

No. 21-7938

SUPREME COURT OF THE UNITED STATES

Larry Wayne Kimes

Petitioner,

vs.

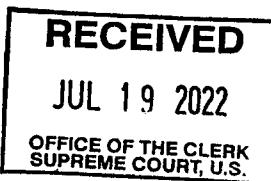
United States Of America,

Respondent.

**On Petition for Writ Of Certiorari to
the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR REHEARING

Larry Wayne Kimes, Petitioner *pro se*
2225 Normandy Dr.
Irving, Texas 75060



Pursuant to U.S. Sup. Ct. R. 44(2), Petitioner, Larry Wayne Kimes ("Kimes"), presents his petition for a rehearing of the above-entitled cause, and in support thereof, respectfully shows:

I. QUESTIONS PRESENTED

1. An article was recently published in the American Bar Journal on June 14, 2022, entitled "Texas federal judge proclaims that he doesn't read Fifth Circuit opinions before second reversal." The article was about Judge Biery. He admitted, on the record and in open court, that he did not follow the case law set forth by the United States Circuit Court of Appeals for the Fifth Circuit ("Fifth Circuit"). It now appears that Judge Biery failed to follow other controlling laws, such as the Rules Governing Section 2255 Proceedings, much to the detriment of Kimes and his family.

Was it judicial misconduct or reversible error for Judge Biery to ignore compelling legal precedent set forth by the Fifth Circuit and other controlling laws when it denied Kimes' motions?

2. Obviously, the Court is well aware of the several adverse events that have occurred in the last few weeks. These events may have distracted and stressed the Court and its staff. The petition was timely filed on May 6, 2022. The petition was then distributed to the Court for the conference on June 16, 2022. The petition was denied on June 21, 2022.

With all of the disruption generated by the Court's recent rulings; the wholly improper and offensive threats to the safety of the justices and their staff; the failure of the Department of Justice to provide security and protection, and the attempted assassination of Justice Kavanaugh, was the Court in a position to thoroughly review and analyze Kimes' petition for a writ of certiorari in such a relatively short time, considering the immense, uncalled for, and unjustified pressure exerted upon the Court and its staff.

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¹ The current version of the Local Rules of the Western District of Texas does not appear to have Rule CV-3(b)(7).

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IV. GROUNDS FOR REHEARING

Intervening Circumstances of a Substantial or Controlling Effect or Other Substantial Grounds Not Previously Presented

1. On June 10, 2022, the Honorable Fred S. Biery ("Judge Biery"), the trial court judge in this case, admitted on the record and in open court that he does not read Fifth Circuit opinions.

In numerous motions and briefs before Judge Biery, including the denial of the motion filed in this case under Fed. Rules Civ. Pro. R 60, it only now appears that Judge Biery may have ignored compelling case law and other controlling laws.

Ignoring the law of the case is either judicial misconduct, impropriety, or the appearance of judicial misconduct and impropriety.

Kimes has repeatedly argued that he is actually innocent.

Judge Biery's acts and omissions caused Kimes to suffer great prejudice by being sentenced to twelve years of incarceration, of which Kimes has served over eight years, and an order to pay \$132,000,000.00 in restitution.

2. Recent Court rulings have caused undeserved and adverse events. These events may have distracted and stressed the Court and its staff. Understandably, these events added pressure may have precluded a thorough review and analysis of the petition for the writ of certiorari. Kimes respectfully requests a comprehensive review.

3. This case presents an issue of national importance. When federal courts do not do what is legally, morally, and ethically expected, justice is not served, and thousands and thousands of lives are adversely affected.

V. INTERVENING CIRCUMSTANCES OF A SUBSTANTIAL OR CONTROLLING EFFECT OR OTHER SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED

This case appears to be a case of first impression, as Kimes has found no case law on this exact type of matter.

On June 14, 2022, the weekly newsletter of the American Bar Association (“ABA”), the American Bar Journal, published an article by Debra Cassens Weiss entitled, “Texas federal judge proclaims that he does not read Fifth Circuit opinions before second reversal.” This article was about Judge Fred S. Biery, Kimes’ trial judge. See Appendix pp. 30 to 32.

According to the article, Judge Biery stated:

“I follow Judge (Lucius Desha) Bunton’s rule about 5th Circuit opinions: ‘They can reverse me if they want to, but they can’t make me read it,’ which I’m glad you all have read it. But I also – if my recollection is correct, none of those fine judges have ever tried a case or dealt with what we deal with on the street. But, anyway, what do I know?”

The Fifth Circuit in *U.S. v. Raymond McKinney*, Unpublished Opinion No. 21-50308, included this exact language in a footnote to its opinion. See Appendix pp. 27 to 29.

Judge Biery told the ABA Journal that his remarks were no more than “courtroom banter” and that he had read the opinions. Did he read the opinions? Has he ever read Fifth Circuit opinions? Who knows?

If the ABA Journal thought Judge Biery’s comments were important enough to include in its weekly newsletter, it should be significant enough to form the basis for Kimes’ petition for rehearing.

The appearance of impropriety or judicial misconduct is overwhelming.

Unimaginably, Judge Biery also insulted all of the judges of the Fifth Circuit.

If Judge Biery does not read Fifth Circuit opinions, all the briefs Kimes filed related to his Fed. R. Civ. Pro 60 Motion (the “Rule 60 Motion” -- See Appendix pp. 1 to 26) or Kimes’ motion under 28 U.S.C. § 2255 (the 2255 Motion”), on which the Rule 60 Motion was based, were useless. The Rule 60 Motion and briefs included compelling Fifth Circuit law and other controlling laws or rules. If Judge Biery had followed established case law, Kimes would have prevailed, and his case would have been dismissed, or, at a minimum, Kimes would have been granted a new trial.

There is no evidence that the laws were carefully considered or even read.

Judge Biery considered Kimes guilty from the very beginning of the case. Judge Biery ignored prevailing law and denied all Kimes’ filings because of gross negligence and bias. Numerous comments from the bench, his acts, and his omissions prove this contention, and, upon request by the Court, Kimes will provide these.

If his statements were not factual, why would he make them? This is certainly something that a sitting judge should do so frivolously. At a minimum, the appearance of bias and potential misconduct throws Judge Biery's rulings into question.

Kimes has argued to every court that he is actually innocent, but his arguments have been summarily denied by Judge Biery, the Fifth Circuit, and this Court. This appeal is Kimes’ last realistic chance for justice.

Judge Biery's failure is unconscionable and forms the basis for claims of misconduct by the Judicial Council of the Fifth Circuit and the State Bar of Texas.

If Judge Biery has ignored Fifth Circuit case law and other controlling laws, there can be little doubt that he has also ignored the case law cited from rulings and opinions from other circuits or this Court. Judge Biery does what he wants to do, which is "just plain wrong," as we say in Texas.

Kimes has personally witnessed Judge Biery's acts and omissions. In Kimes' opinion, Judge Biery runs his court based on what he wants to do, not the law. He appears narcissistic and believes no person is more intelligent than he. I respectfully allege that Judge Biery is, in effect, a despot, which, according to the Merriam-Webster dictionary, is one exercising power tyrannically or a person exercising absolute power brutally or oppressively.

None of the acts or omissions Kimes alleges are appropriate or acceptable behavior for any judge.

Kimes' various motions filed in the district court, including motions under 28 U.S.C. § 2255, the Rules Governing Section 2255 Proceedings, and Fed. R. Civ. Pro 60 and all related briefs, were tainted. Judge Biery's rulings should be set aside and Kimes' conviction vacated. The briefs relied heavily on compelling Fifth Circuit case law and other controlling laws.

Despite three requests for guidance in filing a brief in support of the 2255 Motion, all of which were ignored by Judge Biery, Kimes was never able to file the brief. Kimes did, however, file motions and briefs related to several other matters.

related to Kimes' 2255 Motion. Judge Biery ignored these motions and supporting briefs. They were all denied AFTER Judge Biery denied the 2255 Motion. They would not have been denied had he acted upon them BEFORE denying the 2255 Motion

Kimes was sentenced to twelve years. Kimes is now in his ninth year of incarceration. Kimes was also ordered to pay restitution in the enormous, unsupported, and contested amount of \$132,000,000.00, which Kimes will never be able to pay.

As a direct and proximate result of judicial misconduct and egregious behavior, in addition to his 12-year sentence and restitution, Kimes has also lost his career as a certified public accountant, which has deprived Kimes of income he would have earned, the loss of a 25-year romantic relationship, and prevented Kimes from being with his family and friends.

It now, and only now, appears probable that Kimes' 2255 Motion, and related filings, were denied because of Judge Biery's unimaginable failure to follow compelling Fifth Circuit case law and other controlling laws, such as Fed. Crim. Pro. Rule 11(b)(1) and 11(b)(3), Fed. Crim. Pro. Rule 35(a), 18 U.S.C. §3553(a), and the Rules Governing Section 2255 Proceedings. There is no other plausible explanation for why Kimes' various motions were denied. Based on his recent statements, Judge Biery may have never read Kimes' briefs in support of the various motions filed in the district court or, most importantly, the Rule 60 Motion. In the Appendix, Kimes has set forth compelling and apparent examples of Judge Biery's multiple failures to follow the law.

For reasons known only to Judge Biery, he did not want Kimes to prevail. This is bias, judicial misconduct, and injustice of the highest order.

Judge Biery attempted to withdraw his statements by referring to his comments as “courtroom banter.” No one can know if Judge Biery was being truthful when he admitted that he stated that he did not follow Fifth Circuit precedent. Judge Biery erred egregiously and without remorse when he said he did not follow Fifth Circuit precedent. All his rulings are now tainted by his contradictory statements and, therefore, unreliable. His remarks bring all of his denials of motions, especially those of this *pro se* defendant, into question.

For example, this situation is similar to someone telling another person, “I slept with your spouse.” Even if one’s spouse denies it, the seed has been planted. The unoffending spouse may always wonder what the truth is. Judge Biery’s rulings are now in doubt and will forever be in doubt because he admitted it in open court and on the record and then later contradicted it, causing great confusion.

By ignoring Fifth Circuit case law and other controlling laws, Judge Biery’s failure to follow clear law supporting Kimes’ claims draws into question whether Kimes’ *pro se* defense was destroyed and whether Kimes received due process of law as required by the Constitution. There has been no semblance of justice in this case.

VI. JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 44.2.

VII. CANONS AND LAW RELATED TO JUDICIAL MISCONDUCT

The Code of Conduct for United States Judges, Canons 1, 2, and 3 applies to this case. Relevant excerpts of the canons and their commentary are below:

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct

Pt. A: Codes of Conduct

Ch. 2: Code of Conduct for United States Judges

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A. *Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

COMMENTARY

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges, including harassment and other inappropriate workplace behavior. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased. The judge should adhere to the following standards:

Canon 3(A)(4) states, in pertinent part:

“A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law.”

The website from which the above language came is:

[Code of Conduct for United States Judges | United States Courts \(uscourts.gov\)](https://www.ustc.ustc.gov/judicial-conduct-and-disability-proceedings/article-ii-misconduct-and-disability)

The same is true of Rules for Judicial-Conduct and Judicial-Disability Proceedings, Article II. Misconduct and Disability, USCS Jud. Con. And Disab. Proc. 4(a)(6). The following are relevant excerpts from 4(a)(6):

(a) Misconduct Generally. Cognizable Misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts. Cognizable misconduct includes, but is not limited to, the following:

(6) Failure to Report or Disclose. Cognizable misconduct includes failing to call to the attention of the relevant chief district judge or chief circuit judge any reliable information reasonably likely to constitute judicial misconduct or disability.

If Judge Biery did not follow the law of the Fifth Circuit and other controlling laws, he was duty-bound to report that information as required by the preceding rule.

VIII. EXAMPLES OF ISSUES FOR WHICH JUDGE BIERY FAILED TO FOLLOW THE LAW

In addition to the law decided by the Fifth Circuit and other appeals courts, Judge Biery failed to follow or read other controlling laws. Some of the controlling laws he failed to follow are:

Fed. R. Crim. Pro. 11

Fed. R. Crim. Pro. 35(a)

18 U.S.C. § 3553(a)

28 U.S.C. § 2255(b)

USCS § 2255 Proc. Rules 6, 7, and 8

Judge Biery, throughout this case, chose to follow the law he believed supported his rulings and ignore the law that supported Kimes claims in the 2255 Motion and the Rule 60 Motion.

These are many examples of law that Judge Biery did not follow, much to Kimes' detriment; some of these are explained in detail below:

Judge Biery Refused to Allow Kimes to Speak at the Plea Colloquy:

On January 16, 2014, when Kimes pleaded guilty, he asked Judge Biery if he could speak. Kimes wanted to tell Judge Biery that the plea had been obtained through duress and coercion. Kimes could not expect the prosecutor or trial attorney to inform the judge. Judge Biery told Kimes that Kimes could not talk because Kimes had an attorney to do the talking for him. If Judge Biery had allowed Kimes to speak, at a minimum, Kimes' complaint would be in the record. See Canon 3 *supra*.

Judge Biery Failed to Comply with Fed. R. Crim. P. 11 at the Plea Colloquy:

Fed. R. Crim. P. 11 requires that certain things happen at the plea colloquy. Rule 11(b)(1) states: ("During this address, the court must inform the defendant of, and determine that the defendant understands the following:")

This rule is not optional. Judge Biery was required to comply with the rules.

No careful and objective review of the record will reveal that Judge Biery addressed the following four (4) sections of Rule 11(b):

- A. Rule 11(b)(1)(G). The nature of each charge to which the defendant was pleading.
- B. Rule 11(b)(1)(M). The sentencing guidelines and other sentencing factors in 18 U.S.C. §3553(a).
- C. Rule 11(b)(1)(N). The terms of any plea agreement provisions waiving the right to appeal or to collaterally attack the sentence.
- D. Rule 11(b)(3). The factual basis for the plea. During the colloquy, the district court asked Kimes, "And have you gone over these several pages of factual basis here

with Mr. Langlois today?" Kimes answered, "No, sir." (DE¹ 167, Page 22, Lines 19 to 22.) This alone forms the basis for setting aside the Plea Agreement. Because the district court did not follow the procedures outlined in Rule 11, the plea was not knowing and voluntary, and the law requires that the conviction be vacated. At a minimum, the appeal waivers should not be enforced because to do so would be an injustice. The lack of a factual basis for the plea can never be a harmless error. *U.S. v. Bennett*, 291 F.3d 88, 895 (6th Cir. 2002).

Judge Biery Failed to Hold the Hearing Required by Rule 35(a):

"Defendant's Motion for Rule 35 Re-Sentencing for Clear Error" under Fed. R. Crim. Pro. 35(a) was timely filed. (DE¹ 137 and DE 138). A request for a hearing, although not required, was also timely filed. (DE 140.) Judge Biery ignored both filings, did not hold the required hearing, and denied the motion after the 10-day requirement. (DE 154 and DE 155.) This failure is a clear example of Judge Biery making his own rules and ignoring the controlling law.

Judge Biery Failed to Follow the Requirements of 18 U.S.C. § 3553:

As a result, Kimes received a disparate sentence.

Judge Biery Refused to Provide Requested Guidance Relative to a Brief in Support of the 2255 Motion:

Judge Biery did not respond to any of Kimes' numerous requests for guidance in preparing a brief in support of the 2255 Motion, thereby preventing or interfering with Kimes' ability to prepare and file a brief in support of the 2255 Motion.

Judge Biery Failed to Hold the Required Evidentiary Hearing on the Rule 2255 Motion and Failed to follow USCS § 2255 Proc. Rule 8:

¹ "DE" refers to the Docket Number in the trial court.

Kimes pointed out Judge Biery's obligation to hold an evidentiary hearing in his "Motion Relative to Brief in Support of Motion Filed Pursuant to 28 U.S.C. Section 2255" (DE 330). The Motion contained the following language in paragraph 13:

"Pursuant to 28 U.S.C. Section 2255(b), "the court SHALL ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law." (Emphasis added.) Rule 8(b) of the Rules Governing Section 2255 Proceedings and Rule CV-3(b)(7) of the Local Rules of Court support this requirement. Kimes' brief is intended to assist the magistrate judge and the Court in that process."

Judge Biery Denied Motions that Should have Been Granted:

Judge Biery denied Kimes' 2255 Motion without granting his related motions and failed to consider the briefs and other pleadings filed supporting the 2255 Motion and supporting motions. These denials prevented Kimes from proving the facts and allegations contained in the 2255 Motion and led to the filing of the Rule 60 Motion that is the subject of this appeal. The Appendix contains all relevant motions and briefs. The motions and briefs are included for the convenience of the Court. The briefs show how many laws were ignored or never considered by Judge Biery. If requested, Kimes will provide copies to the Court.

Judge Biery Improperly Denied the Rule 60 Motion:

Had Judge Biery followed the law relative to the Rule 60 Motion (DE 368), Kimes would have prevailed.

In its denial of the Rule 60 Motion, the district court said that the issues raised were successive. (DE 372). They were clearly not, as no merits issues were raised. The 2255 Motion addressed only the merits of Kimes' claims, and the Rule 60 Motion

addressed only procedural errors related to the denial of the 2255 Motion and ineffective assistance of appellate counsel. Appellate counsel filed only an *Anders* brief, even though numerous issues could have formed the basis for a successful appeal.

The issues presented to the district court were supported by briefs containing facts, case law, rules, and statutes necessary for the Kimes to prevail, yet he did not.

Judge Biery Failed to Follow Fed. R. Civ. Pro. R. 52(a)(1):

In denying the 2255 Motion and the subsequent Rule 60 Motion, Judge Biery failed to adhere to the requirements of Fed. R. Civ. Pro. R. 52(a)(1).

Compliance with Rule 52 is mandatory. *Lettsome v. United States*, 434 F.2d 907, 909 (5th Cir. 1970), supported by a long line of cases, held that findings of fact and conclusions of law are mandatory and must be sufficient in detail and exactness to indicate the factual basis for the ultimate conclusion reached by the court. *Also see Acme Boat Rentals, Inc. v. J. Ray McDermott & Co.*, 407 F.2d 1324, 1325 (5th Cir. 1969).

Findings of fact and conclusions of law are conspicuous in their absence from the district court's record.

The Fifth Circuit held in *In re Incident Aboard the D/B Ocean King*, 758 F.2d 1063, 1072 (5th Cir. 1985), ("Where the trial court fails to prepare findings of fact and conclusions of law, the proper procedure is to vacate the judgment and remand the case for such findings.")

IX. REASONS FOR GRANTING THE PETITION FOR REHEARING

I. By ignoring controlling and compelling law, Judge Biery failed to perform the duties with which he was faithfully charged. Allowing federal judges to rule in any way that suits them, regardless of the law, is wrong in many ways. If this type of jurisprudence is allowed to continue without severe consequences, it will eat at the heart of what is right and wrong in our criminal judicial system.

II. Considering the amount of excessive pressure that has been exerted on the Court and its staff, it is reasonable to believe that the Court may have been prevented from thoroughly reviewing and analyzing the petition for a writ of certiorari because of a shortage of time caused by time spent dealing with the threats and other outside pressures on the Court, such as protests.

III. This case presents an issue of national importance. The district court failed to follow Fifth Circuit case law and other controlling laws, thereby ignoring the principles of justice and fair play that lie at the heart of American jurisprudence. This practice should be eliminated or discouraged wherever and whenever it occurs in the federal criminal justice system. To do otherwise enables federal judges to do what they want, regardless of canons, rules, statutes, and controlling and compelling case law rendered by the Fifth Circuit, other circuits, and this Court.

When federal courts do not do what is legally, morally, and ethically expected of them in cases filed by *pro se* litigants and in cases filed by *pro se* inmates, thousands and thousands of lives are adversely affected. This includes litigants and their families.

X. CONCLUSION

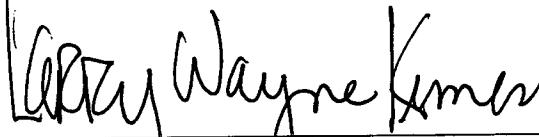
For the foregoing reasons, Kimes respectfully requests that this Court grant this Petition for Rehearing.

Additionally, or alternatively, Kimes respectfully moves this Court to either dismiss the case against Kimes in its entirety or remand it to the district court for a new trial. If a new trial is ordered, Kimes respectfully request that this case be transferred to the Northern District of Texas, Dallas Division. Throughout this case, Kimes has resided in Irving, Texas, a suburb of Dallas. If this case is remanded to the Western District, Kimes respectfully requests that it be assigned to a judge other than Judge Biery.

Pursuant to 28 U.S.C. § 1746, I, Larry Wayne Kimes, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: July 15, 2022.

Respectfully submitted,



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Irving, Texas 75060

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SUPREME COURT OF THE UNITED STATES

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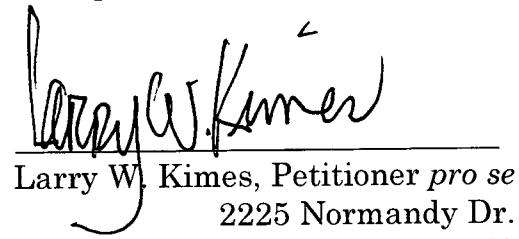
On Petition for a Writ Of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

RULE 44 CERTIFICATE

As required by Supreme Court Rule 44.2, I certify that the Petition for Rehearing is limited to "intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented," and that the Petition is presented in good faith and not for delay.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 15, 2022.



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