

## APPENDIX-A

1. REPLIED LETTER FROM U.S.C.A FOR THE FIFTH CIRCUIT COURT CLERK FROM REQUESTED COPY OF JUDGMENT FROM 4-5-23, ON DENIAL OF REHEARING, WITH ATTACHED 2 PAGE JUDGMENT DATED BACK TO SAME JUDGMENT FROM JAN. 26, 2023.
2. A LETTER FROM U.S.C.A. FOR THE 5TH CIR. COURT CLERK STATING THAT ENCLOSED IS A COPY OF THE JUDGMENT ISSUED AS THE MANDATE (CLERK NEVER SENT COPY OF JUDGMENT TO PETITIONER) THIS LETTER IS DATED ON 4-5-23.
3. A COPY OF ORDER DENYING PETITION FOR REHEARING AND/OR REHEARING EN BANC, WITH A COVER LETTER STATING SEE LOCAL RULES 41 FOR STAY OF MANDATE, DATED ORDER ON MARCH 28, 2023.
4. A NOTICE FROM U.S.C.A. FOR THE 5TH CIR. COURT CLERK STATING THAT PETITION WAS ACCEPTED IN ITS PRESENT FORM, AND IT WAS FILED ON FEB. 8, 2023.
5. DENIAL OF COA ON A UNPUBLISHED ORDER DATED ON JAN. 26, 2023, AND COVER LETTER STATING TO SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.
6. A ORDER TO U.S.D.C., REMANDING CASE FOR LIMITED PURPOSE ALLOWING DISTRICT COURT TO GRANT OR DENY COA AS TO THE RULE 59(e) MOTION.
7. U.S.D.C. REPLIED ORDER TO THE U.S.C.A FOR THE 5TH CIRCUIT AS TO THE LIMITED PURPOSE OF COA RULING DENYING RULE 59(e) PROCEEDINGS ON COA.

TOTAL ENCLOSED DOCS. 22 PAGES

United States Court of Appeals  
for the Fifth Circuit

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United States Court of Appeals  
Fifth Circuit

**FILED**

January 26, 2023

Lyle W. Cayce  
Clerk

No. 22-20446

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OMAR JAVIER TORRES,

*Petitioner—Appellant,*

*versus*

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,  
Correctional Institutions Division,*

*Respondent—Appellee.*

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Application for Certificate of Appealability  
the United States District Court  
for the Southern District of Texas  
USDC No. 4:21-CV-673

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UNPUBLISHED ORDER

Before STEWART, WILLETT, and DOUGLAS, *Circuit Judges.*

PER CURIAM:

Omar Javier Torres, Texas prisoner #01739119, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 application and the denial of his motion for reconsideration under Federal Rule of Civil Procedure 59(e), wherein Torres challenged his conviction for capital murder. His § 2254 application raised claims that his due process and equal protection rights were violated and that the state

courts violated their own laws in connection with his allegation that parts of his state court trial record were nefariously altered after the trial in an effort to conceal various errors. He also claimed that he was actually innocent. The district court dismissed the application on the ground that his claims were not cognizable in federal habeas proceedings and additionally because his claims were unexhausted.

Because Torres fails to “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong” or that “jurists of reason would find it debatable whether the district court was correct in its procedural ruling,” a COA is DENIED. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As Torres fails to make the required showing for a COA, we do not reach whether the district court erred by failing to conduct an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).<sup>1</sup>

United States Court of Appeals  
for the Fifth Circuit

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United States Court of Appeals  
Fifth Circuit

**FILED**

November 11, 2022

Lyle W. Cayce  
Clerk

OMAR JAVIER TORRES,

*Petitioner—Appellant,*

*versus*

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,  
Correctional Institutions Division,*

*Respondent—Appellee.*

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Application for Certificate of Appealability from the  
United States District Court for the Southern District of Texas  
USDC No. 4:21-CV-673

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ORDER:

Omar Javier Torres, Texas prisoner # 01786125, seeks a certificate of appealability (COA) to appeal both the district court's denial of his 28 U.S.C. § 2254 application and his motion for reconsideration under Federal Rule of Civil Procedure 59(e). Because the district court has not yet ruled on whether a COA should be granted or denied for the issues raised in the Rule 59(e) motion, his COA motion in this court is HELD IN ABEYANCE, and the case is REMANDED for the limited purpose of allowing the district court to grant or deny a COA as to the Rule 59(e) motion.

No. 22-20446

*See Black v. Davis*, 902 F.3d 541, 543, 545 (5th Cir. 2018); *Cardenas v. Thaler*, 651 F.3d 442, 443-44 (5th Cir. 2011).

/s/ *Leslie H. Southwick*

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LESLIE H. SOUTHWICK  
*United States Circuit Judge*

United States Court of Appeals  
for the Fifth Circuit

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No. 22-20446

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OMAR JAVIER TORRES,

*Petitioner—Appellant,*

*versus*

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,  
Correctional Institutions Division,*

*Respondent—Appellee.*

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:21-CV-673

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ON MOTION FOR RECONSIDERATION  
AND REHEARING EN BANC

UNPUBLISHED ORDER

Before STEWART, WILLETT, and DOUGLAS, *Circuit Judges.*

PER CURIAM:

The motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX - B

U.S.D.C. FOR THE SOUTHERN DISTRICT - HOUSTON DIVISION  
ORDERS / JUDGMENT / DECISIONS / DOCS

1. ORDER TO ANSWER ON SEP. 2, 2021, INDICATING THAT ANSWER IS NEEDED.  
CIVIL ACTION No. 4:21-CV-0673 ; H-21-673
2. MEMORANDUM OPINION AND ORDER, DATED ON JULY 06, 2022, DISMISSING LAWSUIT  
WITHOUT PREJUDICE
3. FINAL JUDGMENT DATED ON JULY 06, 2023, CIVIL ACTION No. H-21-673
4. ORDER DENYING 59(e) MOTION DATED ON AUGUST 04, 2022, WITH ALL 3 MAJOR  
GROUNDS IGNORED AND STATING THAT IT WAS DENIED FOR LACK OF MERIT SIGNED ON  
AUG. 03, 2022.

TOTAL ENCLOSED DOCS. 14 PAGES

**ENTERED**

July 06, 2022

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

OMAR JAVIER TORRES, §  
§  
*Petitioner*, §  
§  
v. § CIVIL ACTION NO. H-21-0673  
§  
BOBBY LUMPKIN, §  
§  
*Respondent*. §

**MEMORANDUM OPINION AND ORDER**

Petitioner, a state inmate proceeding *pro se*, filed a section 2254 habeas petition challenging his 2011 conviction and life sentence for capital murder. Respondent filed a motion for summary judgment predicated on failure to exhaust (Docket Entry No. 11), to which petitioner filed a response in opposition (Docket Entry No. 15).

Having considered the motion, the response, the record, matters of public record, and the applicable law, the Court **GRANTS** the motion for summary judgment and **DISMISSES** this lawsuit for the reasons shown below.

**I. BACKGROUND AND CLAIMS**

Petitioner was convicted of capital murder in Harris County, Texas, and sentenced to life imprisonment without parole on August 15, 2011. The conviction was affirmed on appeal, *State v. Torres*, No. 14-11-00698-CR, 2012 WL 3135536 (Tex. App. — Houston [14th Dist.] Aug. 2, 2012, no pet.). The Texas Court of Criminal Appeals granted petitioner an extension of time until November 11, 2012, to file a petition for discretionary review, but

no petition was filed. Petitioner did not file an application for state habeas relief prior to filing the instant federal habeas lawsuit.

Petitioner raises the following claims in his federal habeas petition:

1. He was denied due process because the court record was falsified to hide that the judge instructed the venire panel that if he did not testify, he was guilty; pages were added to the jury instructions; and the indictment was edited.
2. The trial records have been replaced to cover up the fact that he is actually innocent, and he was wrongly convicted based on an erroneous jury instruction.
3. He was denied effective assistance of trial counsel and the real trial transcript has been edited to add in objections that were never made by his trial counsel.
4. He was denied due process by the State appellate courts because they failed to tell him the proper way to file an application for state habeas relief and failed to provide him the "real" record or allow him to compare the audiotape record with the transcription.

## II. ANALYSIS

Petitioner's federal habeas claims are two-fold: he challenges the validity of his conviction predicated on a fabricated and altered trial record, and he complains of adverse state court non-habeas procedural rulings regarding the trial court record.

Petitioner complains that the state courts refused to correct purported fabrications and alterations in the trial court record, refused to provide him the original trial audiotape, and failed to tell him how to file a proper application for state habeas relief. These are matters of state law that are challenges to the state court proceedings and not to the conviction itself,

and raise no cognizable federal habeas claims. Regardless, petitioner proffers no probative summary judgment evidence establishing any alleged infirmities in the trial record, nor are his claims supported in the record itself. Petitioner's conclusory assertions that the state trial judge fabricated or altered portions of the state court record provide no basis for federal habeas relief in this instance.

Regardless, petitioner has not exhausted his federal habeas claims through the Texas Court of Criminal Appeals. Under 28 U.S.C. Section 2254(b)(1)(A), a state prisoner's application for a federal writ of habeas corpus shall not be granted unless the applicant has exhausted his state court remedies. In order to satisfy the exhaustion requirement, a claim must be presented to the highest court of the state for review. *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993). For purposes of exhaustion, the Texas Court of Criminal Appeals is the highest court in Texas which has jurisdiction to review petitioner's conviction.

The state court record shows that petitioner did not file a petition for discretionary review following the intermediate state appellate court's decision affirming his conviction, and that he has not filed an application for state habeas relief. Petitioner has not exhausted his federal habeas challenges to his conviction, and has not established that state corrective processes are ineffective to protect his federal constitutional rights. 28 U.S.C. § 2254(b)(1)(B)(ii).

Respondent is entitled to summary judgment dismissal of petitioner's habeas claims for failure to exhaust.

### III. CONCLUSION

Respondent's motion for summary judgment (Docket Entry No. 11) is **GRANTED** and this case is **DISMISSED WITHOUT PREJUDICE**. Any and all pending motions are **DISMISSED AS MOOT**. A certificate of appealability is **DENIED**.

Signed at Houston, Texas, on JUL 06 2022



ALFRED H. BENNETT  
UNITED STATES DISTRICT JUDGE

**ENTERED**

August 04, 2022

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

OMAR JAVIER TORRES, §  
§  
Petitioner, §  
§  
v. § CIVIL ACTION NO. H-21-0673  
§  
BOBBY LUMPKIN, §  
§  
Respondent. §

**ORDER**

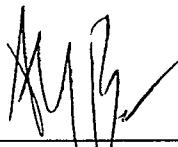
Pending before the Court is petitioner's *pro se* motion to alter or amend a final judgment under Federal Rule of Civil Procedure 59(e). (Docket Entry No. 19.) To prevail on a Rule 59(e) motion, the moving party must show (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) a manifest error of law or fact. *See Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003). A Rule 59(e) motion is "not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). Relief under Rule 59(e) is an "extraordinary remedy that should be used sparingly." *Id.*

The Court has carefully reviewed petitioner's motion and finds that it does not meet the requirements of Rule 59(e). Petitioner contends that he shows a manifest error of law or fact; however, he raises arguments that were made, or could have been made, before the judgment issued. Petitioner's habeas petition was dismissed because he failed to exhaust his

state habeas claims through the state courts prior to filing the instant federal petition. He presented no probative summary judgment evidence to the contrary prior to judgment, and he presents no supporting evidence or viable legal ground for relief in this postjudgment motion. Moreover, his claims are not procedurally barred at this time, as he has not sought state habeas relief, and he establishes no factual or legal grounds for why exhaustion should be excused in his case.

Petitioner's motion to alter or amend a final judgment under Federal Rule of Civil Procedure 59(e) (Docket Entry No. 19) is **DENIED** for lack of merit.

Signed at Houston, Texas, on AUG 03 2022.



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ALFRED H. BENNETT  
UNITED STATES DISTRICT JUDGE

**ENTERED**

July 06, 2022

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

OMAR JAVIER TORRES,

*Petitioner,*

v.

CIVIL ACTION NO. H-21-0673

BOBBY LUMPKIN,

*Respondent.*

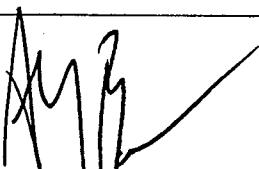
**FINAL JUDGMENT**

For the reasons stated in this Court's *Memorandum Opinion and Order* of even date,  
this lawsuit is **DISMISSED WITHOUT PREJUDICE**.

This is a **FINAL JUDGMENT**.

Signed at Houston, Texas, on

JUL 06 2022

  
ALFRED H. BENNETT  
UNITED STATES DISTRICT JUDGE

**ENTERED**

September 02, 2021

Nathan Ochsner, Clerk

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

OMAR JAVIER TORRES, §  
(TDCJ #01739119) §  
§  
Petitioner, §  
§  
v. § CIVIL ACTION NO. 4:21-cv-0673  
§  
BOBBY LUMPKIN, §  
§  
§  
Respondent. §

**ORDER TO ANSWER**

Omar Javier Torres, a Texas state inmate, has filed a petition under 28 U.S.C. § 2254, seeking a federal writ of habeas corpus. Under 28 U.S.C. § 2241, et seq., and the Rules Governing Section 2254 Cases in the United States District Courts, the Court

**ORDERS** as follows:

1. Preliminary examination of Torres's petition for a writ of habeas corpus indicates that an answer is needed.
2. The respondent shall file an answer to the petition, in compliance with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, no later than **November 1, 2021**. The respondent shall forward a copy of same to Torres.
3. If appropriate, the respondent's answer shall contain: (a) a statement of the authority by which Torres is held, and if held under the judgment of any court(s) the name of such court(s) and the number and style of the case(s) in which same were entered; (b) the offense(s) and sentence(s); (c) a specific response to each factual allegation and legal contention with applicable authority; (d) a statement as to whether Torres has exhausted

all state remedies, either by appeal or collateral attack; and (e) a statement indicating what transcripts of pretrial, trial or plea, sentencing and post-conviction proceedings are available (or which may later be available) and when they can be furnished, and what proceedings have been recorded and not transcribed.

4. Moreover, if appropriate, the copy of the respondent's answer filed with the Court shall be accompanied by the following documents relating to the conviction(s) of the state court which Torres attacks: (a) copies of the indictment(s), judgment(s), sentence(s), and order(s) pursuant to which Torres is being held; (b) if Torres appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of Torres's brief on appeal and a copy of the judgment(s) on appeal, the statement of facts on appeal, the opinion(s) of the appellate courts or a reference to where it or they may be found in the reports; (c) if Torres has collaterally attacked the judgment of conviction or order in a post-conviction proceeding, a copy of Torres's application for collateral relief including all answers and judgments rendered as a result; and (d) a copy of only such portions of the transcripts the respondent considers relevant for the proper resolution of this action.

5. Unless otherwise instructed by the Court, each party shall serve the other party, or counsel, with a copy of every pleading, letter, or other document submitted for consideration by the Court; service shall be by mail to the other party. Although Torres proceeds *pro se* in this case, he must provide a copy of all future pleadings, motions, and correspondence filed with the Court to the respondent's counsel. Every pleading or document filed with the Clerk of Court shall contain a signed certificate stating the date a

true and correct copy of the pleading or document was mailed and to whom mailed. Any pleading or other document received by the Clerk which fails to include the certificate of service will be returned to the submitting party. Failure to mail a copy of the pleadings as certified by the certificate will subject Torres to sanctions by the Court. There will be no direct communications with the U.S. District Judge or Magistrate Judge. Communications must be submitted to the Clerk with copies to the other party.

6. If the respondent elects to submit a dispositive motion (i.e., a motion to dismiss or for summary judgment), Torres shall file a response within **thirty (30) days** of the date reflected on the certificate of service. If Torres fails to comply on time, the Court may dismiss this case for want of prosecution pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

7. **The Clerk shall serve a copy of the petition, (Dkt. 1), the memorandum in support, (Dkt. 2), and this Order by regular mail or electronically, if appropriate, upon (1) the Respondent, Bobby Lumpkin, P.O. Box 99, Huntsville, Texas 77342-0099; (2) the Attorney General of the State of Texas, Ken Paxton, Attention: Edward L. Marshall, Chief, Criminal Appeals Division (Mail Code 066), P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548, and (3) the Attorney General's Docketing Clerk, Laura Haney: [Laura.Haney@oag.texas.gov](mailto:Laura.Haney@oag.texas.gov).**

SIGNED at Houston, Texas, on SEP 02 2021

  
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ALFRED H. BENNETT  
UNITED STATES DISTRICT JUDGE

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