

JUL 22 2022

OFFICE OF THE CLERK

No. 22-5647IN THE  
SUPREME COURT OF THE UNITED STATESJOSE ANTONIO GUERRERO-YANEZ PETITIONER  
(Your Name)

VS.

BOBBY LUMPKIN, DIRECTOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOSE ANTONIO GUERRERO-YANEZ  
(Your Name)#1926789, CLEMENTS UNIT, 9601 SPUR 591  
(Address)AMARILLO, TEXAS 79107-9606  
(City, State, Zip Code)N/A  
(Phone Number)**ORIGINAL**

**QUESTION(S) PRESENTED**

- (1) Did the United States Court of Appeals for the Fifth Circuit misapply 28 U.S.C. §2253 by requiring Petitioner to be granted a Certificate of Appealability as prerequisite in order to appeal the denial of his Rule 60(b) Motion in the District Court thereby infringing his rights to petition for the redress of grievances as guaranteed by the First Amendment and, or the Due Process Clause of the Fifth Amendment?

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## **RELATED CASES**

**None.**

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APPENDIX C	United States Court of Appeals for the Fifth Circuit, No. 21-50172 Denial of Rehearing/Rehearing En Banc.
APPENDIX D	Petition for Rehearing or Rehearing En Banc, No. 21-50172.

### APPENDIX E

### APPENDIX F

Appendix B (Supplemented) with ORDER (Dkt. #14), Final  
Judgement (Dkt. #15), and Docket Sheet. Though  
required by S.Ct. R. 14.1(i), the ORDER at issue in  
the Petition is the Text Only ORDER of 2/8/2021. See  
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## TABLE OF AUTHORITIES CITED

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## OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

**[X] For cases from **federal courts**:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished. No. 21-50172

The opinion of the United States district court appears at Appendix B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished. No. 6:18-cv-273-ADA, Text Only Order 02/08/2021

**[ ] For cases from **state courts**:**

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 25, 2022.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 25, 2022, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

First Amendment, Petition Clause

Fifth Amendment, Due Process Clause

Federal Statutes:

Title 28: § 2244(a)(6)  
2244(d)(1)(A)

2253

2254

Federal Rules of Civil Procedure, Rule 60(b)

### STATEMENT OF THE CASE

Petitioner filed a Rule 60(b) Motion, Federal Rules of Civil Procedure in the United States District Court on February 5, 2021 challenging the application of the AEDPA time bar under 28 U.S.C. §2244(d)(1)(A) to his §2254 Petition. No. 6:18-cv-273-ADA (W.D.Tex.), Dkt. #20. That Rule 60(b) Motion is not a subsequent §2254 petition. The District Court denied the Rule 60(b) Motion on February 8, 2021 in a text only Order - no associated document. Petitioner filed a Notice of Appeal on March 5, 2021. Dkt. #21.

The Fifth Circuit required Petitioner to obtain a Certificate of Appealability (hereafter "COA") in order to appeal the denial of his Rule 60(b) Motion. With the denial of a COA to appeal, he was denied his right to appeal. Case No. 21-50172, Doc.: 00516253907, 3-25-2022. A timely Petition for Rehearing or Rehearing En Banc (Appendix D) was denied. Doc.: 00516292718, 4-25-2022, Appendix C. This Petition for a Writ of Certiorari to the Supreme Court of the United States seasonably follows.

### REASONS FOR GRANTING THE PETITION

The Fifth Circuit is misapplying 28 U.S.C. §2253 to require a COA in order to appeal the postjudgement denial of his Rule 60(b) Motion. Not only did the misapplication of the COA requirement occur in Petitioner's case, it is standardized Circuit precedent. Whats more, the Circuit Courts are split as to requiring a COA to appeal the denial of a postjudgement order under either Rule 59 or 60.

Whether it is a prejudgement order appealed interlocutory, or a postjudgement order, 28 U.S.C. §2253 is inapposite. That statute clearly applies only to "the final order in a habeas corpus proceeding" under 28 U.S.C. §§2254 or 2255. For any United States Court of Appeals to require a COA in order to appeal the denial of a pre- or post-judgement order not only rewrites the law as passed by Congress, but also in doing so infringes countless petitioners' - including Petitioner Guerrero-Yenez - of their First Amendment right to petition the Government for the redress of grievances along with their Fifth Amendment right to due process. The only lawful way a COA could be required of a Rule 60(b) movant is if his putative motion is recharacterized as a subsequent writ. See 28 U.S.C. §2244(a),(b).

Due to the vast number of cases wherein 28 U.S.C. §2253 is misapplied by the Fifth Circuit along with their being a Circuit split on the application of the COA requirement for judgements other than the final order in a federal habeas corpus proceeding, this Court should GRANT the Petition for a Writ of Certiorari and review this issue. Until such time as Congress extends the COA requirement or else chooses not to do so, the law as written needs to be properly enforced.

## AUTHORITIES

A COA is necessary ONLY to challenge "the final order in a habeas corpus proceeding" (28 U.S.C. §2253(c)(1)(A)) or "the final order in a proceeding under section 2255." (28 U.S.C. §2253(c)(1)(B)). As for an interlocutory appeal, a §2254 petition remains pending and thus there ~~is no~~<sup>is no</sup> "final order in [the] habeas corpus proceeding." Despite the clear language of §2253, courts are divided on whether an appeal taken during a habeas corpus proceeding requires a COA. See Wolfe v. Bryant, 678 Fed. Appx. 631 (10<sup>th</sup> Cir. 2017) (collecting case).

As for the Fifth Circuit, "a COA is not necessary to appeal the denial of funds for expert assistance." Smith v. Dretke, 422 F.3d 269, 288 (5<sup>th</sup> Cir. 2005); Ayesta v. Stephens, 817 F.3d 888, 895 (5<sup>th</sup> Cir. 2016); Sorto v. Davis, 859 F.3d 356, 358 n.1 (5<sup>th</sup> Cir. 2017). A COA is not necessary to appeal the denial of an evidentiary hearing. Normon v. Stephens, 817 F.3d 226, 234 (5<sup>th</sup> Cir. 2016). A COA is not required to appeal an order that merely denies a motion to enlarge authority of appointed counsel. Harbinson v. Bell, 556 U.S. 180 (2009). "A COA is not required to review a district court's ruling on a non-merits issue such as a stay. See Dunn v. Cockrell, 302 F.3d 491, 492 (5<sup>th</sup> Cir. 2002)(per curiam)(holding that a COA is not required to appeal the denial of a Rule 60 motion)." Young v. Stephens, 795 F.3d 484, 494 (5<sup>th</sup> Cir. 2015). A COA is not necessary for an interlocutory appeal under 28 U.S.C. §1292(a)(1) appealing the denial of a Petition for Injunctive Relief filed as part of a §2254 proceeding. See Warterfield v. Davis, No. 18-40936, Order

Feb. 18, 2020, Hon. James C. Ho, Cir. Judge)(not published).

Nevertheless, the Fifth Circuit required this Petitioner to obtain a COA to appeal the denial of his Rule 60(b) Motion. See per curiam Opinion, Mar. 25, 2022, No. 21-50172, pages 1-2, ("To the extent that he contends that he does not require a COA to proceed, his claim is unavailing. See Ochoa-canales v. Quarterman, 507 F.3d 884, 888 (5<sup>th</sup> Cir. 2007)"). Appendix A.

#### CONCLUSION

Based on the patent misapplication of the §2253 statute clearly stated by Congress, the Fifth Circuit repeatedly denies petitioners their First Amendment right to petition and their Fifth Amendment right to due process. "Considerable historic evidence indicates that 'due process of law' merely required executive and judicial actions to comply with legislative enactments and the common law when depriving a person of life, liberty, and property." Dobbs v. Jackson Women's Health, No. 19-1392 (Thomas, J., concurring). Requiring a COA to appeal the denial of a Rule 60(b) motion is a judicial action that does not comply with 28 U.S.C. §2253. Whats more, United States Courts of Appeals are split on when and when not to require a COA to proceed on appeal of pre- or pos-judgement orders. For said reasons, Petitioner Guerrero-Yanez respectfully asks that this Honorable Court GRANT this Petition.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jose A. Gómez-Ariza

Date: July 21, 2022

Respectfully resubmitted,

Jose Antorro Gómez

Date: August 22, 2022