

# United States Court of Appeals for the Fifth Circuit



No. 21-40104

A True Copy  
Certified order issued Jun 02, 2021

*Tyler W. Cayer*  
Clerk, U.S. Court of Appeals, Fifth Circuit

IN RE: JOSE VICTOR HERNANDEZ-CUELLAR,

*Movant.*

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Motion for an order authorizing  
the United States District Court for the  
Eastern District of Texas to consider  
a successive 28 U.S.C. § 2255 motion

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Before HIGGINBOTHAM, SMITH, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Jose Victor Hernandez-Cuellar, federal prisoner # 26608-078, was charged with and convicted of sexual exploitation of children, and he was sentenced to 247 months of imprisonment. He now moves this court for authorization to file a second or successive motion pursuant to 28 U.S.C. § 2255. The district court dismissed his first § 2255 motion without prejudice for failure to prosecute.

Any § 2255 motion filed by Hernandez-Cuellar at this time would not be successive within the meaning of § 2255(h) or 28 U.S.C. § 2244(b)(3)(A), given that his first § 2255 motion was dismissed without prejudice prior to a final adjudication of the merits of his claims. *See In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997). Thus, Hernandez-Cuellar does not require

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authorization from this court to file a § 2255 motion in the district court. *See* § 2255(h); § 2244(b)(3)(A).

Accordingly, IT IS ORDERED that Hernandez-Cuellar's motion for authorization is DENIED as unnecessary.

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**United States Court of Appeals**

FIFTH CIRCUIT  
OFFICE OF THE CLERK

**LYLE W. CAYCE  
CLERK**

TEL. 504-310-7700  
600 S. MAESTRI PLACE,  
Suite 115  
NEW ORLEANS, LA 70130

July 08, 2021

#26608-078

Mr. Jose Victor Hernandez-Cuellar  
FCI Texarkana  
4001 Leopard Drive, P.O. Box 7000  
Texarkana, TX 75505-0000

No. 20-40865 USA v. Hernandez-Cuellar  
USDC No. 4:20-CV-134

Dear Mr. Hernandez-Cuellar,

We received your Motion for a Certificate of Appealability and Brief in Support. In light of the court's order of January 27, 2021 the appeal is closed, we are taking no action on this motion.

Sincerely,

LYLE W. CAYCE, Clerk



By:

Monica R. Washington, Deputy Clerk  
504-310-7705

cc: Ms. Marisa J. Miller \* \* \* S E E \* \* \*

On JUNE 14, 2021., I, Hernandez Cuellar Jose Victor, mailed a "Motion for a Certificate of Appealability (COA)" to the Appeals Court of the 5th Circuit. In it Showing multiple Constitutional issues, due to the strength of my reasons, the Appellate Court docketed the Motion into ANOTHER Appeal Case (21-40051). I try to correct the issue and I send the COA again with a cover letter point out the Court error, then the Appellate Court placed the COA into ANOTHER Appeal Case Again (20-40865-this letter), then dismissed. It seems like the Court are using "procedures" to avoid underlying Constitutional claims. The Court have not address the Constitutional issues that I presented which leaves ONLY the Supreme Court to satisfied my 1st Amendment Right of redress of grievances.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

JOSE HERNANDEZ-CUELLAR #26608-078 §  
§  
VS. §  
§  
UNITED STATES OF AMERICA §

CIVIL ACTION NO. 4:20cv134  
CRIMINAL ACTION NO. 4:16cr111(1)

**ORDER OF DISMISSAL**

This civil action was referred to United States Magistrate Judge Kimberly C. Priest Johnson. The Report and Recommendation of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. No objections were timely filed. The Court concludes that the findings and conclusions of the Magistrate Judge are correct, and adopts the same as the findings and conclusions of the Court.

It is therefore **ORDERED** the motion to vacate, set aside, or correct sentence is **DISMISSED** without prejudice. It is further **ORDERED** all motions by either party not previously ruled on are hereby **DENIED**.

**SIGNED** this 20th day of July, 2020.

  
AMOS L. MAZZANT  
UNITED STATES DISTRICT JUDGE

Appendix

# United States Court of Appeals for the Fifth Circuit

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No. 20-40865

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United States Court of Appeals  
Fifth Circuit

**FILED**

January 27, 2021

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

JOSE VICTOR HERNANDEZ-CUELLAR,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Eastern District of Texas  
No. 4:20-CV-134

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Before HIGGINBOTHAM, SMITH, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

This court must examine the basis of its jurisdiction, on its own motion if necessary. *Hill v. City of Seven Points*, 230 F.3d 167, 169 (5th Cir. 2000). Under 28 U.S.C. § 2107(b) and Federal Rule of Appellate Procedure 4(a)(1)(B), the notice of appeal in a civil action in which the United States is a party must be filed within sixty days of entry of the judgment or order from which appeal is taken. A motion brought under 28 U.S.C. § 2255 is a civil action to which the sixty-day appeal period applies. *United States v. de los Reyes*, 842 F.2d 755, 757 (5th Cir. 1988).

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In this § 2255 proceeding, the final judgment was entered on July 20, 2020, so the final day for filing a timely notice of appeal was September 18, 2020. The defendant's *pro se* notice of appeal is dated December 16, 2020, and it was filed on December 21, 2020. Because the notice of appeal is so dated, it could not have been deposited in the prison's mail system within the prescribed time. *See FED. R. APP. P. 4(c)(1)* (stating that a prisoner's *pro se* notice of appeal is timely filed if deposited in the institution's internal mail system on or before the last day for filing). When set by statute, the time limit for filing a notice of appeal in a civil case is jurisdictional. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017); *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

The lack of a timely notice mandates dismissal of the appeal. *United States v. Garcia-Machado*, 845 F.2d 492, 493 (5th Cir. 1988). Accordingly, the appeal is DISMISSED for want of jurisdiction. All pending motions are DENIED.

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