his initial § 2255 motion, Dickey argued, in relevant part, that (1) he was actually innocent of three of his offenses because the pictures that were found on a flashcard could not have been his because he did not have access to the flashcard, and the flashcard was "previously in the possession of a convicted serial child monster"; (2) the victims only traveled across state lines three of the six times that the government alleged; (3) he received ineffective assistance of counsel at the trial and appellate levels; and (4) he was maliciously prosecuted by the government, which withheld evidence.

In 2017, Dickey filed a successive application where he argued, in relevant part, that he was actually innocent of his convictions based on the sworn declarations, letters, and affidavits from the victims' family. He emphasized that his co-conspirator, Edward Lee Thomas, admitted that he abused the victims and took illegal pictures of him, and the victims saw a counselor, where

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they reported that Dickey did not abuse them. We dismissed this claim because he had raised the same claim in his initial § 2255 motion.

In his present application, Dickey wishes to bring two claims in a successive § 2255 motion. In his first claim, Dickey states that he does not want to present his actual innocence claim as a habeas claim in his second § 2255 motion. Instead, citing *McQuiggin v. Perkins*, 569 U.S. 383 (2013), he explains that he wishes to present evidence of his actual innocence as a "gateway to overcome any barriers which may prevent [him] from being able to file a successive § 2255" motion. In support of his actual innocence "gateway claim," Dickey asserts that the victims' mother "states that her children . . . did not go on these trips 6 times. They only went 3 times which makes 3 of the charges factually impossible," and the victims' mother and grandmother have stated that he is in prison for crimes that he did not commit. He maintains that the victims' mother and grandmother have exculpatory testimony and "have begged the courts to be allowed to speak," but because no court has ever heard their testimony, it was new evidence. Likewise, Dickey states that "numerous people, (including the mother, grandmother, grandfather, and great-grandmother of the victims) swear under penalty of perjury that the flashcard" did not have child pornography on it.

Additionally, Dickey lists eight other facts that he believes establish his actual innocence. In those eight facts, he argues that Federal Bureau of Investigation ("FBI") files showed that (1) he was not associated with online child pornography because FBI investigative files did not return evidence of his "screen name and IP address" on the "Index Servers, and Office of Juvenile Justice and Delinquency Prevention"; (2) his co-conspirator admitted to "something" happening when he was alone with the victims and Dickey had "gone out to get pizza"; (3) his co-conspirator admitted

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to sexually abusing the victims and had initially said Dickey was not involved, but later changed his story and accused Dickey of conspiring with him; (4) the FBI's only evidence against Dickey was his co-conspirator's conflicting statements against him, and even though the FBI investigated him from 2002 to 2005, they found no corroborating evidence to his co-conspirator's claims; (5) the FBI believed that perhaps his crimes, as stated by his co-conspirator, did not occur; (6) the Birmingham FBI office closed its case against him because there was no evidence; (7) a month after Birmingham closed its case against him, the Mississippi FBI office ran his IP address and screen names through their "Innocent Images" database but found no evidence against him; and (8) his co-conspirator was caught in 2002 with thousands of images but was not imprisoned for the images that he produced, and he repeated the same conduct in 2020.

In his second claim, Dickey argues that the FBI violated his Fourth Amendment rights because the FBI affidavit that was used to gain a search warrant for his house "clearly shows a rogue FBI agent willfully and intentionally used known false information and misrepresentations to mislead the court." He includes five facts that he believes show that his Fourth Amendment rights were violated, including that the FBI search warrant affidavit: (1) relied on the statements of his co-conspirator, whose statements were false and conflicting; (2) was submitted after the FBI said that there was no evidence to corroborate the allegations made against him; (3) explained that he was investigated for sexual abuse in the past, but there was no report on him in Alabama's Child Abuse and Neglect registry; (4) insinuated that he "had something to do with pictures of 'toys in the rectum,' and other heinous allegations," which were not true; and (5) directly opposed everything in the FBI's investigative files against him.

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We must dismiss a claim presented in an application to file a second or successive § 2255 motion that was presented in a prior application or an original § 2255 motion. *See* 28 U.S.C. § 2244(b)(1); *In re Baptiste*, 828 F.3d at 1339-40; *Randolph v. United States*, 904 F.3d 962, 964-65 (11th Cir. 2018). "[A] claim is the same where the basic gravamen of the argument is the same, even where new supporting evidence or legal arguments are added." *In re Baptiste*, 828 F.3d at 1339. The bar on previously presented claims is jurisdictional. *In re Bradford*, 830 F.3d 1273, 1277-78 (11th Cir. 2016).

In *McQuiggin*, the Supreme Court held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or the expiration of the statute of limitations." *McQuiggin*, 569 U.S. at 386. It emphasized that a petitioner must persuade a district court that, considering the newly discovered evidence, no reasonable juror would have found him guilty beyond a reasonable doubt. *Id.*

We have explained that *McQuiggin*'s holding was limited to initial habeas petitions and it does not apply to successive petitions. *In re Bolin*, 811 F.3d 403, 411 (11th Cir. 2016). Also, we have clarified that, even if *McQuiggin* applied to a successive petition, it would only apply to petitions that were dismissed as time-barred, instead of those denied on the merits. *Id.*

Here, Dickey has not satisfied the statutory criteria in § 2255(h). 28 U.S.C. § 2255(h)(1), (2). First, we must dismiss Dickey's claim premised on actual innocence because he previously presented the same claim of actual innocence in his original § 2255 motion in the district court. 28 U.S.C. § 2244(b)(1); *Baptiste*, 828 F.3d at 1339-40; *Bradford*, 830 F.3d at 1277-78; *Randolph*, 904 F.3d at 964-65.

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As to Dickey's second claim, he has not established that it relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). Likewise, his Fourth Amendment claim does not rely upon "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found" Dickey guilty of possession of child pornography, transporting child pornography, traveling in interstate commerce to engage in sexual acts with a minor, and conspiracy to produce child pornography. *Id.* § 2255(h)(1). Dickey's reliance on his first claim to serve as a gateway claim for his second claim, under *McQuiggin*, is misplaced. We have emphasized that *McQuiggin* only applies to initial habeas petitions that were dismissed as time-barred, rather than those denied on the merits, and Dickey's original § 2255 motion was denied on the merits. *Bolin*, 811 F.3d at 411. Therefore, *McQuiggin* does not provide an avenue for Dickey to obtain relief and he has failed to identify a claim that meets the statutory criteria.

Accordingly, because Dickey has failed to make a *prima facie* showing of the existence of either of the grounds set forth in 28 U.S.C. § 2255, his application for leave to file a second or successive motion is hereby DISMISSED in part and DENIED in part.

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IN RE: JOSEPH DICKEY, Petitioner.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2020 U.S. App. LEXIS 18933
No. 20-11417-E
June 16, 2020, Filed

Editorial Information: Prior History

Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence, 28 U.S.C. § 2255(h){**2020 U.S. App. LEXIS 1**}.United States v. Dickey, 2007 U.S. Dist. LEXIS 105263 (N.D. Ala., Mar. 30, 2007)

Counsel **In re: JOSEPH** R. **DICKEY**, Petitioner, Pro se, Yazoo City, MS.
For United States of America, Successive Habeas Respondent: U.S. Attorney Service - Northern District of Alabama, U.S. Attorney's Office, Birmingham, AL.

Judges: Before MARTIN, ROSENBAUM, and JILL PRYOR, Circuit Judges. MARTIN, Circuit Judge, concurring in judgment.

Opinion

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Joseph Dickey has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a{**2020 U.S. App. LEXIS 2**} second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

Our denial of a successive application shall not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E); *In re Baptiste*, 828 F.3d 1337, 1340 (11th Cir. 2016). We have held that we must dismiss claims that were presented in a prior application for leave to file a second or successive § 2255 motion. *See* 28 U.S.C. § 2244(b)(1); *Baptiste*, 828 F.3d at 1339-40 (holding that § 2244(b)(1) bars repetitious claims in § 2255 motions); *In re Everett*, 797 F.3d 1282, 1291 (11th Cir. 2015) (noting in a § 2254 case that the petitioner's claim was barred because it was the same claim he raised in his original § 2254 petition). A claim is the same, for purposes of §

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2244(b)(1), when the basic gravamen of the legal argument is the same. *Everett*, 797 F.3d at 1288.

Dickey is a federal prisoner serving a 1,620-month (135-year) sentence for possession of child pornography, transporting child pornography, traveling in interstate commerce for the purpose of engaging in sexual acts with a minor, and conspiracy to produce child pornography. Dickey pled guilty{**2020 U.S. App. LEXIS 3**} to those crimes.

As a brief factual background, Dickey filed his original § 2255 motion in 2007, which the district court denied with prejudice. In that motion, Dickey, in part, argued that he was actually innocent of three of his offenses; received ineffective assistance of counsel at the trial and appellate levels; and was maliciously prosecuted by the government, which withheld evidence. Since 2007, Dickey's collateral attacks on his conviction have been before us several times.

Notably, in 2017, we denied two of Dickey's successive applications as barred, in part, by *Baptiste* because he had previously raised his actual-innocence claim and portions of his ineffective-assistance-of-counsel claim in his original § 2255 motion.

In 2019, Dickey filed his most recent successive application seeking permission to raise one claim in a second or successive § 2255 motion. In that application, Dickey argued that we incorrectly decided *Baptiste* and impermissibly applied it to his claims of actual innocence that he had previously raised. We denied that application because it did not rely on a new rule of constitutional law or newly discovered evidence, *Baptiste* barred further review of the actual innocence claim,{**2020 U.S. App. LEXIS 4**} and Dickey could not challenge *Baptiste* or our denial of his prior applications.

Dickey titled his instant application a "MOTION FOR AN EN BANC CONSIDERATION FOR PERMISSION TO FILE A SECOND/SUCCESIVE 2255." He states that he has previously filed at least three successive applications that were procedurally barred and references unidentified applications that we denied as barred by *Baptiste*. He explains that new evidence supporting his actual innocence claim came to light between the time he filed his initial § 2255 motion-where he made an actual-innocence claim-and when the district court denied it. He requests that we sit *en banc* and overturn *Baptiste* so he can raise his actual-innocence claim with that new evidence, arguing that *Baptiste* is wrong as a matter of law and "is forcing [him] to serve an illegal sentence."

Dickey attached to his application evidence that he contends supports his actual-innocence claim, asserting that the evidence shows he is innocent of at least three of his offenses because the alleged victims were not present on the dates those offenses took place. He states that he seeks to bring four claims in a successive § 2255 motion: one claim that the government violated *Brady*{***2020 U.S. App. LEXIS 5***}1 by withholding exculpatory evidence from his trial counsel and three claims that trial counsel was ineffective for not seeking exculpatory evidence and for advising him to plead guilty. He concludes by again asking us to hear his motion *en banc* so we can overturn *Baptiste* and review his actual innocence claim.

Dickey does not allege that his claims rely on a new rule of constitutional law, and claims of ineffective assistance of counsel and violations of *Brady* necessarily do not rely on new rules of constitutional law. *See Brady*, 373 U.S. at 83 (rule announced in 1963); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). While he states he wishes to present new evidence, his primary argument-that we should reconsider our previous orders denying his previous successive applications because those orders were based on the legally incorrect decision of *Baptiste*-does not rely on that new evidence. *See id* § 2255(h)(1).

In any event, Dickey's application is barred by *Baptiste* because he has previously raised all the claims he seeks to bring. *See* 28 U.S.C. § 2244(b)(1). By Dickey's own admission, he is barred from raising his actual-innocence claim because he previously raised it in his initial § 2255 motion and in

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prior successive applications. *See Baptiste*, 828 F.3d at 1339-40. Dickey has also raised his ineffective-assistance-of-counsel{**2020 U.S. App. LEXIS 6**} claims before. Finally, the basic gravamen of Dickey's *Brady* claim is the same as the malicious-prosecution claim that he raised in his initial § 2255 motion-that the government prosecuted him knowing exculpatory evidence existed. *See Everett*, 797 F.3d at 1288.

And as we said in denying Dickey's most recent application, Dickey cannot seek reconsideration of our previous orders denying his prior successive applications seeking permission to raise his actual-innocence claim. *See Baptiste*, 828 F.3d at 1340 (stating that § 2244(b)(3)(E) does not permit "what amounts to a motion for reconsideration under the guise of a separate and purportedly 'new' application"). Nor, as we also said, can Dickey seek an *en banc* hearing or to recall the mandate in *Baptiste* because he is not a party to that case. To the extent that Dickey seeks initial *en banc* hearing on this application, that motion is DENIED.

Accordingly, Dickey's application for leave to file a second or successive § 2255 motion is DISMISSED.

Concur

Concur by: MARTIN

MARTIN, Circuit Judge, concurring in judgment:

The panel holds that Mr. Dickey's claims are barred by In re Baptiste, 828 F.3d 1337 (11th Cir. 2016), which held that "the federal habeas statute requires us to dismiss a claim that has been presented in a prior application" to file a § 2255 motion. Id. at 1339. I have stated my view that{**2020 U.S. App. LEXIS 7**} Baptiste has no basis in the text of the habeas statute:

> Baptiste was construing 28 U.S.C. § 2244(b)(1), which says any "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Of course, [] § 2255 motions . . . are filed by federal prisoners [and] § 2255 motions are certainly not brought "under section 2254," which governs petitions filed by state prisoners. But the Baptiste panel ruled that even though § 2244(b)(1) does not mention § 2255 motions, it applies to them anyway, since "it would be odd [] if Congress had intended to allow federal prisoners" to do something state prisoners can't do.In re Clayton, 829 F.3d 1254, 1266 (11th Cir. 2016) (Martin, J., concurring). And

Baptiste is inconsistent with the statute in a second way. The text of the habeas statute shows that it requires courts to dismiss only claims that were already presented in an actual § 2255 motion, as opposed to a mere request for certification of a successive § 2255 motion. Both § 2244 and § 2254 distinguish between "applications" (which are the § 2254 petitions and § 2255 motions filed in district courts) and "motions" (which are the earlier request for certification filed in a court of appeals). Baptiste assumes that "motion" and "application" mean the same thing, even though Congress{**2020 U.S. App. LEXIS 8**} carefully distinguished the two. When Congress uses different words in this way, courts must presume those words mean different things.In re Anderson, 829 F.3d 1290, 1296 (11th Cir. 2016) (Martin, J., dissenting). My colleagues have articulated other problems with Baptiste. See In re Jones, 830 F.3d 1295, 1297 (11th Cir. 2016) (Rosenbaum and Jill Pryor, J.J., concurring).

I am concerned that Baptiste is blocking relief to prisoners who ask us to take a second look at their case after we got it wrong the first time. Nevertheless, Baptiste is binding precedent in this circuit, so Mr. Dickey will not be allowed to present his claims to a District Court for an examination of whether his convictions are legal.

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JOSEPH R. DICKEY, Petitioner-Appellant v. C. NASH, Warden, United States Penitentiary Yazoo City, Respondent-Appellee
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
777 Fed. Appx. 108; 2019 U.S. App. LEXIS 27875
No. 19-60197 Summary Calendar
September 16, 2019, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2019 U.S. App. LEXIS 1}Appeal from the United States District Court for the Southern District of Mississippi. USDC No. 3:19-CV-101.

Counsel JOSEPH R. DICKEY, Petitioner - Appellant, Pro se, Yazoo City, MS.
Judges: Before ELROD, HAYNES, and DUNCAN, Circuit Judges.

Opinion

{777 Fed. Appx. 108} PER CURIAM:*

Joseph R. Dickey, federal prisoner # 25345-001, pleaded guilty to numerous counts relating to child pornography and interstate travel to engage in sexual acts with a juvenile, and he received an aggregate sentence of 135 years in prison. He has filed an unsuccessful 28 U.S.C. § 2255 motion challenging these convictions.

Following this, Dickey filed the instant petition pursuant to 28 U.S.C. § 2241, in which he argued that he was actually innocent of at least some of his offenses and that his trial attorneys were ineffective. The district court denied Dickey's petition because he was challenging the judgment of conviction rather than the manner in which his sentence was executed, and Dickey failed to demonstrate that the remedy under § 2255 was inadequate or ineffective to test the legality of his detention. Dickey moved for leave to proceed in forma pauperis (IFP) on appeal from that judgment, but the district court denied the motion based on its finding that Dickey was financially ineligible{2019 U.S. App. LEXIS 2} for IFP status. He now moves this court for leave to proceed IFP on appeal.

Under Federal Rule of Appellate Procedure 24(a)(5), we may entertain a motion to proceed IFP when the district court has denied a litigant leave to proceed IFP. To be granted leave to proceed IFP on appeal, Dickey must show not only that he is pauper1 but also that he will raise a nonfrivolous issue on appeal. *See Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982). If the appeal is frivolous, we may dismiss it sua sponte. 5th Cir. R. 42.2.

A § 2241 petition that challenges errors at trial or sentencing, like Dickey's, is properly construed as a § 2255 motion. *Reyes-Requena v. United States*, 243 F.3d 893, 901 (5th Cir. 2001). Under the "savings clause" of § 2255, however, a prisoner may be permitted to raise his claims in a § 2241 petition if he can demonstrate that the § 2255 remedy would be "inadequate or ineffective to test the legality of his detention." *See id.* (quoting § 2255). The savings clause of § 2255 applies to a claim (i)

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that is based on a retroactively applicable Supreme Court decision, (ii) that was foreclosed by circuit law at the time when the claim should have been raised, and (iii) which establishes that the petitioner may have been convicted of a nonexistent offense. *Reyes-Requena*, 243 F.3d at 904.

{777 Fed. Appx. 109} Dickey makes no argument that he satisfies this standard and instead argues that he should not be required to do so because his claims of**{2019 U.S. App. LEXIS 3}** actual innocence and his inability to satisfy the standards for filing a successive § 2255 motion warrant consideration of his claims. We have held that neither a prior unsuccessful § 2255 motion nor the inability to meet the requirements for filing a successive § 2255 motion makes the § 2255 remedy inadequate. *Tolliver v. Dobre*, 211 F.3d 876, 878 (5th Cir. 2000). Dickey has failed to demonstrate that the remedy under § 2255 is inadequate or ineffective and that he will raise a nonfrivolous issue on appeal. *See Carson*, 689 F.2d at 586. Accordingly, his motion to proceed IFP is DENIED, and his appeal is DISMISSED as frivolous. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983); 5th Cir. R. 42.2. Dickey's motion for leave to file a supplemental brief is DENIED as unnecessary.

Footnotes

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Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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Because we determine that the appeal is frivolous, we do not address Dickey's arguments about his financial status.

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IN RE: JOSEPH DICKEY, Petitioner.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2019 U.S. App. LEXIS 5767
No. 19-10416-D
February 26, 2019, Decided

Editorial Information: Prior History

Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence, 28 U.S.C. § 2255(h){**2019 U.S. App. LEXIS 1**}.Dickey v. United States, 437 Fed. Appx. 851, 2011 U.S. App. LEXIS 16985 (11th Cir. Ala., Aug. 15, 2011)

Counsel In re: JOSEPH R. DICKEY, Petitioner, Pro se, Yazoo City, MS.
For United States of America, Successive Habeas Respondent: U.S. Attorney Service - Northern District of Alabama, U.S. Attorney's Office, Birmingham, AL.

Judges: Before: MARTIN, ROSENBAUM and JILL PRYOR, Circuit Judges. MARTIN, Circuit Judge, concurring.

Opinion

BY THE COURT:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Joseph Dickey has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive{**2019 U.S. App. LEXIS 2**} application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In 2007, Dickey filed his initial § 2255 motion, which the district court denied with prejudice. In his initial § 2255 motion, Dickey pertinently argued that he was actually innocent of three of his offenses.

Liberally construed, in his instant *pro se* application, Dickey indicates that he wishes to raise one claim in a second or successive § 2255 motion. He does not specify if his claim relies on newly discovered evidence or a new rule of constitutional law. Dickey asserts that, in his previous applications, we erroneously determined that we lacked jurisdiction to consider his actual innocence

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claim, pursuant to *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016). Dickey specifically argues that *Baptiste* was incorrectly decided and impermissibly applied to claims of actual innocence in violation of the Supreme Court's multiple holdings that actual innocence claims should overcome procedural bars. He asserts that his{**2019 U.S. App. LEXIS 3**} actual innocence claim-namely, that eyewitnesses could testify that it was factually impossible for him to have committed three of his offenses-that he raised in his previous applications deserves a merits determination. He also argues that, if he is permitted to file a second § 2255 motion, the district court should determine if a freestanding claim of actual innocence may be brought in a § 2255 proceeding. He concludes that we should construe his application "in any way that might afford me justice in this extraordinary case," such as a new application, a request for reconsideration of his rejected applications, or a request to review *Baptiste en banc* or recall our mandate.

Dickey attaches two of our previous orders to his instant application. First, he attaches our order from Case No. 17-11721, in which we determined that Dickey's successive application was barred in part under *Baptiste*, specifically because he raised his actual innocence claim in his first § 2255 motion, and denied in part on the merits. Second, Dickey attaches our order from Case No. 17-12705, in which we denied his application in part and dismissed it in part, pertinently determining that his ineffective-assistance-of-counsel claim{**2019 U.S. App. LEXIS 4**} was barred under *Baptiste* because it was raised in his initial § 2255 motion.

Here, Dickey has not made a *prima facie* showing that his claim meets the statutory criteria. *See* 28 U.S.C. § 2255(h). Dickey does not allege that his claim relies on a new rule of constitutional law. *See id.* § 2255(h)(2). And, although Dickey indicates that he wishes to present newly discovered evidence proving his actual innocence in a second or successive § 2255 motion, his claim also does not rely on that evidence. *See id.* § 2255(h)(1). Instead, liberally construing his application, Dickey's only claim is that we erred in our previous orders when we determined that *Baptiste* barred consideration of his claims, including a claim of actual innocence, and that, by extension, *Baptiste* was wrongly decided. Thus, as Dickey's argument only relates to his previous applications to file second or successive § 2255 motions and requests that we reconsider our prior precedent and our previous orders denying him relief, it does not provide him with the grounds to file a second or successive § 2255 motion in the district court. *See id.* § 2255(h).

Moreover, any other construction of Dickey's application is also meritless. First, to the extent that he intends to raise the same actual innocence claim{**2019 U.S. App. LEXIS 5**} from his original § 2255 motion again, it is barred by *Baptiste*, as he concedes. *See Baptiste*, 828 F.3d at 1339-41 (holding that § 2244(b)(1) requires dismissal of any claim in an application for leave to file a second or successive § 2255 motion that was presented in a prior application that we denied). Second, Dickey cannot seek reconsideration of our previous orders denying his prior successive applications. *See id.* at 1340 (stating that § 2244(b)(3)(E) does not permit a movant to file "what amounts to a motion for reconsideration under the guise of a separate and purportedly 'new' application"). Lastly, Dickey cannot seek an *en banc* rehearing or a recalled mandate in *Baptiste* because he is not a party to that case.

Accordingly, because Dickey has failed to make a *prima facie* showing of the existence of either of the grounds set forth in 28 U.S.C. § 2255, his application for leave to file a second or successive motion is hereby DENIED.

Concur

Concur by: MARTIN

MARTIN, Circuit Judge, concurring:

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As I said in my concurrence in an earlier order denying Mr. Dickey leave to file a second or successive § 2255 motion, I believe In re Baptiste, 828 F.3d 1337 (11th Cir. 2016), was wrongly decided. In re Dickey, No. 17-12705, slip op. at 5-6 (11th Cir. 2017) (Martin, J., concurring in the judgment). I have not changed my mind, but I have nothing to add to what I said there.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12705-B

IN RE:

JOSEPH DICKEY,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before: MARTIN, ROSENBAUM, and JILL PRYOR, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Joseph Dickey has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

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28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In 2007, Dickey filed his original § 2255 motion challenging his various child pornography charges, asserting, in part, that his counsel was ineffective because she failed to contact witnesses who could have testified that the victims were not with Dickey on three of the six dates the charged sexual abuse allegedly occurred, and because she erroneously informed both Dickey and his family about the benefits of a plea agreement and his likely sentence. Dickey also raised this claim in a prior successive application, and we determined we were precluded from reviewing the claim under *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016).

In his application, Dickey seeks to raise two claims in a second or successive § 2255 motion. Dickey asserts that his claims rely on newly discovered evidence. First, Dickey contends that he was constructively denied counsel. He contends that counsel was aware that potential exculpatory evidence existed, namely, statements from the victims' family members that reflected Dickey's innocence, but counsel failed to contact those family members. As his newly discovered evidence, Dickey cites to statements the victims' family members made in a malpractice suit filed after his initial § 2255 motion, including statements that (a) this crime could not have occurred on the dates alleged, (b) trial counsel did not contact Dickey's family or allow them to speak at his sentencing, and (c) trial counsel informed Dickey's family that he

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needed to plead guilty. Additionally, Dickey notes that counsel stated that Dickey's lack of money influenced how she handled the case, and that she believed he was guilty and a pedophile.

Second, Dickey contends that the prosecutor engaged in prosecutorial misconduct by pursuing charges the government knew to be factually impossible and using known false testimony from a co-conspirator. Dickey notes that his co-conspirator admitted to abusing the victims in this case and had thousands of images of child pornography. As his newly discovered evidence, Dickey again cites to affidavits and testimony from a legal malpractice hearing, which apparently included questions from the victims' mother as to why the co-conspirator had not been incarcerated, and a background check conducted on his co-conspirator, which showed that he was never incarcerated based on his role in this offense.

Pursuant to § 2244, "[a] claim presented in a second or successive habeas corpus application under [28 U.S.C. § 2254] that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). A prisoner's original § 2254 petition is a "prior application" for § 2244(b)(1) purposes, even if new evidence or legal arguments are added. *In re Everett*, 797 F.3d 1282, 1287-88 (11th Cir. 2015). Similarly, *Baptiste* precludes us from considering claims raised in prior requests for authorization to file a second or successive habeas petition.

As an initial matter, review of the record indicates that Dickey raised his "constructive denial of counsel," or ineffective assistance of counsel claim in his initial § 2255 motion and in a prior application to file a second or successive § 2255 motion. Thus, we are precluded under *Baptiste* from considering these claims and must dismiss them. *See Baptiste*, 828 F.3d at 1339; *Everett*, 797 F.3d at 1287-88.

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As to Dickey's second claim, his reliance on the statements from his legal malpractice suit and the background check as newly discovered evidence is unavailing. Dickey has not shown that this evidence establishes his actual innocence, as he has not established that, but for evidence that his testifying co-conspirator had not been incarcerated, no reasonable jury would have found him guilty. *See* 28 U.S.C. § 2255(h)(1); *In re Boshears*, 110 F.3d 1538, 1541 (11th Cir. 1997) (holding that an application to file a successive § 2255 motion must be denied if, in light of the new evidence, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt).

Accordingly, because Dickey has failed to make a *prima facie* showing of the existence of either of the grounds set forth in 28 U.S.C. § 2255, his application for leave to file a second or successive motion is hereby DISMISSED IN PART and DENIED IN PART.

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MARTIN, Circuit Judge, with whom JILL PRYOR, Circuit Judge, joins, concurring in judgment:

The majority holds that Mr. Dickey's ineffective assistance of counsel claim is barred by In re Baptiste, 828 F.3d 1337 (11th Cir. 2016), which held that "the federal habeas statute requires us to dismiss a claim that has been presented in a prior application" to file a § 2255 motion. Id. at 1339. I have stated my view that Baptiste has no basis in the text of the habeas statute:

> Baptiste was construing 28 U.S.C. § 2244(b)(1), which says any "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Of course, [] § 2255 motions . . . are filed by federal prisoners [and] § 2255 motions are certainly not brought "under section 2254," which governs petitions filed by state prisoners. But the Baptiste panel ruled that even though § 2244(b)(1) does not mention § 2255 motions, it applies to them anyway, since "it would be odd [] if Congress had intended to allow federal prisoners" to do something state prisoners can't do.

In re Clayton, 829 F.3d 1254, 1266 (11th Cir. 2016) (Martin, J., concurring). And

> Baptiste is inconsistent with the statute in a second way. The text of the habeas statute shows that it requires courts to dismiss only claims that were already presented in an actual § 2255 motion, as opposed to a mere request for certification of a successive § 2255 motion. Both § 2244 and § 2254 distinguish between "applications" (which are the § 2254 petitions and § 2255 motions filed in district courts) and "motions" (which are the earlier

> request for certification filed in a court of appeals). Baptiste assumes that "motion" and "application" mean the same thing, even though Congress carefully distinguished the two. When Congress uses different words in this way, courts must presume those words mean different things.

In re Anderson, 829 F.3d 1290, 1296 (11th Cir. 2016) (Martin, J., dissenting). My colleagues have articulated other problems with Baptiste. See In re Jones, 830 F.3d 1295, 1297 (11th Cir. 2016) (Rosenbaum and Jill Pryor, J.J., concurring).

I am concerned that Baptiste is blocking relief to prisoners who ask us to take a second look at their case after we got it wrong the first time. Nevertheless Baptiste is binding precedent in this circuit, so Mr. Dickey will not be allowed to present his case to a District Court for an examination of whether his sentence is legal.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

JOSEPH R. DICKEY,	)	
	)	
Movant/Defendant,	)	
	)	**Case Numbers:**
vs.	)	**7:07-cv-8006-CLS-SGC**
	)	**7:05-cr-0321-CLS-SGC**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Joseph R. Dickey was sentenced by this court on February 27, 2006, to 1,620 months (or 135 years) of imprisonment following his pleas of guilty to the following federal offenses: *i.e.,* one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B); one count of transporting child pornography, in violation of 18 U.S.C. § 2252A(a)(1); six counts of traveling in interstate commerce for the purpose of engaging in sexual acts with a minor, in violation of 18 U.S.C. § 2423(b); and one count of conspiracy to produce child pornography, in violation of 18 U.S.C. § 2251(a).[1]

[1] *See* doc. no 35 in case no. 7:05-cr-00321-CLS-SGC (Judgment in a Criminal Case (For Offense(s) Committed on or After November 1, 1987)).

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Dickey appealed his conviction and sentence, but the Eleventh Circuit Court of Appeals entered an order on October 12, 2006, dismissing the appeal due to a valid appeal waiver contained in Dickey's plea agreement.[2] Dickey then filed a motion on February 20, 2007, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.[3] He contended that: he was actually innocent of the charges against him; the government breached his plea agreement; his guilty plea was not voluntarily, intelligently, and knowingly made; his trial and appellate counsel provided constitutionally ineffective assistance; the government's prosecution of him was malicious; he had been subjected to cruel and unusual punishment; the delay in prosecuting his case denied him due process; his appeal waiver was null and void; and, some of the evidence used against him was obtained by unlawful means.

Following an evidentiary hearing, United States Magistrate Judge Paul W. Greene recommended that Dickey's § 2255 petition be denied.[4] Dickey objected to the Magistrate Judge's report and recommendation,[5] but following a review, this court overruled those objections and denied Dickey's § 2255 motion on September 30,

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[2] Doc. no. 58 in case no. 7:05-cr-0321-CLS-SGC (Eleventh Circuit Order).

[3] Doc. no. 1 in case no. 7:07-cv-8006-CLS-SGC; doc. no. 59 in case no. 7:05-cr-00321-CLS-SGC.

[4] Doc. no. 67 in case no. 7:07-cv-8006-CLS-SGC (Magistrate Judge's Findings and Recommendation Following Evidentiary Hearing).

[5] Doc. no. 72 in case no. 7:07-cv-8006-CLS-SGC (Petitioner's Objections to Magistrate Judge's Finding and Recommendations).

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2010.[6] Dickey appealed that decision, and the Eleventh Circuit affirmed this court's dismissal order on November 29, 2011.[7]

Dickey then filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(6) to set aside the final judgment entered against him, and to reopen his § 2255 proceedings.[8] This court denied the motion,[9] and Dickey appealed, but the Eleventh Circuit entered an order on October 28, 2014, denying Dickey's motion for a certificate of appealability.[10]

Dickey filed a second motion to set aside the final judgment and reopen his § 2255 proceedings on January 14, 2015.[11] This court denied that motion on September 29, 2015.[12] Dickey appealed, and the Eleventh Circuit again denied Dickey a certificate of appealability on July 19, 2016.[13] Dickey appealed to the United States

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[6] Doc. nos. 82 & 83 in case no. 7:07-cv-8006-CLS-SGC (Memorandum Opinion and Final Judgment).

[7] Doc. no. 92 in case no. 7:07-cv-8006-CLS-SGC (Mandate of Eleventh Circuit Court of Appeals).

[8] Doc. no. 94 in case no. 7:07-cv-8006-CLS-SGC (Petitioner's Motion Pursuant to Federal Rule of Civil Procedure 60(b)(6)).

[9] Doc. no. 101 in case no. 7:07-cv-8006-CLS-SGC (Order).

[10] Doc. no. 112 in case no. 7:07-cv-8006-CLS-SGC (Order and Mandate of Eleventh Circuit Court of Appeals).

[11] Doc. no. 113 in case no. 7:07-cv-8006-CLS-SGC (Movant's *Pro Se* Motion to Re-Open Section 2255 Judgment Under Civil Rule 60(b)(4) and 60(b)(6)).

[12] Doc. no. 114 in case no. 7:07-cv-8006-CLS-SGC (Order).

[13] Doc. no. 122 in case no. 7:07-cv-8006-CLS-SGC (Order and Mandate of Eleventh Circuit Court of Appeals).

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Supreme Court, which denied his petition for writ of *certiorari* on February 21, 2017.[14]

The case presently is before the court on Dickey's *third* motion, filed pursuant to Federal Rule of Civil Procedure 60(b)(4) and 60(b)(6), to set aside the final judgment and reopen his § 2255 proceedings,[15] as well as his motion for a hearing on the Rule 60(b) motion.[16] Dickey makes the new argument that the Supreme Court's June 23, 2017 decision in *Lee v. United States,* – U.S. – , 137 S. Ct. 1958 (2017), should change the outcome of his claim for constitutionally ineffective assistance of counsel. He also repeats his previous arguments that he is actually innocent of the charges against him, and that the criminal judgment against him is void because he was denied due process.

Dickey insists that he is not attempting to address any determinations previously made on the merits of his § 2255 claim, and that he is not attempting to bring a new claim for relief from his conviction. Instead, he asserts, he only wants to *reopen* his previous § 2255 claim.[17] Despite that characterization, it is clear that

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[14] Doc. no. 123 in case no. 7:07-cv-8006-CLS-SGC (Eleventh Circuit Notice and Supreme Court Order).

[15] Doc. no. 124 in case no. 7:07-cv-8006-CLS-SGC (Petitioner's Motion Pursuant [*sic*] Federal Rules of Civil Procedure Procedural Rule 60(b)(6) and Rule 60(b)(4)).

[16] Doc. no. 128 in case no. 7:07-cv-8006-CLS-SGC (Motion for a Hearing on Petitioner's 60(b) Motion).

[17] *See* doc. no. 126 in case no. 7:07-cv-8006-CLS-SGC (Clarification of and a Request for a Ruling on Petitioner's Pending Rule 60(b) Motion).

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Dickey is *either* attempting to resurrect claims that already have been reviewed on appeal, *or* to assert additional § 2255 claims. Neither is permissible.

Before filing a second or successive motion pursuant to 28 U.S.C. § 2255, a prisoner must first seek an authorizing order from the applicable court of appeals — here, the Eleventh Circuit. *See* 28 U.S.C. § 2255(h) ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals . . . ."); 28 U.S.C. § 2244; *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Because Dickey has not obtained such an order from the Eleventh Circuit, and his Rule 60 motion is properly construed as a second or successive motion, Dickey cannot proceed with the Rule 60 motion.

An appropriate order will be entered contemporaneously herewith.

DONE and ORDERED this 5th day of October, 2018.

United States District Judge