

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17103
Non-Argument Calendar

D.C. Docket Nos. 8:02-cv-01830-SCB-EAJ; 8:98-cr-00302-SCB-EAJ-3

ANDRE PEASE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(April 11, 2019)

Before MARTIN, NEWSOM and BLACK, Circuit Judges.

PER CURIAM:

Andre Pease, a federal prisoner, appeals through counsel the district court's denial of his *pro se* motion for relief from judgment, pursuant to Federal Rule of Civil Procedure 60(b), which challenged the denial of his 28 U.S.C. § 2255 motion to vacate his sentence, and subsequent motion for reconsideration. The district court granted a certificate of appealability (COA) as to "Pease's claim that he is actually innocent of a violation of 21 U.S.C. § 841(b)(1)(A) and of an erroneous career offender designation under § 4B1.1(A) U.S.S.G., resulting in an unlawful upward departure sentence, which is an exception to the appeal waiver contained in his plea agreement." The Government argues the district court lacked jurisdiction to consider Pease's Rule 60(b) motion,¹ and alternatively, it argues the district court did not abuse its discretion in denying relief. Pease maintains he is entitled to relief under Rule 60(b). After review,² we affirm the district court.

Generally, a federal prisoner collaterally attacking his sentence must do so by filing a 28 U.S.C. § 2255 motion to vacate his sentence. *Sawyer v. Holder*, 326 F.3d 1363, 1365 (11th Cir. 2003). A prisoner who has filed a previous § 2255

¹ The Government also suggests we lack jurisdiction to review the district court's order because the COA is defective. However, a defective COA would not deprive us of jurisdiction, and in any event, we do not find it defective. *See Spencer v. United States*, 773 F.3d 1132, 1137-38 (11th Cir. 2014) (en banc).

² We review *de novo* whether the district court had subject-matter jurisdiction over a Rule 60 motion. *Williams v. Chatman*, 510 F.3d 1290, 1293 (11th Cir. 2007). "We review a district court's denial of a Rule 60(b) motion for an abuse of discretion." *Arthur v. Thomas*, 739 F.3d 611, 628 (11th Cir. 2014).

motion that was denied on the merits must apply for and receive permission from our Court 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 subject-matter jurisdiction to consider a second or successive § 2255 motion. *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003).

A Rule 60(b) motion in a § 2255 proceeding may not raise a new claim for relief from the judgment of conviction and may not attack the post-conviction court's prior resolution of a claim on the merits. *See Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005).³ A Rule 60(b) motion that does so impermissibly circumvents the restrictions on second or successive § 2255 motions. *See id.* 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. *See id.* at 532, 538. The Supreme Court in *Gonzalez* gave several examples of a proper Rule 60(b) challenge to a prior ruling that precluded 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.

Contrary to the Government's argument, the district court had jurisdiction to consider Pease's Rule 60(b) motion. First, the Government concedes, and

³ *Gonzalez* considered the extent to which Rule 60(b) applied to 28 U.S.C. § 2254. 545 U.S. at 529 n.3. However, this Court has held that *Gonzalez* also applies in the context of a § 2255 proceeding. *Gilbert v. United States*, 640 F.3d 1293, 1323 (11th Cir. 2011) (en banc).

Gonzalez confirms, that Pease's challenge in his Rule 60(b) motion to the time-bar ruling in his § 2255 proceeding was a proper use of Rule 60(b) because such a claim challenges a procedural defect in the integrity of the § 2255 proceeding. *See* 545 U.S. at 532 n.4. Second, Pease's career offender designation claim is properly brought in a Rule 60(b) motion because, in denying his § 2255 claim, the district court did not address the merits of whether it improperly applied the career offender designation, as it denied the § 2255 claim based on his appeal waiver, and his challenge to the procedural ruling is not a new claim for relief. *See id.* at 531-32. Contrary to the position of the Government, for which it offers no authority in support, the denial of a claim based on a valid appeal waiver is not a decision on the merits. Although an appeal waiver dismissal of a claim was not among the examples provided by the Supreme Court in *Gonzalez*, the Supreme Court specifically noted the types of denials it provided were examples, and there is nothing indicating the Supreme Court was providing an exhaustive list. *See id.* at 532 n.4. Accordingly, Pease's Rule 60(b) challenge to the district court's failure to rule on the merits of his career offender designation claim does not circumvent the rules restricting second or successive § 2255 motions, and the district court had jurisdiction to consider the claim.

However, Pease has abandoned any challenge to the district court's denial of his Rule 60(b) motion to the extent it relied on the court's prior time-bar ruling on

his actual innocence claim, as he failed to make any arguments regarding the time-bar in his initial brief. *See United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir. 2005) (“[I]ssues not raised in a party’s initial brief are deemed abandoned and generally will not be considered by this Court.”). While he addresses the district court’s time-bar ruling in his reply brief, this is insufficient to preserve the issue for appellate review. *See id.* Thus, we address only the denial of Pease’s Rule 60(b) motion to the extent he argued the district court erred in failing to address whether his career offender designation amounted to an upward departure.

As to his career offender designation claim, Pease argues that, because the district court incorrectly calculated his Guidelines range, he was, in effect, subject to an upward departure from his correct Guidelines range, which is the type of claim listed among the exceptions to his appeal waiver. This, however, would effectively allow him to appeal from any Guidelines calculation error that increased his final sentence. Such a reading of his appeal waiver would be inconsistent with the plain language of the waiver, which provides an exception for a sentence in violation of the law “apart from the sentencing guidelines.” Further, such a reading would be inconsistent with the parties’ intention that Pease was waiving his right to appeal his sentence, “directly or collaterally, on any ground,” except the enumerated exceptions. Accordingly, the district court did not abuse its discretion in denying Rule 60(b) relief, as Pease’s career offender claim was barred

by his appeal waiver. *See United States v. Bascomb*, 451 F.3d 1292, 1296 (11th Cir. 2006) (“[K]nowingly and voluntarily entered plea agreements containing appeal waivers are like contracts in which the government and the defendant have bargained for a deal.”); *United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir. 2005) (stating plea agreements “should be interpreted in accord with what the parties intended”).

Moreover, Pease’s career offender argument relies on his underlying claim the district court erred in determining the amount of cocaine attributed to him at sentencing, and this Court has already held that Pease’s knowing and voluntary appeal waiver precluded such a claim. *See United States v. Pease*, 240 F.3d 938, 942 (11th Cir. 2001). Even if Pease’s claim were not barred by his appeal waiver, because this issue was decided in his direct appeal, he was procedurally barred from raising the same issue in his § 2255 motion, and thus, the district court did not abuse its discretion in dismissing the Rule 60(b) motion as to this claim. *See Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014) (stating a defendant is procedurally barred from raising issues in a § 2255 motion that were raised and rejected in his direct appeal).

Furthermore, Pease filed the instant Rule 60(b) motion over nine years after the entry of judgment in his § 2255 proceedings, and Pease has not established any good reason for the delay because he raised the same claims in previous Rule 60(b)

proceedings. *See* Fed. R. Civ. P. 60(c)(1) (providing a Rule 60(b) motion premised on subsections (1), (2), or (3) must be filed within a year of entry of the judgment, and otherwise, the motion must be filed “within a reasonable time”).

Accordingly, the district court did not abuse its discretion in denying Pease’s Rule 60(b) motion, and we affirm.

AFFIRMED.