

No: 22 A455

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
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SUPREME COURT, U.S.

Jesus Cortez - Petitioner,

Vs.

United States of America - Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

MOTION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI

Jesus Cortez
Pro SE Representation
Reg. No. 06879-380
FCI Milan
P.O. Box 1000
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To The Honorable Justices of The Supreme Court:

COMES NOW Jesus Cortez, the Petitioner, Pro Se, and respectfully moves The Honorable Court, pursuant to Rule 13 of The Supreme Court of the United States, for an order Extending the Time (60 days) to file a Writ of Certiorari.

JUDGMENT

Petitioner is seeking review of the Fifth Circuit Court of Appeal's denial for a Certificate of Appealability and Appointment of Counsel (Appendix A). To authorize Petitioner to Appeal the denial of his Motion To Vacate, Set Aside or Correct Sentence pursuant to Title 28 U.S.C. § 2255.

The opinion of the United States Court of Appeals (Appendix B) is reported at United States v. Cortez, No. 21-50152, 2022 WL 3928521 (5th Cir. Aug. 31, 2022).

CONSTITUTIONAL PROVISION

The Sixth Amendment of the United States Constitution provides:

"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 witnesses in his favor, and to have the assistance of counsel for his defense."

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 31, 2022 (Appendix A). Petitioner's

current ninety (90) day deadline for filing a Writ of Certiorari is set for November 29, 2022. Petitioner request a enlargement of time sixty (60) days, until January 28, 2023, to file a Writ of Certiorari.

The jurisdiction of the Honorable Court is invoked under Title 28 U.S.C. § 1254(1).

REASONS FOR EXTENSION OF TIME

1. Petitioner is representing himself Pro SE, he has no training in the law field and needs additional time to research and prepare to file his Petition for a Writ of Certiorari.

2. Petitioner works a full-time job and is enrolled full-time in an Automotive Vocational Training Course at Federal Correctional Institution Milan.

3. In light of the ongoing Public Health concerns related to COVID-19, Federal Correctional Institution Milan is currently operating on a modified operations schedule. Additionally, Federal Correctional Institution Milan is short staffed.

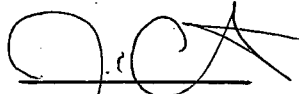
4. Due to the aforementioned reasons, Petitioner's access to the institution's law library is very limited. Petitioner needs access to the law libray to research and prepare his Petition for a Writ of Certiorari.

5. This motion is made in the interest of justice and is not meant to delay the proceedings. The United States will not be prejudiced by a sixty (60) day delay.

WHEREFORE, based on the above, Petitioner, prays that the Honorable Court grant this motion and afford him an additional sixty (60) days,

(until January 28, 2023) to file his Petition for a Writ of Certiorari.

Respectfully Submitted on this 10th day of November 2022.

A handwritten signature in black ink, appearing to read 'J. Cortez', written over a horizontal line.

Jesus Cortez

Pro SE Representation

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Appendix

A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 31, 2022

Lyle W. Cayce
Clerk

No. 21-50152

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JESUS CORTEZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:19-CV-1160

Before SOUTHWICK, GRAVES, and COSTA, *Circuit Judges.*

PER CURIAM:*

A member of this panel previously denied Jesus Cortez a certificate of appealability and denied appointment of counsel. Cortez now moves for reconsideration. Both motions are again DENIED.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Appendix

B

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obtain copies of his bank and phone records. Trial counsel is required to “make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* at 691. When assessing whether pretrial investigation was reasonable, we consider “the ‘number of issues in the case, the relative complexity of those issues, the strength of the government’s case[,] and the overall strategy of trial counsel.’” *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985) (citation omitted). At a minimum, counsel must “interview potential witnesses and make an independent investigation of the facts and circumstances of the case.” *Id.*; see also AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 4-4.1 (4th ed. 2017).

The district court dismissed this claim, relying on an affidavit provided by trial counsel stating that Cortez had not asked counsel to interview the potential witnesses or obtain phone or bank records. Though perhaps not requested, Cortez’s trial counsel apparently did not interview any potential witnesses or conduct an independent investigation. They only attempted to interview Cortez’s father and then did not interview anyone else. Instead, trial counsel believed, “in [their] professional judgment and experience, that [their] defensive theory was best supported by Mr. Cortez’s own testimony, and our cross-examination of the Government’s witnesses.” Under these facts, reasonable jurists could debate the district court’s conclusion that counsel’s efforts were objectively reasonable. See *Strickland*, 466 U.S. at 691.

The district court also concluded that Cortez failed to show how additional efforts would have altered the outcome of the trial given the weight of the evidence against Cortez, including his oral confession. In support of his motion, Cortez provided only a single admissible affidavit from his brother – one of the named, uncalled witnesses – stating he was available and would have testified. See *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir.

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concluding that Cortez's arguments were largely unsubstantiated and that his counsel had vigorously represented Cortez at trial.

Cortez raises a debatable issue regarding counsel's deficient performance in failing to consult a medical expert regarding Cortez's apparent diagnosis of PTSD and failure to present evidence of his PTSD at trial. The defense knew of Cortez's claimed PTSD, as counsel relied on it at trial extensively. Even so, the defense did not submit documents or expert testimony in support of the supposed diagnosis at trial. To substantiate this claim, Cortez attached medical notes to his Section 2255 motion showing that a doctor listed PTSD as one of Cortez's ailments on December 1, 2016. Importantly, Cortez's trial counsel did not explain the failure to present this evidence or consult with Cortez's doctors regarding Cortez's PTSD diagnosis, nor did they suggest it was based on any strategic decision.

Nonetheless, Cortez has not made a substantial showing that the failure to present this evidence was prejudicial. He has not explained how evidence of a PTSD diagnosis would have altered the outcome of the trial given the weight of the evidence against him. *See Gray v. Lucas*, 677 F.2d 1086, 1093 (5th Cir. 1982). He argues that had his counsel been better prepared, they would have "been in a better position to impeach the government's witnesses" and "strengthen[ed] Cortez's defense." These conclusory allegations cannot satisfy Cortez's burden of showing prejudice. *See United States v. Holmes*, 406 F.3d 337, 361 (5th Cir. 2005).

Fourth, Cortez claims that his counsel's failure to investigate and present evidence of his PTSD was ineffective at the sentencing phase. The district court concluded that Cortez failed to show that his trial counsel was ineffective at sentencing and that but for the failure to investigate his PTSD he would have received a lesser sentence, noting that his trial counsel did raise the issue of Cortez's PTSD at sentencing. Indeed, Cortez received a

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“false statements” that were made outside the presence of the jury. His contention is unavailing. As the district court noted, no presumption of vindictiveness arises from a prosecutor’s filing a superseding indictment after a defendant refuses to accept a guilty plea. *See United States v. Saltzman*, 537 F.3d 353, 360–62 (5th Cir. 2008). Also, Cortez has failed to explain how the complained-of “false statements” could have prejudiced him or how his appellate counsel would have been able to show plain error. Appellate counsel are not required to present patently frivolous – or even all non-frivolous issues – on appeal. *Ellis v. Lynaugh*, 873 F.2d 830, 840 (5th Cir. 1989).

Second, Cortez contends his appellate counsel was ineffective when they failed to challenge the constitutionality of 18 U.S.C. § 924(c)(2) after the Supreme Court’s decision in *Johnson v. United States*, 576 U.S. 591 (2015). Specifically, Cortez complains that his appellate counsel did not argue that Section 924(c)(2) is unconstitutionally vague because it fails to “provide a fair notice of the prohibited drugs” that constitute “drug trafficking.” The district court dismissed this argument because *Johnson* and subsequent cases — *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) and *United States v. Davis*, 139 S. Ct. 2319 (2019) — applied to provisions of the United States Code with residual clauses. Section 924(c)(2) contains no residual clause, making *Johnson* inapplicable.

Cortez’s motions for a COA and for appointment of counsel are DENIED.

CERTIFICATE OF FILING AND SERVICE

I, Jesus Cortez, hereby certify that I have served a true copy of the following:


MOTION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI

which is deemed filed at the time it was delivered to prison authorities for forwarding, Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 101 L.Ed. 2d 245 (1988) and Fed. R. App. P. 25(a)(2)(c).* To the Clerk of the Court of THE SUPREME COURT OF THE UNITED STATES

and _____,
with sufficient First Class Postage for its delivery via the U.S. Postal Service, by placing said document into to Institution's Legal Mail System at FCI Milan, P.O. Box 1000, MI., 48160. With postage affixed and addressed as follows:

UNITED STATES SUPREME COURT
OFFICE OF THE CLERK
1 FIRST Street, N.E.
Washington, D.C., 20543

Executed on this 10th day of November of 20 22.



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*Pursuant to Fed. R. App. P. 25(a)(2)(c), "A paper filed by an inmate confined in an institution is timely filed if deposited in the institution's internal mail system on or before the last day of filing."