

No. \_\_\_\_\_

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In the Supreme Court of the United States

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RODNEY MESQUIAS,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the  
Fifth Circuit at New Orleans, Louisiana

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PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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GREGORY SHERWOOD

Attorney

6001 W. Parmer Ln.,

Ste. 370, PMB 1172

Austin, Texas 78727-3908

(512) 484-9029

Texas Bar # 18254600

Counsel of Record for  
Petitioner Rodney Mesquias

## **Question Presented for Review**

Did the lower courts err in applying the standard for determining whether a certificate of appealability should issue in a post-conviction proceeding, in deciding that petitioner had not presented a debatable issue on which reasonable jurists could disagree – whether petitioner received ineffective assistance of counsel when his first attorney admitted that he did insufficient work to be ready for trial from January 2018 to July 2019, the date that the district court denied any further trial continuances, forcing petitioner to hire additional counsel to prepare for and try the case three months later in October 2019?

## **List of Parties**

The names of the parties are listed in the caption of this case. The Magistrate Judge's Report and Recommendation was issued by the Hon. Ignacio Torteya, III, United States Magistrate Judge for the Southern District of Texas, Brownsville Division, and is included at Appendix Tab A. The Order Adopting Magistrate Judge's Report and Recommendation was issued by the Hon. Rolando Olvera, United States District Judge for the Southern District of Texas, Brownsville Division, included at Appendix Tab B. The United States Court of Appeals for the Fifth Circuit denied a certificate of appealability in an order issued by the Hon. Carl E. Stewart, United States Circuit Judge, at Appendix Tab C. The Fifth Circuit issued an order denying petitioner's petition for rehearing *en banc* (Appendix Tab D), and an order denying petitioner's motion for reconsideration by a three judge panel (Appendix Tab E), with the panel consisting of the Hon. Carl E. Stewart, the Hon. Catharina Haynes, and the Hon. Stephen A. Higginson, United States Circuit Judges.

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Opinions Below

This is an attempt to appeal the adverse decision denying post-conviction relief under 28 U.S.C. § 2255, in which the U.S. Magistrate Judge, the U.S. District Judge, and the Fifth Circuit, all denied a certificate of appealability. The Magistrate Judge’s Report and Recommendation that relief be denied and no certificate of appealability should issue is included at Appendix Tab A. The U.S. District Judge’s Order Adopting Magistrate Judge’s Report and Recommendation, which also denied a certificate of appealability, is at Appendix Tab B. One judge of the Fifth Circuit

denied petitioner's motion for a certificate of appealability, with that order at Appendix Tab C. Petitioner sought rehearing both by a three judge panel, and by the *en banc* court, with the Fifth Circuit denying *en banc* rehearing in a May 20, 2025 order at Appendix Tab D, and denying rehearing by a three judge panel in a May 21, 2025 order at Appendix Tab E.

### Statement of Jurisdiction

This is an attempt by petitioner Rodney Mesquias to appeal the adverse decisions by the U.S. Magistrate Judge and U.S. District Judge denying his *pro se* motion for post-conviction relief filed pursuant to 28 U.S.C. § 2255, with both decisions also denying a certificate of appealability. *See* Appendix Tabs A and B. Petitioner filed a notice of appeal with the United States Court of Appeals for the Fifth Circuit, and a motion for certificate of appealability with supporting brief. One judge of the Fifth Circuit issued a March 25, 2025 order denying certificate of appealability. *See* Appendix Tab C. Petitioner sought rehearing both by a three judge panel, and by the *En Banc* Court, with the Fifth Circuit denying *en banc* rehearing in a May 20, 2025 order at Appendix Tab D, and denying rehearing by a three judge panel in a May 21, 2025 order at Appendix Tab E.

This certiorari petition will be due within 90 days after the Fifth Circuit's May 21, 2025 order denying panel rehearing, or by August 19, 2025. Sup. Ct. Rule 13.1.

### Relevant Constitutional Provision and Federal Statutes

U.S. Const. Amend. VI provides in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”

28 U.S.C. § 2253(a), (c)(1)(B), and (c)(2) provide:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

### Statement of the Case

Petitioner Rodney Mesquias seeks review of the orders of the U.S. Magistrate Judge, U.S. District Judge, and the Fifth Circuit which denied a certificate of appealability from the district court order denying habeas relief, which are at Appendix Tabs A through E.

### Statement of Procedural History

Petitioner Rodney Mesquias timely filed his *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (hereinafter “2255 motion”), Fifth Cir. ROA.24-40776.12-25, along with his *pro se* supporting legal memorandum. Fifth Cir. ROA.24-40776.26-80. This writer was appointed to represent petitioner at an evidentiary hearing by U.S. Magistrate Judge Ignacio Torteya, III. Fifth Cir. ROA.24-40776.160-162.

Two evidentiary hearings were held. The first hearing occurred on April 16, 2024, and is reported at Fifth Cir. ROA.24-40776.355-407. Petitioner’s first attorney Charles A. Banker, III failed to appear at this hearing, even though he was subpoenaed. Fifth Cir. ROA.24-40776.212-214, and Fifth Cir. ROA.24-40776.224. This failure to appear required the issuance of an April 16, 2024 order setting a second hearing for April 30, 2024. Fifth Cir. ROA.24-40776.255-256. That hearing is reported at Fifth Cir. ROA.24-40776.408-430.

The magistrate judge issued his Report and Recommendation, recommending denial of habeas relief, and that no certificate of appealability issue. Fifth Cir. ROA.24-40776.149-179. Petitioner timely filed objections to the Report and Recommendation, Fifth Cir. ROA.24-40776.306-317, after receiving an extension of time to file those objections. Fifth Cir. ROA.24-40776.304. The government filed its response to those objections, Fifth Cir. ROA.24-40776.318-332, and petitioner filed a reply to that response. Fifth Cir. ROA.24-40776.333-337.

On October 3, 2024, U.S. District Judge Rolando Olvera entered an Order Adopting Magistrate Judge's Report and Recommendation which overruled petitioner's objections, determined that the Report and Recommendation was correct and adopted it, dismissed petitioner's case, denied a certificate of appealability, and ordered the district clerk to close the case. Fifth Cir. ROA.24-40776.338-343. Petitioner timely filed his notice of appeal with the United States Court of Appeals of the Fifth Circuit, which stated that a certificate of appealability had not been issued by the district judge, and that petitioner would request one from that court. Fifth Cir. ROA.24-40776.347-348.

Petitioner Rodney Mesquias timely filed his application for certificate of appealability and supporting brief (Fifth Cir. Dkt. Nos. 23 and 24 in No. 24-40776), asking for a certificate of appealability on the issue of:

whether appellant received ineffective assistance of counsel when his first attorney admitted that he did insufficient work to be ready for trial from January 2018 to July 2019, the date that the [d]istrict [c]ourt denied any further trial continuances, forcing appellant to hire additional counsel to prepare for and try the case three months later in October 2019.

*See* Fifth Cir. Dkt. No. 24 in No. 24-40776, from Appellant's Brief in Support of Application for Certificate of Appealability, at p. 2 (pdf 8). Bracketing added. The Fifth Circuit's March 25, 2025 order denying a certificate of appealability noted that:

Mesquias argues that he received ineffective assistance when his counsel, during the period of January 2018 to July 2019, failed to diligently review the Government's discovery, communicate with him,

and provide him with sufficient information to make an informed decision regarding whether to plead guilty or go to trial.

Appendix Tab C, pp. 1-2.

On March 25, 2025, U.S. Circuit Judge Carl E. Stewart, pursuant to Fifth Cir. R. 27.2.3, issued an order denying a certificate of appealability. Appendix Tab C. On April 4, 2025, petitioner filed Appellant’s Opposed Motion for Reconsideration of Order Denying Certificate of Appealability (Fifth Cir. Dkt. No. 40 in No. 24-40776) (hereinafter “petition for panel rehearing”), asking a three judge panel to reconsider the order denying a certificate of appealability. On May 8, 2025, petitioner filed Appellant’s Petition for Rehearing *En Banc* of [the] March 25, 2025 Order Denying [a] Certificate of Appealability (hereinafter “petition for *en banc* rehearing”). Fifth Cir. Dkt. No. 49-1. The Fifth Circuit denied the petition for *en banc* rehearing on May 20, 2025 (Appendix Tab D), and denied the petition for panel rehearing on May 21, 2025. Appendix Tab E.

#### Question Presented for Review (Restated)

Did the lower courts err in applying the standard for determining whether a certificate of appealability should issue in a post-conviction proceeding, in deciding that petitioner had not presented a debatable issue on which reasonable jurists could disagree – whether petitioner received ineffective assistance of counsel when his first attorney admitted that he did insufficient work to be ready for trial from January 2018 to July 2019, the date that the district court denied any further trial continuances, forcing petitioner to hire additional counsel to prepare for and try the case three months later in October 2019?

### Argument Amplifying Reasons for Granting the Writ

Certiorari should be granted, and an order directing the Fifth Circuit to issue a certificate of appealability and consider the merits of the issue petitioner attempted to appeal should be issued, because the lower courts misapplied the standard for determining whether a certificate of appealability should issue from a district court order denying post-conviction relief, since petitioner brought a debatable issue on which reasonable jurists could disagree.

Discussion of Facts Related to this Ground: On January 9, 2018, petitioner Rodney Mesquias and other defendants were indicted on twelve counts related to health care fraud in a sealed indictment. Fifth Cir. ROA.24-40776.550-576. Attorney Charles A. Banker, III filed a January 22, 2018 Attorney Notice of Appearance as Mr. Mesquias's attorney. Fifth Cir.ROA.24-40776.583.

On July 23, 2018, attorney Banker filed pretrial motions. Fifth Cir. ROA.24-40776.717-747. Banker then filed Defendant's Unopposed Motion for Continuance asking for a 120 day continuance of the September 17, 2018 trial setting, which was referred to as a sentencing hearing at ¶ 1 of the motion. Fifth Cir. ROA.24-40776.761-763. The continuance was sought based upon counsel's case load, and the amount of additional discovery provided. Fifth Cir. ROA.24-40776.761-762, ¶ 2. This motion was granted, and the trial was reset for jury selection on January 28, 2019, as shown in the docket sheet entry for August 9, 2018, at Fifth Cir. ROA.24-40776.518-519.

Attorney Charles Banker then filed a December 5, 2018 Defendant's Unopposed Motion for Continuance asking for a continuance of the January 2019 trial setting until April 2019, because of additional discovery that was produced. Fifth Cir. ROA.24-40776.860-862. This motion was granted on December 7, 2018 with jury selection rescheduled for March 18, 2019. Fifth Cir. ROA.24-40776.864. Jury selection was then reset for May 20, 2019 in a February 1, 2019 Amended Scheduling Order. Fifth Cir. ROA.24-40776.865-866. On April 8, 2019, the district court reset the jury selection date to July 22, 2019. Fifth Cir. ROA.24-40776.872. After that, a June 18, 2019 Second Amended Scheduling Order reset jury selection for August 5, 2019. Fifth Cir. ROA.24-40776.885.

On July 12, 2019, attorney Banker filed Defendant's Motion for Continuance asking for the August 5, 2019 trial date to be continued, stating that he was not ready for trial due to voluminous discovery that had been produced. Fifth Cir. ROA.24-40776.899-902. The government opposed this motion in a July 15, 2019 responsive pleading. Fifth Cir. ROA.24-40776.904-911. This continuance hearing was heard on July 16, 2019, reported at Fifth Cir. ROA.24-40776.1962-1997. U.S. District Judge Olvera denied the continuance motion because: (1) three continuances had been previously granted based on voluminous documents being produced in discovery, (2) granting a fourth continuance for this same reason would be repetitive and no longer meritorious, and (3) all the defendants had announced ready at a previous hearing.

Fifth Cir. ROA.24-40776.1972-1973. *See also* docket entry for July 16, 2019, at Fifth Cir. ROA.24-40776.522-523.

On July 19, 2019, attorney Banker filed a Notice to the Court of Additional Counsel for Defendant Rodney Mesquias, stating that attorneys J.A. (Tony) Canales and Hector Canales were appearing as additional attorneys of record for Mr. Mesquias. Fifth Cir. ROA.24-40776.954-955. Jury selection occurred on October 21, 2019, reported at Fifth Cir. ROA.24-40776.4853-5205. Attorneys Charles Banker, Tony Canales and Hector Canales represented Mesquias at trial, with both of the Canales attorneys continuing to represent Mr. Mesquias at sentencing and on direct appeal. Fifth Cir. ROA.24-40776.272. The jury trial heard by U.S. District Judge Olvera lasted from October 22, 2019 to November 6, 2019, and is reported at Fifth Cir. ROA.24-40776.1998-4852.

As noted earlier, evidentiary hearings on petitioner's *pro se* § 2255 motion were held in the district court, relief was denied, and a certificate of appealability was denied. One judge of the Fifth Circuit issued an order denying a certificate of appealability (Appendix Tab C), and the Fifth Circuit issued later orders denying panel rehearing and en banc rehearing. Appendix Tabs D and E.

Why Certiorari Should be Granted: Certiorari should be granted because the lower courts have misapplied the standard for determining whether a certificate of appealability should issue in a post-conviction habeas proceeding.

A [certificate of appealability] should issue if the applicant has “made a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), which we have interpreted to require that the “petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. [473], at 484, 120 S.Ct. 1595 [(2000)]; see also *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (“Under the controlling standard, a petitioner must ‘sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were “adequate to deserve encouragement to proceed further””).

*Tennard v. Dretke*, 542 U.S. 274, 282 (2004). First three brackets added, fourth bracket in original. “[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (*quoting Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). “The question is the debatability of the underlying constitutional claim, not the resolution of that debate.” *Roberts v. Dretke*, 356 F.3d 632, 637 (5<sup>th</sup> Cir. 2004) (*quoting Miller-El*, 537 U.S. at 342). “[A] COA ruling is not the occasion for a ruling on the merit of petitioner’s claim[.]” *Martinez v. Dretke*, 404 F.3d 878, 884 (5<sup>th</sup> Cir. 2005) (*quoting Miller-El*, 537 U.S. at 336).

The record from the § 2255 evidentiary hearings demonstrates that Mr. Mesquias's initial trial counsel Charles Banker did very little work from January 2018 to July 2019, when the district judge denied Mesquias's July 12, 2019 motion for continuance of the August 5, 2019 trial setting in which counsel stated he was not ready. Fifth Cir. ROA.24-40776.899-902 (continuance motion), and Fifth Cir. ROA.24-40776.1965-1973 (July 16, 2019 hearing transcript). This forced Mr. Mesquias to hire two other attorneys to prepare for trial which started with jury selection shortly thereafter on October 21, 2019. Fifth Cir. ROA.24-40776.4853. As this writer argued near the end of the April 16, 2024 evidentiary hearing on petitioner's *pro se* habeas petition:

The issue of this case is going to be the 20 months that Charles Banker was lead counsel versus the three months that [Hector Canales and Tony Canales] were lead counsel [for Movant Rodney Mesquias]. . . . The issue in this case is: Was there ineffective assistance of counsel from January 2018 to July 2019 that prevented Mr. Mesquias from having an informed decision about whether or not to plead guilty versus what happened in the three months between July 2019 to October of 2019 when the trial started? . . . We have to decide what happened when Banker was lead counsel and was that sufficient to taint any efforts by both [of the] Canales to cure what I believe was ineffective assistance [by Banker] from January 2018 to July 2019.

Fifth Cir. ROA.24-40776.403:10-12, Fifth Cir. ROA.24-40776.403:18-23, and Fifth Cir. ROA.24-40776.494:4-7. Bracketing added. Attorney Banker admitted that from January 2018 to July 2019 he did not adequately investigate or evaluate the discovery in the case in order to advise petitioner Mesquias on whether it would be better to

proceed to trial, or to plead guilty, in the following excerpt from his April 30, 2024 testimony at the habeas hearing:

[Question]: Regardless of whether Mr. Mesquias may have believed he was guilty and regardless of whether he may have wanted to proceed to trial, you had not done the initial investigative work needed in evaluating the discovery in the case in order to provide Mr. Mesquias, your client, with the information he needed on whether proceeding to trial would be a good idea or whether pleading guilty would be a good idea?

[Answer]: True.

Fifth Cir. ROA.24-40776.419:8-15.

Petitioner respectfully disagrees with the Fifth Circuit's order denying a certificate of appealability, which stated that Mr. Mesquias failed to make the requisite showing authorizing a certificate of appealability pursuant to *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), and 28 U.S.C. § 2253(c)(2). See Appendix Tab C, p. 2. Petitioner Mesquias believes that jurists of reason could disagree with the Magistrate Judge's Report and Recommendation and the District Court's Order, which both denied habeas relief on petitioner's constitutional claim of ineffective assistance of counsel, or that jurists could conclude that the issue presented is adequate to deserve encouragement to proceed further.

The lower courts did not properly apply the standard for determining whether a certificate of appealability should issue in petitioner's case herein. Certiorari is requested to vacate or reverse the Fifth Circuit's order denying a certificate of

appealability, with a remand to that court to decide the merits of the issue petitioner Mesquias sought to appeal.

Conclusion and Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, petitioner RODNEY MESQUIAS respectfully prays that this Court grant this petition for a writ of certiorari, set this cause for oral argument and for briefing on the merits, and vacate or reverse the Fifth Circuit's orders denying a certificate of appealability, and remand to the Fifth Circuit for a determination of the merits of the issue petitioner sought to appeal.

Respectfully submitted,

/s/ *Gregory Sherwood*

GREGORY SHERWOOD  
ATTORNEY  
6001 W. Parmer Ln.,  
Ste. 370, PMB 1172  
Austin, Texas 78727-3908  
(512) 484-9029  
Texas Bar # 18254600

Counsel of Record for  
Petitioner Rodney Mesquias

Date E-Filed: June 18, 2025