

APPENDIX A

IN RE DAVID ANDREW DIEHL, Movant.
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
2025 U.S. App. LEXIS 2323
No. 24-51024
January 31, 2025, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

Motion for an Order Authorizing the United States District Court for the Western District of Texas to Consider a Successive 28 U.S.C. § 2255{2025 U.S. App. LEXIS 1} Motion.

Counsel In re: David Andrew Diehl, Movant, Pro se, Marianna, FL.
Judges: BEFORE STEWART, HAYNES, AND HIGGINSON, Circuit Judges.

Opinion

UNPUBLISHED ORDER

Per Curiam:

David Andrew Diehl, federal prisoner # 53214-018, was convicted of ten counts of sexually exploiting a child by producing child pornography in violation of 18 U.S.C. § 2251(a). See *United States v. Diehl*, 775 F.3d 714, 717 (5th Cir. 2015). He now moves for authorization to file a second or successive 28 U.S.C. § 2255 motion in the district court challenging his convictions.

In support of his motion, Diehl does not rely 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). Instead, he seeks authorization based on purportedly new evidence. *Id.* § 2255(h)(1). To obtain authorization, Diehl must show "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" him guilty of his offenses. *Id.* He has not made the requisite prima facie showing. See *id.*; 28 U.S.C. § 2244(b)(3)(C); *United States v. Hanner*, 32 F.4th 430, 434 (5th Cir. 2022).

Accordingly, IT IS ORDERED that Diehl's motion{2025 U.S. App. LEXIS 2} for authorization is DENIED. Further, Diehl is WARNED that any future frivolous or repetitive filings will invite the imposition of sanctions, which may include dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction.

CIRHOT

APPENDIX D1

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus DAVID ANDREW DIEHL,
Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
2022 U.S. App. LEXIS 37201
No. 22-50100
October 4, 2022, Filed

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Diehl v. United States, 2023 U.S. LEXIS 3491 (U.S., Oct. 2, 2023)

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1} Application for Certificate of Appealability from the United States District Court for the Western District of Texas. USDC No. 1:16-CV-1124, USDC No. 1:10-CR-297-1. United States v. Diehl, 775 F.3d 714, 2015 U.S. App. LEXIS 245, 2015 WL 110145 (5th Cir. Tex., Jan. 7, 2015)

Counsel For United States of America, Plaintiff - Appellee: Joseph H. Gay, Jr., Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Texas, San Antonio, TX.
David Andrew Diehl, also known as David A. Diehl, Defendant - Appellant, Pro se, Coleman, FL.

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

Opinion

Per Curiam:

David Andrew Diehl, federal prisoner # 53214-018, was convicted of sexual exploitation of a child and production of child pornography and sentenced to 600 months of imprisonment. He moves for a certificate of appealability (COA) to appeal the denial of the Federal Rule of Civil Procedure 60(b) motion that he filed regarding the dismissal of his 28 U.S.C. § 2255 motion. He argues that (i) the district court and appellate court mischaracterized or failed to address certain of his § 2255 claims; (ii) the district court erroneously dismissed as procedurally barred his § 2255 claims regarding the statute of limitations and an alleged violation of the Ex Post Facto clause; and (iii) he is entitled to relief under Federal Rule of Civil Procedure 60(d)(3) because the Government committed fraud by misrepresenting or mischaracterizing evidence {2022 U.S. App. LEXIS 2} or prior court findings. We will not consider Diehl's claim raised for the first time in his COA motion that his Ex Post Facto claim was erroneously construed as a procedural argument instead of a substantive argument. See *Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018).

A COA may issue if a prisoner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). To obtain a COA, he must establish that reasonable jurists would find the decision to

APPENDIX D2

deny relief debatable or wrong, see *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), or that the issues that he raises "are adequate to deserve encouragement to proceed further," *Miller-El*, 537 U.S. at 327. To obtain a COA from the denial of a Rule 60(b) motion, he must demonstrate that reasonable jurists could debate whether the district court abused its discretion in denying him relief from the judgment. See *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

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

A COA is not required to appeal the denial of a motion to recuse. *Trevino v. Johnson*, 168 F.3d 173, 176-78 (5th Cir. 1999). However, **Diehl** did not brief, and therefore abandons, any challenge to the district court's denial of his motion to recuse. See *Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). The denial of the motion to recuse is AFFIRMED. Diehl's motion to docket the appeal of the denial of his motion{2022 U.S. App. LEXIS 3} to recuse in separate case is DENIED.

UNITED STATES OF AMERICA, Plaintiff-Appellee v. DAVID ANDREW DIEHL, also known as David A. Diehl, Defendant-Appellant
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
803 Fed. Appx. 800; 2020 U.S. App. LEXIS 14538
No. 19-50165
May 6, 2020, Filed

Notice:

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

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Diehl v. United States, 2021 U.S. LEXIS 740 (U.S., Jan. 25, 2021)

Editorial Information: Prior History

{2020 U.S. App. LEXIS 1} Appeals from the United States District Court, for the Western District of Texas. USDC No. 1:16-CV-1124. USDC No. 1:10-CR-297-1. United States v. Diehl, 704 Fed. Appx. 393, 2017 U.S. App. LEXIS 24037, 2017 WL 5891664 (5th Cir. Tex., Nov. 28, 2017)

Counsel

For UNITED STATES OF AMERICA, Plaintiff - Appellee: Joseph H. Gay, Jr., Assistant U.S. Attorney, U.S. Attorney's Office, San Antonio, TX.

DAVID ANDREW DIEHL, also known as David A. Diehl
(Federal Prisoner: #53214-018), Defendant - Appellant, Pro se, Coleman, FL.

Judges: Before HAYNES, GRAVES, and ENGELHARDT, Circuit Judges.

Opinion

{803 Fed. Appx. 800} PER CURIAM:*

David Andrew Diehl, federal prisoner # 53214-018, was found guilty of ten counts of producing child pornography under 18 U.S.C. § 2251(a), and he was sentenced to serve a total of 600 months in prison and five years of supervised release. The district court denied the 28 U.S.C. § 2255 motion he filed to challenge these convictions and sentence, and he moves this court for a certificate of appealability (COA) on claims concerning limitations, the jurisdictional nexus to support his conviction, his sentence, ineffective assistance of counsel, *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and discovery. He also argues that the district court erred by not holding an evidentiary hearing. His outstanding motions to supplement his COA motion are GRANTED.

To obtain a COA, one must make "a substantial showing of the denial of {2020 U.S. App. LEXIS 2} a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy that burden, he must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. {803 Fed. Appx. 801} McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), or that the issues he presents "are adequate to deserve encouragement to proceed further,"

APPENDIX E2

Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). Because Diehl has not met these standards, his COA motion is DENIED. We construe the motion for a COA with respect to the district court's declining to hold an evidentiary hearing as a direct appeal of that issue, see *Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016), and AFFIRM.

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.

PTSO: [CS]

AO 245-B (Rev. 06/05)(W.D.TX.) - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Western District of Texas
AUSTIN DIVISION

FILED

2011 OCT 25 AM 11:22

UNITED STATES OF AMERICA

v.

Case Number A-10-CR-297(01)-LY
USM Number 53214-018

DAVID ANDREW DIEHL

True Name: David Andrew Diehl

Aliases: David Diehl, David A. Diehl

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)


The defendant, DAVID ANDREW DIEHL, was represented by E. G. Morris.

The defendant was found guilty on Count(s) SS1 through SS10 of the Second Superseding Indictment by a Court verdict on February 8, 2011, after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count (s)</u>
18 USC 2251(a)	SEXUAL EXPLOITATION OF A CHILD/ PRODUCTION OF CHILD PORNOGRAPHY	NOVEMBER 2000	SS1-SS10

As pronounced on OCTOBER 24, 2011, the defendant is sentenced as provided in pages 2 through 9 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 25th day of October, 2011.
LEE YEAKEL
United States District Judge

A true copy of the original, I certify.
WILLIAM G. PUTNICKI
Clerk, U.S. District Court

By 
Deputy Clerk

Appendix I-1

Defendant: DAVID ANDREW DIEHL
Case Number: A-10-CR-297(01)-LY

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **SIX HUNDRED (600) MONTHS**. This sentence consists of 200 months on Counts SS1, SS3 and SS6, all to be served consecutively to each other; and 200 months on Counts SS2, SS4, SS5, SS7, SS8, SS9 and SS10, to be served concurrently with one another and Counts SS1, SS3 and SS6. While imprisoned, the defendant shall participate in the Sex Offender Management Program offered by the Bureau of Prisons.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

**Additional material
from this filing is
available in the
Clerk's Office.**