

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-11096
Non-Argument Calendar

JEFFREY SPIVACK,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket Nos. 9:23-cv-81236-KAM,
9:21-cr-80016-KAM-1

Before JILL PRYOR, BRANCH, and LUCK, Circuit Judges.

PER CURIAM:

Jeffrey Spivack appeals the district court's dismissal of his second 28 U.S.C. section 2255 habeas petition for lack of subject-matter jurisdiction. He argues that the district court erred in dismissing his habeas petition as second or successive and denying a motion to reconsider that order because it originally construed his petition as a motion to amend and was therefore bound by that initial determination. After careful consideration, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In May 2021, Spivack pleaded guilty to wire fraud and extortion by interstate communication. *See* 18 U.S.C. §§ 1343, 875(b). He was sentenced to 63 months' imprisonment and three years' supervised release. In March 2022, he filed a motion seeking dismissal of all charges. The district court denied that motion because his direct appeal was still pending. After we summarily affirmed his direct appeal because he had signed an appeal waiver, Spivack filed another motion seeking dismissal in the district court. The district court gave Spivack a *Castro* warning, explaining that it intended to characterize his motion as a section 2255 habeas petition. *See Castro v. United States*, 540 U.S. 375, 383 (2003).

The district court's order warned Spivack that he was permitted to file one habeas petition as of a matter of right, and that he may not file a second or successive one without our authorization. *See* 28 U.S.C. §§ 2255(f), (h). It explained that Spivack could, within thirty days, withdraw his motion or amend it so that it contained all his potential claims. If he chose not to do so, the district

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court would recharacterize his motion as his first habeas petition and decide it.

Spivack did not withdraw his motion, but after the district court recharacterized his motion as a habeas petition, he did attempt to appeal the order making that recharacterization. We dismissed that appeal for lack of subject-matter jurisdiction, as the district court had not decided the merits of the petition, and thus had not issued a final order. After our dismissal, the district court denied Spivack's first habeas petition on the merits. Spivack appealed that too.

While that appeal was pending, Spivack filed yet another habeas petition. The district court issued an order explaining that because it had already ruled on Spivack's first petition, this appeared to be a second or successive petition. But because it was not clear under our case law whether Spivack's petition should be regarded as second or successive immediately after the district court's order deciding his first petition, or instead only after we resolved Spivack's appeal of that order, "[f]or case management purposes," it would treat the second petition as a motion to amend the first and stay the case until we adjudicated his appeal.

We denied Spivack a certificate of appealability in his appeal of his first petition. The district court then dismissed the second petition, reconstruing it as an unauthorized second or successive habeas petition. Spivack filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), arguing that his second petition was actually a motion to amend his first petition,

and that the district court was bound by its earlier treatment of the second petition as a motion to amend. The district court denied the rule 59 motion, reaffirming that Spivack's petition was second or successive, and decided against issuing a certificate of appealability.

STANDARD OF REVIEW

We review de novo the district court's dismissal of a section 2255 habeas petition as second or successive. *McIver v. United States*, 307 F.3d 1327, 1329 (11th Cir. 2002). We review for abuse of discretion the denial of a rule 59(e) motion. *Jacobs v. Tempur-Pedic Int'l., Inc.*, 626 F.3d 1327, 1343 n.20 (11th Cir. 2010). Pro se pleadings are held to a less strict standard than counseled pleadings and are liberally construed. *Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1168 (11th Cir. 2014).

DISCUSSION

Spivack's appeal raises three issues: (1) whether we have jurisdiction; (2) whether the district court erred in initially treating Spivack's second petition as a motion to amend and later dismissing it as a second or successive petition; and (3) whether the district court abused its discretion in denying Spivack's rule 59 motion. We address each issue in turn.

We first consider our jurisdiction. A certificate of appealability is required to appeal a final order in a section 2255 proceeding. See 28 U.S.C. § 2253(c). But a district court's dismissal of a habeas petition for lack of subject-matter jurisdiction "is not a final

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order in a habeas corpus proceeding within the meaning of the statute.” *Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004) (citation modified). So, we have jurisdiction here.

Next, Spivack contends that the district court erred in dismissing his second petition because it initially characterized the habeas petition as a motion to amend and was not permitted to change that determination. Under the Antiterrorism and Effective Death Penalty Act, before filing a second or successive habeas petition, a petitioner must first obtain an order authorizing the district court to consider it. 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). Without our authorization, the district court lacks jurisdiction to consider a second or successive habeas petition. *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) (citing *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir.2003) (per curiam)).

A petition is second or successive if its claims could have been raised in an earlier petition and “there was no legitimate excuse for failure to do so,” with the exception—not applicable here—of “a small subset of unavailable claims that must not be categorized as successive.” See *Stewart v. United States*, 646 F.3d 856, 859, 863–65 (11th Cir. 2011) (citations modified). The Supreme Court recently clarified that a petition is second or successive “if a judgment on the merits has issued as to a first-in-time petition even if the case remains pending on appeal.” *Rivers v. Guerrero*, 605 U.S. 443, 457 n.5 (2025). And we have held that “a motion to amend a federal habeas petition filed after the district court entered its final judgment and while an appeal remains pending should be treated

as a second or successive habeas application.” *Boyd v. Sec’y, Dep’t of Corr.*, 114 F.4th 1232, 1238 n.3 (11th Cir. 2024) (citation modified).

There is no doubt that the district court properly construed Spivack’s motion as a second or successive petition because it sought review on grounds that could have been reviewed in his first petition. For example, Spivack claimed that he was denied access to counsel at critical stages of his criminal proceedings. This claim could have been raised in his earlier petition, and Spivack offered no excuse for failing to do so. *See Stewart*, 646 F.3d at 859.

In addition, the district court had already issued a judgment on the merits as to his first petition. Under *Rivers* and *Boyd*, the district court had to construe Spivack’s motion as a second or successive petition and dismiss it. *See Rivers*, 605 U.S. at 457 n.5; *Boyd*, 114 F.4th at 1238 n.3.

Spivack is also wrong that the district court interpreted his petition as a motion to amend. The district court’s characterization of Spivack’s petition was temporary. Quoting from another district court case, it explained that it was following a procedure that the Third Circuit and others used. *See United States v. Santarelli*, 929 F.3d 95, 104–06 (3d Cir. 2019). It characterized the petition as a motion to amend temporarily, “[f]or case management purposes,” because it lacked jurisdiction while the appeal was pending, but, once the appeal was over, it could either dismiss the petition as second or successive or apply the Federal Rule of Civil Procedure 15 standard for amendments. While the Supreme Court has since disapproved of that case management technique, *see Rivers*, 605 U.S.

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at 457 n.5, even under that technique the result here would have been the same: dismissal of Spivack’s petition as second or successive after his first appeal failed, *see Santarelli*, 929 F.3d at 104–06.

Spivack counters that the district court was bound to stick to its earlier characterization of his petition as a motion to amend by the law-of-the-case doctrine. The doctrine “generally provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Musacchio v. United States*, 577 U.S. 237, 244–45 (2016) (citation modified). Because the district court’s characterization was temporary, it had not decided the issue at all, and the doctrine does not apply. But even if we treated the district court’s characterization as some kind of ruling, it would be a nonfinal one, and “district courts enjoy plenary power to reconsider non-final rulings.” *Hornady v. Outokumpu Stainless USA, LLC*, 118 F.4th 1367, 1380 (11th Cir. 2024).

Spivack also argues that the district court erred by not applying rule 15(a)’s presumption in favor of amendment. But “[r]ule 15(a), by its plain language, governs amendment of pleadings *before* judgment is entered; it has no application *after* judgment is entered.” *Jacobs*, 626 F.3d at 1344. So, “once the court has entered final judgment, [r]ule 15(a) no longer applies and no amendment is possible unless the judgment is first set aside.” *Boyd*, 114 F.4th at 1237. The second petition, therefore, could not have been a rule 15 motion to amend because the second petition was filed

after the district court had already entered judgment on the first petition.

Finally, Spivack contends that the district court abused its discretion in denying his rule 59 motion. “Post-judgment, the plaintiff may seek leave to amend if he is granted relief under [r]ule 59(e) or [r]ule 60(b)(6).” *Jacobs*, 626 F.3d at 1344–45 (citation modified). A rule 59 motion may be granted for newly discovered evidence or manifest errors of law or fact, but cannot be used to relitigate old matters, raise new arguments, or present evidence that could have been raised before the district court entered judgment. *Id.* at 1344. But that’s exactly what Spivack was trying to do here. His rule 59 motion simply repeated arguments that he had already made about how his previous motion should have been construed as one to amend.¹

CONCLUSION

Because Spivack had previously filed a habeas petition that was adjudicated on the merits, which was final as soon as the dis-

¹ Because the district court did not have jurisdiction to consider Spivack’s petition, we need not address his remaining arguments. He seeks to relitigate the characterization of his first habeas petition, our decision in the appeal of that matter, and a mixture of old claims from his previous petition and new ones. But “[w]ithout first obtaining [] authorization, the district court [was] without jurisdiction to consider the merits of a second or successive habeas petition.” *Telcy v. United States*, 20 F.4th 735, 740 (11th Cir. 2021) (citing *Farris*, 333 F.3d at 1216). So are we.

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trict court entered its order denying it, and because he did not receive our permission to file a second petition, we affirm the district court's dismissal of Spivack's petition for lack of subject-matter jurisdiction. Because the district court did not abuse its discretion in denying Spivack's rule 59 motion, we affirm also its denial of the motion.

AFFIRMED.