EXHIBIT A

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus DAVID ANDREW DIEHL, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
2025 U.S. App. LEXIS 12684; 2025 LX 60986
No. 24-50855
May 21, 2025, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2025 U.S. App. LEXIS 1}Application for Certificate of Appealability 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 (Jan. 7, 2015)

Counsel **David Andrew Diehl**, Defendant - Appellant, Pro se, Marianna, FL.
Judges: Before JONES, DUNCAN, and DOUGLAS, Circuit Judges.

Opinion

UNPUBLISHED ORDER

Per Curiam:

David Andrew Diehl, federal prisoner # 53214-018, was convicted of 10 counts of sexual exploitation of a child and production of child pornography and was sentenced to a total of 600 months of imprisonment. He moves for a certificate of appealability (COA) to appeal the district court's denials and dismissals of his several Federal Rule of Civil Procedure 59 and 60 motions challenging the dismissal of his 28 U.S.C. § 2255 motion. The orders in question were entered on May 30, 2024, August 2, 2024, and September 26, 2024.

In his COA motion, Diehl contends only that the district court erred by (i) denying on the merits his Rule 60(d)(3) claims of fraud on the court; (ii) failing to address his Rule 60(b)(6) claims of "integrity" violations during his § 2255 proceedings; (iii) dismissing as an unauthorized successive § 2255 claim his Rule 60(b)(6) claim that his sentence violated his ex post facto rights; and (iv) denying his several Rule 59(e) challenges to the foregoing adjudications.1 Diehl has not addressed,**{2025 U.S. App. LEXIS 2}** and therefore abandons any challenge to, the rejection of all other arguments he raised in the postjudgment motions at issue. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993); *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Further, by failing to recognize and substantively address the district court's dismissal of his Rule 60(b)(6) "integrity" claims as unauthorized successive claims, he has abandoned any challenge to their dismissal as successive. *See Yohey*, 985 F.2d at 225; *Brinkmann*, 813 F.2d at 748.

Contrary to Diehl's assertion, a COA is required to appeal the district court's denial of his Rule 60(d)(3) motion. *See Ochoa Canales v. Quarterman*, 507 F.3d 884, 887-88 (5th Cir. 2007). We

therefore DENY his motion to dispense with the COA requirement.

A COA may issue only if the movant has made "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, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). When the district court denies relief on procedural grounds, a COA should issue if the prisoner establishes that jurists of reason would find it debatable whether the motion states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). When the district court denies relief on the merits, the prisoner must show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Id.* To obtain a COA from the denials and dismissals**{2025 U.S. App. LEXIS 3}** of the instant postjudgment motions, Diehl must demonstrate that reasonable jurists could debate whether the district court abused its discretion in adjudicating those motions. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Diehl fails to make the necessary showing. Accordingly, his motion for a COA is DENIED. As Diehl fails to make the required showing for a COA, we do not reach the issues whether the district court erred by denying his motion for discovery and his request for an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

We previously issued a sanction warning to Diehl when we denied his motion for authorization to file a successive § 2255 motion. *See In re Diehl*, No. 24-51024, at 2 (5th Cir. Jan. 31, 2025) (unpublished). However, Diehl filed the instant COA brief before our previous warning. Diehl is again 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.

Footnotes

1

Because Diehl's purported Rule 60(a) motion was filed within 28 days following the denials of his prior Rule 59(e) motions and essentially sought reconsideration of one of those denials, we construe it as a subsequent Rule 59(e) motion. *See Demahy v. Schwarz Pharma, Inc.*, 702 F.3d 177, 182 & n.2 (5th Cir. 2012); *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 668 (5th Cir. 1986) (en banc).

EXHIBIT B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 31, 2025
Lyle W. Cayce
Clerk

No. 24-50855

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DAVID ANDREW DIEHL,

Defendant—Appellant.

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

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

UNPUBLISHED ORDER

Before JONES, DUNCAN, and DOUGLAS, *Circuit Judges.*

PER CURIAM:

The motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

EXHIBIT C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DAVID ANDREW DIEHL, Movant, v. UNITED STATES OF AMERICA, Respondent.	§ § § § § § § § § §	A-10-CR-297-DAE

ORDER

Before the Court are Movant David Andrew Diehl's following pro se motions: Motion to Set Aside Judgment Pursuant to Rule 60(b) (ECF No. 330); Motion for Reconsideration of § 2255 Issue 8 (ECF No. 331); Motion for Order to Compel the United States to Produce an Affidavit Specifying Information Regarding Inventory Item on Computer Hard Drive Forensic Report (ECF No. 334); and Motion to Take Judicial Notice (ECF No. 335). Respondent has responded to Diehl's Motion to Set Aside Judgment and Motion for Reconsideration (ECF Nos. 332-33), to which Diehl has replied (ECF Nos. 336-37).

1. Motion to Set Aside Judgment

In Diehl's Motion to Set Aside Judgment Pursuant to Rule 60(b), he argues there were procedural errors in his original 28 U.S.C. § 2255 motion that prevented the discovery of fraud on the Court. Diehl alleges the United States committed fraud on the Court by withholding evidence and making material misrepresentations of fact. Diehl bases his claims on Federal Rules of Civil Procedure 60(b)(6) and 60(d)(3). (ECF No. 330.)

Federal Rule of Civil Procedure 60(d)(3) "functions as a savings clause: it allows courts to set aside a judgment for fraud on the court without a strict time bar." *Jackson v. Thaler*, 348 F. App'x 29, 34 (5th Cir. 2009) (quotations and citations omitted). "[O]nly the most egregious

misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court." *Id.* (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)). Courts should grant relief for fraud on the court to protect "the integrity of the courts," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991), and to "fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence" to the finality of a judgment. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

Diehl filed his original § 2255 motion on October 6, 2016 (ECF No. 209) and later amended it on January 7, 2019 (ECF NO. 266). The Court denied the motion on February 4, 2019. (ECF No. 275.) Diehl subsequently filed a motion for reconsideration, which the Court denied (ECF Nos. 280, 286), and a motion for a certificate of appealability, which the Fifth Circuit denied on June 30, 2020 (ECF No. 293). Diehl's current motion to set aside the judgment is based on allegations that Respondent materially misrepresented facts to and withheld evidence from the § 2255 Court. Diehl further argues the Court's denial of his motion for discovery (ECF No. 202) also led to fraud on the Court.

Diehl has failed to meet the difficult threshold for a meritorious claim under Rule 60(d)(3). None of his allegations raise the sort of egregious conduct, e.g., bribery or falsifying evidence, that Rule 60(d)(3) is meant to protect against.[1] Accordingly, Diehl's claims brought pursuant to Rule 60(d)(3) are denied.

Diehl also references Rule 60(b)(6) in support of his motion to set aside the judgment. Federal Rule of Civil Procedure 60(b) provides that "[o]n motion and just terms, the court may

[1] Further, Diehl's claims cannot be analyzed under Rule 60(b)(3)—which allows a court to relieve a party from final judgment due to fraud—because they were brought almost four years after the Court denied his amended § 2255 motion. *See* Fed. R. Civ. P. 60(c)(1) (a motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of judgment or order or date of proceeding).

relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

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

FED. R. CIV. P. 60(b).

In *Gonzalez v. Crosby*, the Supreme Court held that Rule 60(b) motions cannot "impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." 545 U.S. 524, 532 (2005) (citing 28 U.S.C. § 2244(b)(3)). *Gonzalez* provides guidance for determining when a Rule 60(b) motion is subject to the requirements for successive petitions. *See id.* at 532-36.[2] Specifically, *Gonzalez* states that courts must construe a Rule 60(b) motion as a successive habeas petition if it "seeks to add a new ground for relief" or "attacks the federal court's previous resolution of a claim on the merits." *Id.* at 532. If a motion challenges "not the substance of the federal court's resolution of a claim on the merits but some defect in the integrity of the federal habeas proceedings," then a Rule 60(b) motion is appropriate. *Id.*

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

Claims properly brought under Rule 60(b) include assertions of "[f]raud on the habeas court" or challenges to procedural rulings that "precluded a merits determination," i.e., the denial of habeas relief "for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4 & n.5. Accordingly, a district court has jurisdiction to consider a motion that shows "a non-merits-based defect in the district court's earlier decision on the federal habeas petition." *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010). But motions that "in effect ask for a second chance to have the merits determined favorably" must be construed as successive habeas petitions regardless of whether they are characterized as procedural attacks. *Gonzalez*, 545 U.S. at 532 n.5. Further, arguments that are characterized as procedural but lead "inextricably to a merits-based attack on the dismissal of the § 2255 motion," require circuit-court authorization. *Id.* (quoting *In re Lindsey*, 582 F.3d 1173, 1175-76 (10th Cir. 2009)).

Diehl attempts to characterize his motion as one attacking the procedural integrity of his § 2255 proceedings, but it is clearly a merits-based attack on the denial of his § 2255 motion. At one point, Diehl argues that the Court's errors "prevented [him] from having his e[x]culpatory equipment examined." (ECF No. 330 at 24.) Because Diehl is challenging the merits of the Court's decision, rather than any procedural defect, the Court does not have jurisdiction over Diehl's motion pursuant to Rule 60(b)(6). Accordingly, to the extent Diehl brings his claims pursuant to Rule 60(b)(6), they are dismissed without prejudice to refiling once Diehl gains the proper preauthorization from the Fifth Circuit Court of Appeals.

2. *Motion for Reconsideration*

In Diehl's Motion for Reconsideration of 2255 Issue 8, he argues that he raised an Ex Post Facto claim for the first time in his § 2255 motion, and that the Court erred in finding that he had raised the issue in his direct appeal. (ECF No. 331.) To the extent Diehl bases his motion on Federal

Rule of Civil Procedure 59(e), it is untimely. Motions for reconsideration under Rule 59(e) "must be filed no later than 28 days after the entry of judgment." FED. R. CIV. P. 59(e). Judgment on Petitioner's § 2255 motion was entered on February 4, 2019. (ECF No. 276.) Diehl's motion for reconsideration was executed on February 27, 2024, almost four years past the deadline for a timely Rule 59(e) motion. Accordingly, this motion is denied as untimely filed.

In the alternative, to the extent Diehl is relying on Rule 60(b)(6) to support his motion, it is similarly unavailing. Diehl explicitly challenges the merits of the Court's ruling on his § 2255 motion—he states that the Report and Recommendations filed on this issue is "plainly in error." (ECF No. 331 at 2.) As a result, because Diehl attacks the merits of the Court's decision, the Court is without jurisdiction to consider it without prior authorization from the Fifth Circuit. Accordingly, to the extent Diehl brings this motion pursuant to Rule 60(b)(6), it is dismissed without prejudice to refiling once Diehl gains the proper preauthorization from the Fifth Circuit.

3. Motion to Compel

In Diehl's Motion to Compel, he asks the Court to order Respondent to produce an affidavit describing the device listed as "Item-0" in the forensic report, including a detailed statement concerning how the device was seized by the government, a chain of custody statement, whether it contains any visual depictions as described in Diehl's indictment, and an unredacted list of files. He argues this evidence is exculpatory and was withheld from him, thereby substantiating his claim of fraud on the Court. (ECF No. 334.)

The Court has already denied Diehl's Motion to Set Aside the Judgment and his Motion for Reconsideration. There is therefore no reason for Respondent to produce any evidence. This motion is denied.

4. Motion to Take Judicial Notice

Finally, Diehl moves the Court to take judicial notice of his intention to file a reply to Respondent's responses to his motion to set aside the judgment and motion for consideration. (ECF No. 335.) This motion is granted.

It is therefore **ORDERED** that the Rule 60(d)(3) claims in Diehl's Motion to Set Aside Judgment (ECF No. 330) are **DENIED** and the Rule 60(b)(6) claims are **DISMISSED WITHOUT PREJUDICE** to refiling once Diehl gains the proper preauthorization from the Fifth Circuit Court of Appeals.

It is further **ORDERED** that Diehl's Motion for Reconsideration (ECF No. 331) is **DENIED** to the extent he seeks relief under Rule 59(e) and is **DISMISSED WITHOUT PREJUDICE** to refiling once Diehl is granted the proper preauthorization from the Fifth Circuit Court of Appeals to the extent he seeks relief under Rule 60(b)(6).

It is further **ORDERED** that Diehl's Motion to Compel (ECF No. 334) is **DENIED**, and his Motion to Take Judicial Notice (ECF No. 335) is **GRANTED**.

It is finally **ORDERED** that a certificate of appealability is **DENIED**, as reasonable jurists could not debate the denial of Petitioner's motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

SIGNED this the 30th day of May 2024.

DAVID A. EZRA
SENIOR UNITED STATES JUDGE

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