

No. 24A1260

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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LARRY WAYNE KIMES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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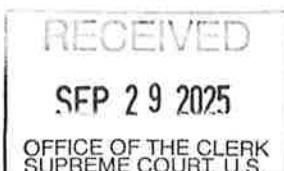
On Petition for Writ Of Certiorari To The  
United States Court Of Appeals For The Fifth Circuit  
Case No. 24-50294

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

### **ISSUE NO. 1**

Kimes' judge, the Honorable Fred S. Biery, admitted in open court and on the record that he did not "read" Fifth Circuit law. Does a federal judge have a mandatory duty to review, interpret, and consider all laws set forth in pleadings before the court, before granting or denying the various motions?

### **ISSUE NO. 2**

In the district court, after discovering Judge Biery's failure to follow the law, Kimes filed a second Rule 60 Motion. The district court construed the Rule 60 Motion as a second or successive 2255 Motion, reclassified it, and then denied it, despite the motion being clearly filed pursuant to Rule 60. Was it abuse of discretion or reversible error for the Court to reclassify the Rule 60 Motion as a Section 2255 Motion and then deny it?

### **ISSUE NO. 3**

After being denied in district court, Kimes applied for a certificate of appealability in the Fifth Circuit. The application was denied. Did the Fifth Circuit err or abuse its discretion when denying the application for the certificate of appealability?

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#### **IV. PETITION FOR A WRIT OF CERTIORARI**

Larry Wayne Kimes (“Kimes”), acting pro se, a former inmate currently under in supervision by the U.S. Probation office in Dallas, Texas, respectfully petitions this Court for a writ of certiorari to review the judgments of the United States District Court for the Western District of Texas San Antonio Division and the United States Court of Appeals for the Fifth Circuit (Case No. 24-50294), which denied both Kimes’ motion filed under Fed. R. Civ. Pro. Rule 60(b) Motion (Case Nos. USDC No. 5:24-CV-125 and USDC No. 5:12-CR-886-2).

#### **V. DECISIONS BELOW**

Kimes was indicted in 2012, so this case has been going on for almost thirteen years. There are many orders and opinions below. Kimes believes that a short history of the proceedings may be helpful to the Court.

All orders and opinions will be contained in the Appendix, if this petition is granted.

At all times relevant to this matter, Kimes was a certified public accountant, and Kimes holds a law degree from the University of Texas at Austin.

Kimes was indicted on September 19, 2012. (DE 3.)<sup>1</sup> The Case Number is 5:12-cr-00886-FB-2 relative to the payroll tax fraud of his client, Service Professionals of Texas. Kimes paid all of the payroll taxes for his firm.

On January 16, 2014, under coercion, Kimes pleaded guilty to conspiracy to commit tax fraud (18 U.S.C. § 371) and conspiracy to commit mail fraud (18 U.S.C. § 1349). Kimes’ trial was set for January 17, 2014. Kimes was told that if he did not plead guilty that morning, Kimes’ son would be indicted for money laundering. There were no facts to support such an indictment, so Kimes pleaded guilty to prevent any attack on Kimes’ son.

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<sup>1</sup> Documents filed in the district court are identified by “DE.”

On April 15, 2014, Kimes was sentenced to five years for conspiracy to commit tax fraud and twelve years for conspiracy to commit mail fraud. Kimes was also ordered to pay the Internal Revenue Service \$132,000,000.00. (DE 131.)

There are many opinions below. Please accept them as examples of how Kimes has been treated. The “wide latitude” and “broad discretion” normally afforded *pro se* litigants do not appear to be present in the district court or the Fifth Circuit.

Kimes will not burden the Court with explanations of many other pleadings filed and numerous other orders declining Kimes’ motions, both in the district court and the Fifth Circuit.

On May 1, 2014, Kimes filed a Notice of Appeal to the Fifth Circuit related to his criminal conviction. (DE 153.) The Fifth Circuit Case No. is 14-50403.

On September 3, 2014, Kimes’ court-appointed appellate counsel filed an Anders brief (5<sup>th</sup> Cir. Doc. 29) and on September 5, 2014, he filed a motion to withdraw as Kimes’ counsel. (5<sup>th</sup> Cir. Doc. 30.) Kimes agreed to dismissal because his appellate attorney told Kimes he had a better chance for reversal of his conviction by filing a motion under 28 U.S.C. § 2255 (the “2255 Motion”).

On July 13, 2015, the direct appeal was dismissed. (5<sup>th</sup> Cir. Doc. 79.)

On July 12, 2016, Kimes filed a 2255 Motion. (DE 319.) The Case Number is 5:16-CV-716-FB. On January 12, 2017, the 2255 Motion was amended. (DE 332.) Kimes also filed motions and briefs related to the expansion of the record (DE 346), for an evidentiary hearing (DE 350), for the discovery and production of documents (DE 351), and a request for the district court to take judicial notice (DE 354). All of Kimes’ pleadings cited federal law that Judge Biery ignored.

On November 21, 2017, the district court denied Kimes’ 2255 Motion and all of the other motions Kimes filed in support of the 2255 Motion. (DE 360.)

On January 24, 2018, Kimes appealed the denial of the 2255 Motion to the Fifth Circuit. (DE 363.) The Fifth Circuit Case No. is 18-50070.

On November 27, 2018, while the direct appeal related to the 2255 Motion was still pending, Kimes timely filed a motion for reconsideration of the denial of the 2255 Motion pursuant to Fed. R. Civ. Pro. 60 (the “Rule 60 Motion”), which was based upon procedural errors in the district court. (DE 368.)

On January 25, 2019, the Fifth Circuit refused to grant Kimes a certificate of appealability (“COA”) for his appeal of the denial of the 2255 Motion. (5<sup>th</sup> Cir. Doc. 43.)

On January 27, 2020, the district court denied the Rule 60 Motion. (DE 369).

On March 26, 2020, Kimes appealed the district court’s denial of the Rule 60 Motion. (DE 375.) The Fifth Circuit Case No. is 20-50251.

On September 20, 2021, the Fifth Circuit denied Kimes’ application for a certificate of appealability relative to the Rule 60 Motion. (5<sup>th</sup> Cir. Doc. 49.)

On May 24, 2022, in Case No. 21-7938, Kimes filed a petition for a writ of certiorari with this Court. On June 22, 2022, the petition was denied without an opinion.

Subsequently, Kimes read an article on the American Bar Association’s website stating that Judge Biery had admitted in open court and on the record that he did not “read” Fifth Circuit law. Judge Biery’s failure to read the law was referenced in an opinion issued by the Fifth Circuit. In *United States v. McKinney*, 21-50308 (5th Cir. June 10, 2022), the Fifth Circuit stated, in a footnote, quoted Judge Biery as follows:

**"I follow Judge [Lucius Desha] Bunton's rule about Fifth 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?"**

A copy of the case will be included in the Appendix.

On July 10, 2023, after Kimes found out that Judge Biery did not read the law, Kimes filed a motion asking Judge Biery to recuse himself from Kimes' case based on bias and Judge Biery's failure to properly review, interpret, and apply the law. (DE 402.)

On July 13, 2023, Judge Biery issued an order recusing himself from Kimes' case. (DE 403.) The Honorable Jason Kenneth Pulliam was then randomly appointed.

On January 29, 2024, Kimes filed a second Rule 60 Motion asking the district court to set aside Kimes' conviction and grant a new trial. (DE 406.)

On February 8, 2024, the district court construed the Rule 60 Motion as a second or successive Section 2255 Motion and denied it. (DE 407.)

On April 11, 2024, Kimes appealed the district court's judgment to the Fifth Circuit in Case No. 24-50294. (DE 414.)

On January 28, 2025, the Fifth Circuit denied the application for the COA. (5<sup>th</sup> Cir. Doc. 50.) Kimes subsequently filed a motion for reconsideration, but it was denied. This appeal ensued.

## **VI. JURISDICTION**

The date the judgment sought to be reviewed was entered on January 28, 2025, by the United States Court of Appeals for the Fifth Circuit in case No. 24-50294, for which a timely petition for rehearing was denied on March 28, 2025.

Kimes invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition.

The due date for this petition for a writ of certiorari was extended through August 25, 2025, by Justice Alito.

## **VII. CONSTITUTIONAL PROVISIONS INVOLVED**

### **United States Constitution, Article III**

#### **Section 1.**

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

### **United States Constitution, Amendment V:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **United States Constitution, Amendment VI:**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### **United States Constitution, Amendment XIV:**

#### **Section 1:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **VIII. STATEMENT OF THE CASE**

Kimes filed several pleadings in the district court, which was presided over by the Honorable Fred S. Biery. Numerous citations to federal law, including statutory law, federal rules, case law of the Fifth Circuit, other circuits, and this Court, were cited.

Kimes subsequently discovered that Judge Biery had ignored the cases, rules, statutes, and other laws cited in the various pleadings, which resulted in the denial of Kimes' 28 U.S.C. § 2255 Motion and Fed. R. Civ. Pro. Rule 60 Motion, thereby denying Kimes' constitutional right to due process. Judge Biery's failure to "read" the law is an abuse of discretion or reversible error.

All of the motions and appeals filed by Kimes were supported by appropriate rules, statutes, and case law, including citations to the Fifth Circuit, other circuits, and this Court. It is clear that Judge Biery failed to "read" the law cited. Had he read it, Kimes' conviction would have been overturned years ago.

It is now evident that Judge Biery did not "read" or interpret the law when he denied all of Kimes' motions and other pleadings, especially the Section 2255 Motion, the Rule 60 Motion, and all related pleadings. It is impossible to interpret the law without first properly reading and reviewing it.

A judge's duty to review, interpret, and apply the law is not optional. It is required.

When presented with the arguments, both the district court and the Fifth Circuit overlooked or ignored Judge Biery's duty to review, interpret, and properly apply the law.

The district court ruled that Kimes' Rule 60 Motion was, in fact, a second or successive 2255 Motion and denied it. This was a convenient way to avoid the issue of whether a fellow judge had followed the law. That was an abuse of discretion or reversible error.

The Fifth Circuit denied Kimes' appeal on procedural grounds, thereby side-stepping the real issue of a judge's duty to properly review, interpret, and apply the law. That was also an abuse of discretion or reversible error.

Kimes has served his entire 12-year sentence and will be on supervision until February 8, 2026. Kimes has been making the required restitution payments.

Kimes is, in fact, legally innocent of all charges and can prove it if given the chance to do so.

Kimes is also a disabled Navy veteran.

## **IX. REASONS FOR GRANTING THE WRIT**

A federal district judge, just like all other judges is obligated to follow the law. *See Kisor v. Wilke*, 139 S.Ct. 2400, 2437; 204 L.Ed. 2d 841, which states, in pertinent part:

"... it sits uneasily with the Constitution. Article III, § 1 provides that the "judicial Power of the United States" is vested exclusively in this Court and the lower federal courts. A core component of that judicial power is " 'the *duty* of interpreting [the laws] and applying them in cases properly brought before the courts.' " (emphasis added)

See also *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803); and *Wayman v. Southard*, 10 Wheat. 1, 46, 6 L.Ed. 253 (1825), which states:

("[T]he legislature makes, the executive executes, and *the judiciary construes the law*"); *The Federalist No. 78*, p. 467 (C. Rossiter ed. 1961) (A. Hamilton). (emphasis added)

In *Patchak v. Zinke*, 583 U. S. ——, ——, 138 S.Ct. 897, 904, 200 L.Ed. 2d 92 (2018) (plurality opinion) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) ) stated, in pertinent part:

"The Constitution creates three branches of Government and vests each branch with a different type of power. See Art. I, § 1; Art. II, § 1, cl. 1; Art. III, § 1. "To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the

judiciary the duty of interpreting and applying them in cases properly brought before the courts." *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); see also *Wayman v. Southard*, 10 Wheat. 1, 46, 6 L.Ed. 253 (1825) (Marshall, C.J.) ("[T]he legislature makes, the executive executes, and the judiciary construes the law"). By vesting each branch with an exclusive form of power, the Framers kept those powers separate. See *INS v. Chadha*, 462 U.S. 919, 946, 103 S.Ct. 2764, 77 L.Ed. 2d 317 (1983). Each branch "exercise[s] ... the powers appropriate to its own department," and no branch can "encroach upon the powers confided to the others." *Kilbourn v. Thompson*, 103 U.S. 168, 191, 26 L.Ed. 377 (1881). This system prevents "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands," *The Federalist No. 47*, p. 301 (C. Rossiter ed. 1961) (J. Madison)— an accumulation that would pose an inherent "threat to liberty," *Clinton v. City of New York*, 524 U.S. 417, 450, 118 S.Ct. 2091, 141 L.Ed. 2d 393 (1998) (KENNEDY, J., concurring)."

The Constitution's division of power thus reflects the "concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person." *INS v. Chadha*, 462 U.S. 919, 962, 103 S.Ct. 2764, 77 L.Ed. 2d 317 (1983) (Powell, J., concurring in judgment). The Framers protected against that threat, both in "specific provisions, such as the Bill of Attainder Clause," and in the "general allocation" of the judicial power to the Judiciary alone. *Ibid.* As Chief Justice Marshall wrote, the Constitution created a straightforward distribution of authority: The Legislature wields the power "to prescribe general rules for the government of society," but "the application of those rules to individuals in society" is the "duty" of the Judiciary. (emphasis added) See *Kisor v. Wilke*, 204 L.Ed. 2d 841, 139 S.Ct. 2400 (2019), at Footnote 70, "As Chief Justice MARSHALL put it, "[i]t is emphatically the province and duty of the judicial department to say what the law is." (emphasis added)

As experts in the legal field, judges play a critical role in interpreting and enforcing the law. Their decisions and rulings have a significant impact on society, affecting people's rights, freedoms, and quality of life. Judges strive to ensure that the law is applied fairly and equitably while upholding the fundamental principles of justice.

### **Interpretation of the Law**

One of the core responsibilities of judges is to interpret the law. Judges carefully examine laws, regulations, and legal precedents, and apply them to the facts of the case before them. To make their interpretation sound, they analyze legal texts and legislative history while considering the relevant social, economic, and political factors. The interpretation of laws is essential to ensuring that justice is served and the rights of all parties are protected.

Judges have a significant responsibility in ensuring impartiality and fairness in the judicial process. They must remain objective and impartial while upholding standards of integrity and ethics. This means that judges should not allow personal biases, prejudices, or external influences to affect their decision-making process. Instead, judges should base their judgments on the available evidence, legal precedent, and the principles of justice.

### **Judicial Independence**

Judges need to carry out their responsibilities with independence and free from external pressures or influences. This independence helps them make objective decisions, impartially interpret the law, and carry out their duties without fear of

retribution or persecution. While judges should remain accountable to the law and society, they must operate independently to ensure that justice is served.

The role of judges in interpreting and enforcing the law is a crucial aspect of the justice system. It is through their interpretation and enforcement that courts operate with fairness, impartiality, and transparency. Through their work, judges ensure that everyone receives equal treatment under the law, uphold democracy and the rule of law, and safeguard people's rights and freedoms. Therefore, it is vital to recognize and support the invaluable role judges play in society.<sup>2</sup>

### **Critical Role in Interpreting and Enforcing the Law**

There is no question that a judge has a duty to read and interpret the law. Judges are responsible for interpreting laws, regulations, and legal precedents to apply them to the facts of a case. They must respect and comply with the law, ensuring that their actions promote public confidence in the judiciary. While judges interpret the law, they do not create it; their role is to apply existing laws to specific situations.

As experts in the legal field, judges play a critical role in interpreting and enforcing the law. Their decisions and rulings have a significant impact on society, affecting people's rights, freedoms, and quality of life. Judges strive to ensure that

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<sup>2</sup> [The Vital Role of Judges in Interpreting and Enforcing the Law | Binham Legal](#)

the law is applied fairly and equitably while upholding the fundamental principles of justice.

By not reading the law of this Court and the Fifth Circuit, Judge Biery could not possibly have interpreted the laws, rules, regulations, and legal precedents cited by Kimes in his pleadings or properly applied them to the facts of Kimes' case.

Judge Biery ensured that Kimes' conviction would never be reversed.

On July 10, 2023, Kimes filed a request for Judge Biery to recuse himself from Kimes' case, because Judge Biery had shown bias against Kimes on many occasions and because he admitted that he had not read the law. A copy of that motion will be included in the Appendix.

On July 13, 2023, Judge Biery entered an order recusing himself from Kimes' case. A copy of that order will be included in the Appendix.

### **Interpretation of the Law**

One of the core responsibilities of judges is to interpret the law. They carefully examine laws, regulations, and legal precedents, applying them to the specific facts of the case before them. To make their interpretation sound, they analyze legal texts and legislative history while considering the relevant social, economic, and political factors. The interpretation of laws is essential to ensuring that justice is served and the rights of all parties are protected.

## **Impartiality and Fairness**

Judges have a significant responsibility in ensuring impartiality and fairness in the judicial process. They must remain objective and impartial while upholding standards of integrity and ethics. This means that judges should not allow personal biases, prejudices, or external influences to affect their decision-making process. Instead, judges should base their judgments on the available evidence, legal precedent, and the principles of justice. That did not happen in this case. Judge Biery consistently showed bias in Kimes' case.

## **Judicial Independence**

Judges need to carry out their responsibilities with independence and free from external pressures or influences. This independence helps them make objective decisions, impartially interpret the law, and carry out their duties without fear of retribution or persecution. While judges should remain accountable to the law and society, they must operate independently to ensure that justice is served.

The role of judges in interpreting and enforcing the law is a crucial aspect of the justice system. It is through their interpretation and enforcement that courts operate with fairness, impartiality, and transparency. Through their work, judges ensure that everyone receives equal treatment under the law, uphold democracy and

the rule of law, and safeguard the rights and freedoms of all individuals. Therefore, it is vital to recognize and support the invaluable role judges play in society.<sup>3</sup>

In the present case, Judge Biery failed to fulfill his judicial obligations. This should never be tolerated. Judge Biery must be ordered to follow the law in every case. For one thing, Judge Biery's conduct erodes the public's respect for the judiciary. *See* Code of Conduct for United States Judges, which states, in pertinent part:

**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.

**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.

The role of a judge is to uphold the laws made by the government and interpret the law, rather than create it. As shown above, Canon 2 of the Code of Conduct for United States Judges states that "a judge should respect and comply with the law."

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<sup>3</sup> The Vital Role of Judges in Interpreting and Enforcing the Law | Binham Legal

Kimes interprets this language to mean that a district judge must properly review, interpret, and apply the law without bias, regardless of his feelings toward the defendant. How can a judge comply with the law if he does not “read” the law? District court judges interpret the law to decide cases, but they do not have the authority to apply the law arbitrarily or make it up as they go.<sup>4</sup>

For the reasons and law set forth above, Judge Biery’s acts and omissions described above should be corrected, either by dismissal of this case in its entirety or by granting Kimes a new trial. The following are Kimes’ reasons for granting the writ:

A. To compel all federal judges to properly review, interpret, and apply the law cited in motions and other pleadings in matters before them. To do otherwise would create dictatorships instead of true judges.

B. To aid all appellants and appellees, it should be mandated by this Court that all lower courts be required to issue opinions and orders that sufficiently explain the reasons for the lower court’s ruling to aid in the appeal.

C. Kimes’ conviction should be dismissed with prejudice, reversed, or set aside.

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<sup>4</sup> [Judges And The Law: Who Makes The Rules? | LawShun](#)

## X. CONCLUSION

For the foregoing reasons, Kimes respectfully requests that this Court issue a writ of certiorari to review the judgments of the district court and the United States Court of Appeals for the Fifth Circuit.

Kimes seeks the following additional relief, if the petition is successful:

Setting aside Kimes' conviction,

Reversing the Fifth Circuit and the district court and awarding Kimes a new trial, or

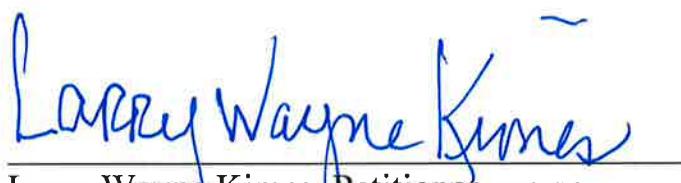
Dismissing the case against Kimes in its entirety.

Kimes seeks all additional relief to which he may be entitled.

Pursuant to 28 U.S.C. §1746, under penalty of perjury, I, Larry Wayne Kimes, hereby affirm that the facts contained herein are true and correct.

DATED: September 22, 2025.

Respectfully submitted,

A handwritten signature in blue ink that reads "Larry Wayne Kimes". The signature is fluid and cursive, with "Larry" and "Wayne" on the first line and "Kimes" on the second line, all connected by a single continuous line.

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United States Court of Appeals  
for the Fifth Circuit

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United States Court of Appeals  
Fifth Circuit

**FILED**

March 28, 2025

No. 24-50294

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Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

LARRY WAYNE KIMES,

*Defendant—Appellant.*

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

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**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

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No. 24-50294

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United States Court of Appeals  
Fifth Circuit

**FILED**

January 28, 2025

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

LARRY WAYNE KIMES,

*Defendant—Appellant.*

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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

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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

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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.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

LARRY WAYNE KIMES,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

§§§§§  
SA-24-CV-125-JKP  
SA-12-CR-886-JKP-2

**ORDER OF DISMISSAL**

Before the Court is Movant Larry Wayne Kimes' pro se Motion for Reconsideration. (ECF No. 411.) In the motion, Kimes argues the Court erred when it construed his Motion for Relief from Judgment or Order Pursuant to Rule 60, filed January 29, 2024, as a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (ECF No. 405). Specifically, Kimes argues the Court erred by (1) reclassifying his motion because he cannot file a § 2255 motion since he is no longer a prisoner; (2) not allowing him to file objections to the reclassification of his Rule 60(b) motion before dismissing it as successive; and (3) denying Kimes a certificate of appealability. Kimes also states he is relying on Federal Rule of Civil Procedure 59(e) to challenge the Court's orders construing his Rule 60(b) motion as a § 2255 motion.

Federal Rule of Civil Procedure 60(b) provides that “[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(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

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<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 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.

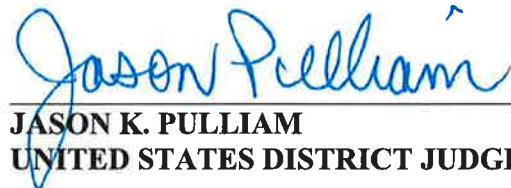
Kimes’s reliance on Rule 59(e) of the Federal Rules of Civil Procedure is similarly unavailing. Rule 59(e) “is ‘an extraordinary remedy that should be used sparingly.’” *Rollins v. Home Depot USA*, 8 F.4th 393, 396 (5th Cir. 2021) (quoting *Templet v. HydroChem Inc.*, 367 F.3d

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

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

LARRY WAYNE KIMES,

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§§§§§  
SA-24-CV-125-JKP  
SA-12-CR-886-JKP-2

**FINAL JUDGMENT**

The Court considered the Judgment to be issued in the above styled and numbered cause.

Pursuant to the Order dismissing Movant Larry Wayne Kimes' Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 of even date herewith without prejudice for want of jurisdiction,

**IT IS HEREBY ORDERED, ADJUDGED and DECREED** that Movant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (ECF No. 406) is **DISMISSED WITHOUT PREJUDICE**. **IT IS FURTHER ORDERED** that all pending motions related to this motion, if any, are **DENIED AS MOOT**.

**FINALLY, IT IS ORDERED** that a **CERTIFICATE OF APPEALABILITY WILL NOT ISSUE**, and this case is **DISMISSED** and **CLOSED**.

It is so **ORDERED**.

SIGNED on this 8th day of February, 2024.



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JASON K. PULLIAM  
UNITED STATES DISTRICT JUDGE

**SUPREME COURT OF THE UNITED STATES  
OFFICE OF THE CLERK  
WASHINGTON, DC 20543-0001**

September 15, 2025

Larry Kimes  
2225 Normandy Drive  
Irving, TX 75060

RE: Kimes v. United States  
USCA 5 No. 24-50294  
No: 24A1260

Dear Mr. Kimes:

The above-entitled petition for writ of certiorari was postmarked August 22, 2025 and received September 10, 2025. The papers are returned for the following reason(s):

The statement of jurisdiction must show the date the judgment or order sought to be reviewed was entered. Rule 14.1(e). To the extent the petition seeks review of the order dated January 28, 2025 by the United States Court of Appeals for the Fifth Circuit in case No. 24-50294, for which a timely petition for rehearing was denied on March 28, 2025, then the statement of jurisdiction must properly reflect those dates.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Upon resubmission, please ensure any personally identifiable information in the submission (e.g. social security number) is redacted.

Sincerely,  
Scott S. Harris, Clerk  
By:  
**COPY**  
Katie Heidrick  
(202) 479-3038

Enclosures