

United States Court of Appeals for the Fifth Circuit

No. 23-50027

United States Court of Appeals
Fifth Circuit

FILED

July 3, 2023

JOSE ANTONIO CORTEZ,

Lyle W. Cayce
Clerk

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 5:18-CV-923

ORDER:

Jose Antonio Cortez was convicted of aggravated sexual assault of a child and indecency with a child by contact and by exposure, and he received an aggregate sentence of 45 years in prison. The district court dismissed Cortez's 28 U.S.C. § 2254 application as untimely. Cortez now seeks a certificate of appealability (COA) to appeal the district court's denial of his Federal Rule of Civil Procedure 60(b) motion challenging the procedural dismissal. Although Cortez contends that it is not clear whether a COA is necessary, he must have a COA to appeal the denial of a Rule 60(b) motion

Appendix A

seeking reconsideration of the dismissal as untimely of a habeas application. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

In his COA motion, Cortez argues that the Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), supports his assertion of actual innocence on the ground that the jury's verdict was not unanimous; thus, he argues that his innocence prevents the application of the time bar to his § 2254 application. He also argues that the district court erred in concluding that he failed to show good cause for the delay in filing his Rule 60(b) motion without giving him an opportunity to make the necessary showing.

To obtain a COA, Cortez must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because he seeks to challenge the denial of a Rule 60(b) motion, Cortez must show that reasonable jurists could debate whether the district court's ruling on his Rule 60(b) motion was an abuse of discretion. *See Hernandez*, 630 F.3d at 428. Cortez has not met this standard.

Accordingly, the motion for a COA is DENIED. Cortez's motion for leave to proceed in forma pauperis on appeal is likewise DENIED.



CAROLYN DINEEN KING
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSE ANTONIO CORTEZ,

Petitioner,

v.

BOBBY LUMPKIN,¹ Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

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Civil No. SA-18-CV-0923-FB

ORDER

Before the Court is *pro se* petitioner Jose Antonio Cortez's Motion for Relief from Judgment (ECF No. 21). On February 28, 2019, this Court denied petitioner's request for federal habeas corpus relief under 28 U.S.C. § 2254 as untimely. (ECF No. 12). This determination was affirmed by the Fifth Circuit Court of Appeals, and the United States Supreme Court denied certiorari. (ECF Nos. 19, 20). Citing Federal Rule of Civil Procedure 60(b)(6), petitioner now argues that the Supreme Court's opinion in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), constitutes an extraordinary circumstance warranting relief from this Court's February 2019 judgment.

Petitioner's motion does not justify granting relief from the Court's judgment.² Pursuant to Rule 60(b)(6), a court may reopen a final judgment when a party shows "any other reason that

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The previous named respondent in this action was Lorie Davis. On August 10, 2020, Bobby Lumpkin succeeded Davis as Director of the Texas Department of Criminal Justice, Correctional Institutions Division. Under Rule 25(d) of the Federal Rules of Civil Procedure, Mr. Lumpkin is automatically substituted as a party.

²

The Court has jurisdiction to consider petitioner's Rule 60(b) motion because it "attacks, not the substance of the federal court's resolution of the claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005).

Appendix B

justifies relief.” While considered a “grand reservoir of equitable power to do justice,” Rule 60(b)(6) relief is available only if “extraordinary circumstances” are present. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (citation omitted); *Rocha v. Thaler*, 619 F.3d 387, 400 (5th Cir. 2010). Furthermore, under Rule 60(c)(1), any “motion under Rule 60(b) must be made within a reasonable time,” unless good cause can be shown for the delay. *In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004). Thus, to succeed on his Rule 60(b) motion, petitioner must show: (1) that the motion was made within a reasonable time; and (2) extraordinary circumstances exist that justify the reopening of a final judgment. *Gonzalez*, 545 U.S. at 535. He does neither.

To start, petitioner’s motion is untimely. In his federal petition, petitioner argued that his conviction was unconstitutional because the jury charge submitted to the jury allowed for a non-unanimous verdict. Petitioner now challenges this Court’s denial of federal habeas corpus relief, arguing that the Supreme Court’s opinion in *Ramos* announced a new rule of criminal procedure requiring jury unanimity. Yet, the *Ramos* opinion was issued in April 2020, over two and a half years prior to the filing of this motion. As petitioner has shown no good cause to excuse this lengthy delay, petitioner’s motion is not made within a reasonable time.

Even assuming petitioner’s motion was timely, he has not established an extraordinary circumstance sufficient to justify reopening the Court’s judgment. Petitioner’s federal habeas corpus petition was denied as untimely, and petitioner has not demonstrated that the *Ramos* opinion would alter that determination, either by establishing his actual innocence or presenting an argument for equitable tolling. Indeed, the Court doubts the applicability of *Ramos* to the instant case, as Texas law required a unanimous jury verdict prior to the issuance of *Ramos*. See *O’Brien v. State*, 544 S.W.3d 376, 382 (Tex. Crim. App. 2018) (noting that the Texas Constitution and Code of Criminal Procedure require a unanimous jury verdict, but

unanimity is not violated by a jury charge that presents the jury with the option of choosing among various alternative manner and means of committing the same statutorily defined offense). Moreover, the Supreme Court has determined that new rule announced in *Ramos* requiring jury unanimity does not apply retroactively on federal collateral review. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1562 (2021). Thus, petitioner is not entitled to the benefit of that rule.

As such, petitioner has failed to identify an error of law or fact or other grounds warranting relief from judgment pursuant to Rule 60(b)(6).

Accordingly, it is hereby **ORDERED** that petitioner's Motion for Relief from Judgment, filed November 7, 2022 (ECF No. 21), is **DENIED**.

It is further **ORDERED** that a COA is **DENIED**, as reasonable jurists could not debate the denial of the 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).

It is so ORDERED.

SIGNED this 17th day of November, 2022.



FRED BIERY
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 23-50027

JOSE ANTONIO CORTEZ, ..

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:18-CV-923

UNPUBLISHED ORDER

Before KING, JONES, and SMITH, *Circuit Judges.*

PER CURIAM:

A member of this panel previously DENIED a certificate of appealability and in forma pauperis. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

Appendix C

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 02, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-50027 Cortez v. Lumpkin
USDC No. 5:18-CV-923

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701

Mr. Jose Antonio Cortez
Mr. Edward Larry Marshall