

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-50523

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

**CARLOS ZUNIGA HERNANDES, also known as CACA, also known as
Carlos Zuniga Hernandez,**

Defendant - Appellant

**Appeal from the United States District Court
for the Western District of Texas**

ON PETITION FOR REHEARING EN BANC

PER CURIAM:

- (✓) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.**
- () Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not**

disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35),
the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Patricia S. Higgins
UNITED STATES CIRCUIT JUDGE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-50523

UNITED STATES OF AMERICA,

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v.

CARLOS ZUNIGA HERNANDES, also known as CACA, also known as
Carlos Zuniga Hernandez,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas

O R D E R:

Carlos Zuniga Hernandez (Hernandes), federal prisoner # 82559-180, pleaded guilty to conspiracy to distribute and possess with intent to distribute cocaine and methamphetamine; he is serving a 262-month term of imprisonment. He moves for a certificate of appealability (COA) to appeal the district court's denial of his Federal Rule of Civil Procedure 60(d)(3) motion, which challenged the dismissal of his 28 U.S.C. § 2255 motion challenging this conviction. As he did below, Hernandez contends that the district court committed fraud by cancelling a scheduled conflict-of-interest hearing when he sought to substitute a retained attorney for appointed counsel in the underlying criminal proceedings. He maintains, as he did in an earlier Rule 60(b) motion, that this appointed attorney was operating under a conflict of

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interest because his retainer was paid by Hernandez's codefendant, which caused Hernandez and his family to suffer threats and harm to ensure that he pleaded guilty and did not cooperate with the Government by providing information against the codefendant.

To obtain a COA, Hernandez must make "a substantial showing of the denial of a constitutional right," which in turn requires him to show that reasonable jurists would find the district court's decision debatable or wrong, *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that his claims "are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). As Hernandez seeks a COA to appeal the denial of his Rule 60(d) motion, he must specifically show that reasonable jurists could debate whether the district court abused its discretion by denying his motion. *See, e.g., Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011) (Rule 60(b) motion).

Hernandez has failed to make the required showing. Accordingly, his request for a COA is DENIED. Hernandez's motion for leave to proceed in forma pauperis on appeal is likewise DENIED.



/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

A True Copy
Certified order issued May 02, 2018

Lyfe W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

FILED

MAY 30 2017

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION**

CLERK, U.S. DISTRICT COURT,
WESTERN DISTRICT OF TEXAS
BY [Signature]
DEPUTY CLERK

UNITED STATES of AMERICA,

Plaintiff-Respondent

V.

CARLOS ZUNIGA HERNANDES,
BoP # 82559-180,

Defendant-Movant

**Civil Action
No. SA-9-CA-938-OG**

Criminal Case
No. SA-6-CR-411(1)-OG

ORDER

Defendant Carlos Zuniga Hernandez' Motion for Relief From § 2255 Judgment (Docket Entry # 625), seeking reconsideration of this Court's March 22, 2011 Order denying and dismissing his 28 U.S.C. § 2255 Motion to Vacate Federal Sentence, construed as a successive § 2255 motion, is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction because the Court of Appeals has not authorized Defendant to file a successive § 2255 motion. *See* 28 U.S.C. § 2244(a)(3)(A); *U.S. v. Hernandez*, 708 F.3d 680, 681-82 (5th Cir. 2013) (explaining that a motion for reconsideration re-asserting a § 2255 claim on the merits or presenting a new claim is in effect a successive § 2255 motion).

Construing the Motion in the alternative as a Fed. R. Civ. P. 60(b) motion for relief from this Court's judgment challenging this Court's procedural rulings in denying and dismissing his § 2255 motion, the Motion is **DENIED** for the reasons stated in this Court's Memorandum Decision (Entry # 568). Defendant failed to identify an error of law or fact or other grounds warranting relief from judgment. Furthermore the Motion is untimely. See Fed. R. Civ. P. 60(c)(1) (providing such a motion "must be made within a reasonable time").

DATED: May 30, 2017

ORLANDO L. GARCIA
Chief United States District Judge

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