

## **ATTACHMENT B**

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff/Appellee, )  
 )  
 v. ) No. 18-3052  
 )  
 MARCO ANTONIO CORTES-GOMEZ, )  
 )  
 Defendant/Appellant. )

**APPOINTED COUNSEL'S *ANDERS* MOTION TO WITHDRAW**

In accordance with 10th Cir. R. 46.4(B), Ryan A. Ray, court-appointed counsel for Defendant/Appellant, Marco Antonio Cortes-Gomez, respectfully requests that the Court grant him leave to withdraw on the grounds that (i) the course that Mr. Cortes-Gomez demands be followed is wholly frivolous, and (ii) there is no good-faith basis for the filing of a petition for certiorari on the sole ground that Mr. Cortes-Gomez wishes to be pursued on certiorari.

On June 12, 2019, this Court entered its Opinion (which was published) denying all of Mr. Cortes-Gomez's propositions of error. On June 26, 2019, this Court entered an Order granting an extension of time to July 3, 2019 within which to file a petition for rehearing.

The undersigned promptly transmitted the Opinion to Mr. Cortes-Gomez, who does not speak the English language, along with a letter

explaining the theoretically available procedural options (which letter was translated into Spanish by an internet service).

After receipt of that letter, Mr. Cortes-Gomez contacted the undersigned's office on June 24, 2019, speaking through an *ad hoc* inmate interpreter, and spoke to the undersigned's assistant. In that call, Mr. Cortes-Gomez demanded that a petition for rehearing be filed. The undersigned was not available at the time Mr. Cortes-Gomez called, and the undersigned had been attempting to establish a telephonic conference with Mr. Cortes-Gomez through his facility of incarceration since June 12, 2019. A privileged call with a court-certified interpreter was finally set on June 27, 2019.

During that call, Mr. Cortes-Gomez explained that the sole issue that he wished to litigate further (specifically in the context of rehearing) was a claim that his being convicted of a conspiracy count (and in particular, being held accountable for the conduct of other co-conspirators under the doctrine of *Pinkerton v. United States*, 328 U.S. 640 (1946)) violated the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.<sup>1</sup> Mr. Cortes-Gomez was clear that this was the one and only issue he wished to have included in a petition for rehearing and in a petition

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<sup>1</sup> Mr. Cortes-Gomez himself mentioned both clauses by name.

for certiorari if rehearing was denied. This was despite discussion of the Opinion and other potential arguments.

The undersigned explained to Mr. Cortes-Gomez during that call that (i) this issue was never raised at the trial or appellate levels, (ii) it was wholly frivolous in light of existing authority, and (iii) there was no good-faith basis for a petition for rehearing (either panel or *en banc*). The undersigned thus explained that, since there was no good-faith basis for rehearing, he would not be filing for rehearing.

On June 28, 2019, Mr. Cortes-Gomez and the *ad hoc* inmate interpreter again called the undersigned's office and demanded that a petition for rehearing be filed on the issue discussed in the June 27 call. The undersigned explained that there was no viable basis for rehearing, but advised Mr. Cortes-Gomez that he would make the Court aware of the issue that Mr. Cortes-Gomez wished to raise and that Mr. Cortes-Gomez himself would have the right to make a filing to pursue it.

In *United States v. Hawkins*, 505 F.3d 613, 615 (7th Cir. 2007), the United States Court of Appeals for the Seventh Circuit noted that an *Anders* motion to withdraw was appropriate in the procedural situation presented in this appeal.

The undersigned certifies to the Court that he has conscientiously examined this case, the Court's Opinion, and the record and finds further litigation of this appeal to be wholly frivolous, for the following reasons:

- The sole issue that Mr. Cortes-Gomez wishes to pursue is directly foreclosed by *Pinkerton v. United States*, 328 U.S. 640 (1946) and nearly seventy-five (75) years of its progeny. There has been no suggestion of the Supreme Court's willingness to overrule *Pinkerton* on due process grounds.<sup>2</sup>
- This Court's rules provide that, as to petitions for rehearing *en banc*:

A request for *en banc* consideration is disfavored. Before seeking rehearing *en banc* litigants should be aware and take account of the fact that, before any published panel opinion issues, it is generally circulated to the full court and every judge on the court is given an opportunity to comment. *En banc* review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court.

10th Cir. R. 35.1(A). Based upon counsel's careful analysis of the Opinion and subsequent legal research, there is no good-faith basis to meet this standard.

- This Court's rules provide that, as to petitions for panel rehearing:

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<sup>2</sup> It bears noting that, by its terms, the Fourteenth Amendment could never apply to a federal prosecution, as it only applies to the States.

A petition for rehearing should not be filed routinely. Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court.

10th Cir. R. 40.1(A). Based upon counsel's careful analysis of the Opinion and review of prior briefing, there is no good-faith basis to meet this standard.

- As for a Petition for Certiorari, the United States Supreme Court's Rules provide:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

S. Ct. R. 10. This Court's decision is based upon decisions from the Supreme Court, and is not in conflict with the decision of any other court to the best knowledge of the undersigned. It is not, in the professional judgment of the undersigned, a departure from the ordinary course of judicial proceedings, and certainly not to an extraordinary extent. Further, the Court's decision is, facially based upon factual determinations, and in the professional judgment of the undersigned, properly states the governing rules of law. Moreover, the only issue that Mr. Cortes-Gomez wishes to further litigate is directly foreclosed by United States Supreme Court authorities consistently followed in the lower courts for nearly seventy-five (75) years. That issue is also waived and forfeited in this case.

In accordance with 10th Cir. R. 46.4(B), the undersigned hereby certifies that:

- Mr. Cortes-Gomez speaks, reads, and writes the Spanish language. The undersigned has, as described above, had interpreted telephonic conversations with Mr. Cortes-Gomez regarding the substance of this brief.
- Mr. Cortes-Gomez's address is:

Marco Antonio Cortes-Gomez  
# 27652-031  
FCI Beaumont Low  
Federal Correctional Institution  
P.O. Box 26020

Beaumont, TX 77720

The undersigned confirmed this on the Bureau of Prisons website as of July 3, 2019.

- Mr. Cortes-Gomez has never been adjudicated incompetent in this case, or otherwise to the knowledge of the undersigned. The undersigned has no reason to believe that Mr. Cortes-Gomez is incompetent. During the pendency of the undersigned's court-appointed representation of Mr. Cortes-Gomez, the undersigned has had several telephonic conversations with Mr. Cortes-Gomez in which he has discussed legal and factual issues in some detail. These communications suggest that Mr. Cortes-Gomez understands the nature of these proceedings and can fully participate in them.
- The undersigned further certifies that, in addition to mailing this brief to Mr. Cortes-Gomez, he also separately advised Mr. Cortes-Gomez, in writing in the Spanish language, that he had an absolute right to submit a response to the Court, consistent with the Federal Rules of Appellate Procedure, and that the failure to do so within the time limit proscribed by this Court could lead to his appeal becoming final.

**WHEREFORE**, court-appointed counsel, Ryan A. Ray, respectfully requests that the Court grant leave to withdraw because further litigation of this appeal would be without a legal basis under this Court's and the Supreme Court's rules, in particular as to the sole issue that Mr. Cortes-Gomez demands be litigate further (to the exclusion of others).

Respectfully submitted,

/s/ Ryan A. Ray

**Ryan A. Ray**, OBA # 22281

**NORMAN WOHLGEMUTH CHANDLER**

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**CERTIFICATION OF DIGITAL SUBMISSION**

In accordance with Section II(I) of this Court's CM-ECF User's Manual, I hereby certify that:

1. There were no privacy redactions made to this motion as there were none required by any privacy policy;
2. No hard copies of this motion are required for submission to the Court; and
3. The digital submission has been scanned for viruses with BitDefender, which was last updated on July 3, 2019 and, according to the program, is free of viruses.

Dated: July 3, 2019.

/s/ Ryan A. Ray

**Ryan A. Ray**

**CERTIFICATE OF SERVICE**

I hereby certify that on July 3, 2019, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

James A. Brown, Esq.  
Skipper Jacobs, Esq.

I further certify that on July 3, 2019, I forwarded, via U.S. Mail, a copy of this brief exactly as filed, along with the Spanish language translated letter described above to:

Marco Antonio Cortes-Gomez  
# 27652-031  
FCI Beaumont Low  
Federal Correctional Institution  
P.O. Box 26020  
Beaumont, TX 77720

/s/ Ryan A. Ray  
**Ryan A. Ray**