

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

APPENDIX

EXHIBIT A

FINDINGS REACHED BY THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
ON MARCH 15, 2018

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

2018 MAR 15 PM 3:1

CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY G
DEPUTYJOSE BERRUM, JR.,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.CAUSE NO.:
AU-17-CA-00943-SS
[AU-16-CR-00143-SS]

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Petitioner Jose Berrum, Jr.'s Motion to Vacate Under § 2255 [#51], Respondent United States of America (the Government)'s Response [#56-2] in opposition, and Berrum's Reply [#57] in support as well as the Government's Motion for Leave to File Sealed Documents [#56].¹ Having reviewed the documents, the relevant law, and the file as a whole, the Court now enters the following opinion and orders.

Background

In January 2014, Berrum was arrested for unlawful possession of a firearm and narcotics and released on bail. Mot. Vacate [#51] at 3. A little over a year later, in April 2015, Berrum was again arrested for unlawful possession of a firearm and released on bail. *Id.* In January 2016, Berrum was yet again arrested after federal agents searched his property pursuant to a warrant and recovered both firearms and narcotics. *Id.*

On August 4, 2016, Berrum appeared with his attorney before Magistrate Judge Mark Lane and pled guilty to three counts of unlawful possession of a firearm by a felon. Resp. Mot.

¹ The Court herein GRANTS the Motion for Leave to File Sealed Documents [#56].

Vacate [#56-3] Attach. A (Plea Tr.). During the plea colloquy, Judge Lane asked Berrum if he suffered from any mental or physical condition that might impede his ability to understand the plea proceedings. Plea Tr. at 9. Berrum said he did not suffer from any such condition. *Id.* Berrum was also asked if he had any complaints regarding his attorney's performance. *Id.* Berrum replied that he had no complaints. *Id.*

On September 15, 2016, the U.S. Probation Office disclosed its presentencing report (PSR) in anticipation of Berrum's sentencing. PSR [#30]. The PSR noted Berrum's left arm had been amputated in November 2013 after Berrum sustained a gunshot wound during the course of a drug deal gone awry. *Id.* at 19; Mot. Vacate [#51] at 1-2. The PSR also noted Berrum had been diagnosed with PTSD shortly after his arm was amputated. *Id.*; *see also* Mot. Vacate [#51] at 2 (alleging Berrum has previously suffered flashbacks, nightmares, insomnia, anxiety, "intrusive thoughts," depression, rage, and "marked paranoia"). During Berrum's sentencing on October 21, 2016, Berrum's attorney requested mental health counseling to address the anxiety Berrum experiences as a result of his injury and explained Berrum's anxiety for his personal safety led him to compulsively carry a firearm. Sent. Tr. at 12-17. The Court took note Berrum's PTSD diagnosis during the sentencing, ultimately sentencing Berrum to 100 months of imprisonment. Resp. Mot. Vacate [#56-2] Attach. B (Sent. Tr.) at 5-17. This sentence fell at the low end of the sentencing range suggested by the sentencing guidelines. *See id.* at 4 (noting U.S. Probation Office calculated a guideline range of 100 to 125 months).

Berrum now files a motion to vacate under 28 U.S.C. § 2255 arguing ineffective assistance of counsel. Mot. Vacate [#51]. Specifically, Berrum contends that he told his attorney he was mentally unfit to stand trial but that his attorney failed to properly investigate whether Berrum's past diagnosis of PTSD rendered him incompetent to enter a guilty plea. *Id.* at 4, 9;

A. Failure to Request Evaluation

Berrum argues Counsel should have investigated whether Berrum's PTSD rendered him incompetent to enter a guilty plea. Mot. Vacate [#51] at 9. Under *Strickland*, Berrum must show (1) that Counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for Counsel's unprofessional error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687–88, 694. *Strickland* does not require the Court analyze these criteria in any particular order. *Bouchillon v. Collins*, 907 F.2d 589, 595–97 (5th Cir. 1990). Here, the Court first examines whether Berrum has shown prejudice.

The Court determines Berrum has not shown prejudice because he has failed to establish there was a reasonable probability Berrum was incompetent during the plea proceedings. *See Theriot v. Whitley*, 18 F.3d 311, 313–14 (5th Cir. 1994) (per curiam) (explaining petitioner must demonstrate there was a reasonable probability petitioner was in fact incompetent in order to show prejudice for failure to investigate). Though Berrum puts forward the conclusory assertion that "he did not believe himself to be mentally fit to stand trial," Berrum does not allege or explain how his PTSD symptoms interfered with his ability to understand or participate in the plea proceedings.² Mot. Vacate [#51] at 4, 9–14; *see also Theriot*, 18 F.3d at 314 (To deny relief seems harsh, because the reason for denial is lack of proof[;] . . . [yet] the judicial system has a great interest in maintaining the finality of guilty pleas"); *cf. Bouchillon*, 907 F.2d at 595–97 (finding petitioner with PTSD had shown prejudice where petitioner alleged episodes of "numbing" and blackouts and where belated psychological evaluation indicated petitioner was

² Relatedly, the Court finds Berrum is not entitled to an evidentiary hearing because he has not alleged specific facts giving rise to a colorable claim that his PTSD affected his competency at the time of the plea proceeding. *See, e.g., Engelen v. United States*, 68 F.3d 238, 240–41 (8th Cir. 1995) (explaining court need not accept as true conclusory allegations couched as statements of fact).

incompetent). Moreover, when Judge Lane asked if he suffered from any mental condition which might affect his judgment or impede his ability to understand the plea proceedings, Berrum replied that he did not suffer from any such condition. Plea Tr. at 9. The Court determines Berrum has not shown prejudice with respect to his attorney's failure to investigate.

B. Failure to Raise PTSD During Sentencing

Berrum has also failed to establish he was prejudiced by the alleged failure of counsel to raise Berrum's PTSD during the sentencing. *See Strickland*, 466 U.S. at 687-88, 694. The Court explicitly took note of Berrum's PTSD during the sentencing proceeding. Sent. Tr. at 5-17. Additionally, Berrum's attorney obliquely raised the issue of Berrum's PTSD with the Court during the sentencing hearing when the attorney explained Berrum's anxiety for his personal safety led him to compulsively carry a firearm and requested mental health counseling to address the anxiety Berrum experiences as a result of his injury. Sent. Tr. at 12-17. In sum, the Court did in fact consider Berrum's PTSD, and the Court now determines Berrum has not shown prejudice with respect to the sentencing proceeding.

Conclusion

Accordingly,

IT IS ORDERED Berrum's Motion to Vacate [#51] is DENIED; and

IT IS FURTHER ORDERED the Government's Motion to Seal [#56] is
GRANTED.

SIGNED this the 13th day of March 2018.


SAM SPARKS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

2018 MAR 15 PM 3:10

CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY *G* DEPUTY

JOSE BERRUM, JR.,
Movant,

-vs-

UNITED STATES OF AMERICA,
Respondent.

CAUSE NO.:
AU-17-CA-00943-SS
AU-16-CR-00143-SS

FINAL JUDGMENT

BE IT REMEMBERED on this day the Court entered its order denying Movant Jose Berrum, Jr.'s Motion to Vacate Under 28 U.S.C. § 2255 [#51]. The Court accordingly enters the following judgment:

IT IS ORDERED, ADJUDGED, and DECREED that Movant Jose Berrum, Jr.'s Motion to Vacate Under 28 U.S.C. § 2255 [#51] is DENIED, and that Respondent United States of America go hence without delay and with its costs, for which let execution issue against the movant.

SIGNED this the 15 day of March 2018.

Sam Sparks
SAM SPARKS

SENIOR UNITED STATES DISTRICT JUDGE

EXHIBIT B

FINDINGS REACHED BY THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT DENYING ISSUANCE OF A CERTIFICATE
OF APPEALABILITY ON FEBRUARY 22, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50277



A True Copy
Certified order issued Feb 22, 2019

UNITED STATES OF AMERICA,

Jyl W. Cuyca
Plaintiff-Appellee

Clerk, U.S. Court of Appeals, Fifth Circuit

JOSE BERRUM, JR., also known as Jose Berrum Hernandez, Jr.,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas

ORDER:

Jose Berrum Hernandez, Jr., federal prisoner # 74977-380, was convicted by guilty plea on two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court sentenced Berrum Hernandez to concurrent terms of 100 months of imprisonment and three years of supervised release. He seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion.

To obtain a COA, Berrum Hernandez must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court denied his motion on the merits, he must demonstrate that jurists of reason could disagree with the district court's resolution of his constitutional claims or could conclude the issues presented "deserve encouragement to

No. 18-50277

proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks and citation omitted).

Berrum Hernandez argues that his defense counsel was ineffective for (1) failing to investigate and ask the trial court to order an evaluation of Berrum Hernandez's mental competency; and (2) failing to seek leniency at sentencing based on his mental health issues. He has failed to make the requisite showing as to these claims.

Accordingly, Berrum Hernandez's motion for a COA is DENIED.



JAMES C. HO
UNITED STATES CIRCUIT JUDGE

EXHIBIT C

FINDINGS REACHED BY THE UNITED STATES COURT OF APPEALS FOR THE
FOR THE FIFTH CIRCUIT DENYING EN BANC HEARING
ON APRIL 16, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50277

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JOSE BERRUM, JR., also known as Jose Berrum Hernandez, Jr.,

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

Before SOUTHWICK, HAYNES, and HO, Circuit Judges.

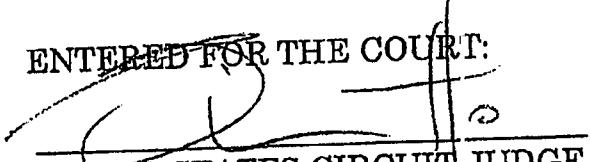
PER CURIAM:

() Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

() Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members of the court

and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

~~ENTERED FOR THE COURT:~~


UNITED STATES CIRCUIT JUDGE

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