

United States Court of Appeals  
for the Fifth Circuit

---

No. 24-50294

---

United States Court of Appeals  
Fifth Circuit

**FILED**

March 28, 2025

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

LARRY WAYNE KIMES,

*Defendant—Appellant.*

---

Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 5:24-CV-125

---

UNPUBLISHED ORDER

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

PER CURIAM:

This panel previously DENIED motions for a certificate of appealability, to amend certificate of appealability and motion for authorization to file successive, for authorization to file successive, and for leave to proceed in forma pauperis. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

January 28, 2025

Lyle W. Cayce  
Clerk

---

No. 24-50294

---

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

LARRY WAYNE KIMES,

*Defendant—Appellant.*

---

Application for Certificate of Appealability  
the United States District Court  
for the Western District of Texas  
USDC No. 5:24-CV-125  
USDC No. 5:12-CR-886-2

---

UNPUBLISHED ORDER

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

PER CURIAM:

Larry Wayne Kimes, former federal prisoner # 45087-177, moves for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2255 motion challenging his conviction for tax conspiracy and conspiracy to commit mail fraud. The district court construed Kimes's Federal Rule of Civil Procedure 60(b) motion as an unauthorized successive § 2255 motion

No. 24-50294

and dismissed it for lack of jurisdiction. Kimes makes an alternative request for authorization to file a second or successive § 2255 motion in district court. His motion for leave to file an amended COA motion is DENIED.

With respect to the request for a COA, Kimes must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Because the district court denied relief on procedural grounds, he must show that “jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

To receive authorization to file a successive § 2255 motion, Kimes must make a prima facie showing that his § 2255 claims rely on either “newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense” or “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h); see 28 U.S.C. § 2244(b)(3)(C); *United States v. Hanner*, 32 F.4th 430, 434 (5th Cir. 2022).

Kimes has not made the necessary showing with regard to either of his motions. Accordingly, his motions for a COA, for leave to proceed in forma pauperis, and for authorization to file a successive § 2255 motion are DENIED.



(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.”

FED. R. CIV. P. 60(b).

In *Gonzalez v. Crosby*, the Supreme Court held that Rule 60(b) motions cannot “impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar.” 545 U.S. 524, 532 (2005) (citing 28 U.S.C. § 2244(b)(3)). *Gonzalez* provides guidance for determining when a Rule 60(b) motion is subject to the requirements for successive petitions. *See id.* at 532-36.<sup>1</sup> Specifically, *Gonzalez* states that courts must construe a Rule 60(b) motion as a successive habeas petition if it “seeks to add a new ground for relief” or “attacks the federal court’s previous resolution of a claim on the merits.” *Id.* at 532. If a motion challenges “not the substance of the federal court’s resolution of a claim on the merits but some defect in the integrity of the federal habeas proceedings,” then a Rule 60(b) motion is appropriate. *Id.*

Claims properly brought under Rule 60(b) include assertions of “[f]raud on the habeas court” or challenges to procedural rulings that “precluded a merits determination,” i.e., the denial of habeas relief “for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.” *Id.* at 532 n.4 & n.5. Accordingly, a district court has jurisdiction to consider a motion that shows “a non-merits-based defect in the district court’s earlier decision on the federal habeas petition.” *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010). But motions that “in effect ask for a second chance to have the merits determined favorably” must be construed as successive

---

<sup>1</sup> The Fifth Circuit has applied *Gonzalez*’s holding in the context of § 2255 motions. *United States v. Vialva*, 904 F.3d 356, 360 n.3 (5th Cir. 2018) (citing *United States v. Hernandez*, 708 F.3d 680, 681 (5th Cir. 2013)).

habeas petitions regardless of whether they are characterized as procedural attacks. *Gonzalez*, 545 U.S. at 532 n.5. Further, arguments that are characterized as procedural but lead “inextricably to a merits-based attack on the dismissal of the § 2255 motion,” require circuit-court authorization. *Id.* (quoting *In re Lindsey*, 582 F.3d 1173, 1175-76 (10th Cir. 2009)).

Here, Kimes is challenging the Court’s January 29<sup>th</sup> order classifying his 60(b) motion as a § 2255 motion to vacate. Because the motion before the Court does not challenge the Court’s previous resolution of Kimes’s habeas claims, the Court has jurisdiction over it.

Regarding Kimes’s claim that the Court erred in reclassifying his prior 60(b) motion as a motion to vacate under § 2255, Kimes’s admits that he “is not attempting to attack his sentence; [he] is seeking to attack every aspect of his conviction.” (ECF No. 409 at 3.) Further, although Kimes is no longer confined to a correctional facility, he is on supervised release, which qualifies as “in custody” for purposes of § 2255. *See Pack v. Yusuff*, 218 F.3d 448, 454 n.5 (5th Cir. 2000) (“Usually, “custody” signifies incarceration or supervised release, but in general it encompasses most restrictions on liberty resulting from a criminal conviction.”); *see also United States v. Bejarano*, 751 F.3d 280, 285 n.4 (5th Cir. 2014). As a result, because Kimes is “in custody” and specifically sought to attack “every aspect” of his underlying conviction, the Court did not err in reclassifying his Rule 60(b) motion as a motion to vacate pursuant to § 2255. Further, because reasonable jurists could not debate the dismissal of the Kimes’s motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed further, the Court did not err in denying him a certificate of appealability.


Kimes’s reliance on Rule 59(e) of the Federal Rules of Civil Procedure is similarly unavailing. Rule 59(e) “is ‘an extraordinary remedy that should be used sparingly.’” *Rollins v. Home Depot USA*, 8 F.4th 393, 396 (5th Cir. 2021) (quoting *Templet v. HydroChem Inc.*, 367 F.3d

473, 479 (5th Cir. 2004)). It serves the narrow purpose of allowing a party to bring errors or newly discovered evidence to the court's attention. *See In re Rodriguez*, 695 F.3d 360, 371 (5th Cir. 2012); *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005). To prevail on a Rule 59(e) motion, a petitioner must demonstrate the existence of (1) an intervening change of controlling law; (2) the availability of new evidence; or (3) the need to correct a clear error or to prevent manifest injustice. *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989). Kimes fails to make this showing.

It is therefore **ORDERED** that Kimes's motion for reconsideration under both Rule 60(b) and Rule 59(e) (ECF No. 411) is **DENIED**.

It is finally **ORDERED** that a certificate of appealability is **DENIED**, as reasonable jurists could not debate the denial of Petitioner's motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

**SIGNED** this the 4th day of April, 2024.

  
\_\_\_\_\_  
**JASON K. PULLIAM**  
**UNITED STATES DISTRICT JUDGE**

