IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40633

ROBERTO MORENO RAMOS,

Petitioner - Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent - Appellee

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

Before DENNIS, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Roberto Moreno Ramos is scheduled to be executed on Wednesday, November 14, 2018. He moves this court to recall its mandate issued sixteen years ago, denying his motion for a Certificate of Appealability (COA) seeking federal habeas relief. *See Ramos v. Cockrell*, 32 F. App'x 126, 2002 WL 334626, at *2 (5th Cir. 2002). He also moves for a stay of execution. Along with these

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 R. 47.5, the court has determined that this motion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

motions, Ramos has filed a motion to file an overlength reply, which is hereby GRANTED. Ramos argues that recall of the mandate is appropriate because his initial federal habeas counsel had a conflict of interest and was therefore ineffective, and Ramos seeks to benefit from subsequent decisions of the Supreme Court and this court that were unavailable to him in his initial federal habeas application. He also argues that a stay of execution is warranted because he is likely to succeed on the merits of his motion to recall the mandate. For the reasons stated below, we deny the motion to recall the mandate and the motion for a stay of execution.

In 1993, Ramos was convicted and sentenced to death in Texas state court for the capital murder of his wife and two young children. Ramos alleges that his trial counsel conducted no mitigation investigation and presented no mitigation evidence at the penalty phase of his case. Ramos's conviction and sentence were affirmed on direct appeal, and his application for state post-conviction relief was denied. In his initial federal habeas petition under 28 U.S.C. § 2254, filed in 1999, Ramos did not raise an ineffective assistance of trial counsel (IATC) claim. The district court granted summary judgment in favor of the State, and Ramos petitioned this court for a COA. *Ramos v. Johnson*, No. 7:99-CV-00134 (S.D. Tex. 2000). This court denied a COA on all of Ramos's claims in 2002. *Ramos v. Cockrell*, 2002 WL 334626, at *8. The Supreme Court denied certiorari. *Ramos v. Cockrell*, 537 U.S. 908 (2002). On November 7, 2018, Ramos filed the instant motion to recall our 2002 mandate so that he may proceed with his initial federal habeas petition with the assistance of conflict-free counsel. He also seeks a stay of execution pending such proceedings. For the reasons stated below, we deny both motions.

This court has inherent power to recall its mandate, which "can be exercised only in extraordinary circumstances." *Calderon v. Thompson*, 523

U.S. 538, 549-50 (1998). This court will not recall its mandate "except to prevent injustice." 5TH CIR. R. 41.2. Ramos argues that extraordinary circumstances are present here because his state and federal habeas counsel's conflict of interest prevented him from raising a potentially meritorious IATC claim in his initial federal habeas petition.[1] Had the rules stated by the Supreme Court in *Trevino/Martinez* and this court in *Speer/Mendoza* been in effect in 2000, Ramos argues that he could have requested supplemental counsel in his federal habeas proceeding to investigate whether there were claims that should have been brought in state habeas proceedings but were not, thus excusing the procedural default and allowing such claims to be addressed on federal habeas in the first instance.[2] When these cases were decided, however, Ramos was in fact represented by conflict-free counsel—he was appointed new counsel by this court in 2001 when his initial federal habeas counsel withdrew. Ramos essentially asks this court to recall its mandate because having the same counsel in state and federal habeas proceedings, he argues, now constitutes a "defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). However, Ramos's argument that he has viable avenues for relief that he could have pursued in his federal habeas petition issued in 2002 had those proceedings

[1] The Supreme Court has indicated the importance of conflict-free counsel. *Christenson v. Roper*, 135 S. Ct. 891, 894-96 (2015). New counsel should be appointed when doing so is in the interests of justice, considering, among other things, "the timeliness of the motion." *Id.* at 894. However, these arguments are unavailing for Ramos because of the Supreme Court's stringent standard for recalling a mandate in a habeas proceeding laid out in *Calderon*, discussed *infra*.

[2] *See Martinez v. Ryan*, 566 U.S. 1, 16 (2012) (holding that a federal habeas court may hear an IATC claim that is procedurally defaulted where the claim was not properly presented at the first opportunity in state court due to the ineffective assistance of state habeas counsel); *Trevino v. Thaler*, 569 U.S. 413, 429 (2013) (applying *Martinez* to Texas state habeas proceedings); *Speer v. Stephens*, 781 F.3d 784, 786 (5th Cir. 2015) (appointing supplemental federal habeas counsel to determine whether petitioner had "additional habeas claims that ought to have been brought"); *Mendoza v. Stephens*, 783 F.3d 203, 208 (5th Cir. 2015) (Owen, J., concurring) (finding it "appropriate to appoint additional counsel for [petitioner] to determine whether, in new counsel's professional judgment, there are claims that should have been, but were not, raised in the state habeas proceedings").

been instituted today does not justify recalling a mandate issued sixteen years ago.

Because Ramos seeks to recall the mandate issued in a habeas proceeding, we "must be guided by the general principles underlying our habeas corpus jurisprudence." *Thompson*, 523 U.S. at 554. In *Calderon v. Thompson*, the Supreme Court instructed that "where a federal court of appeals . . . recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Id.* at 558. To fall under the miscarriage of justice exception, a capital petitioner challenging his death sentence "must show 'by clear and convincing evidence' that no reasonable juror would have found him eligible for the death penalty." *Id.* at 559-60 (citing *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992)). Ramos essentially argues that he qualifies for the miscarriage of justice exception because new, conflict-free counsel would present a claim to this court that mitigating evidence should have been introduced at the penalty phase of his trial. However, the Supreme Court has held that "additional mitigating evidence [can]not meet the miscarriage of justice standard." *Bell v. Thompson*, 545 U.S. 794, 812 (2005) (citing *Sawyer*, 505 U.S. at 345-47); *see also Rocha v. Thaler*, 626 F.3d 815, 825 (5th Cir. 2010). Because mitigating evidence cannot meet the miscarriage of justice standard, Ramos's motion to recall the mandate solely for the purpose of developing mitigation evidence must be DENIED.

Additionally, to succeed on his motion for a stay of execution, Ramos must, among other things, make "a strong showing that" his motion to recall

the mandate "is likely to succeed on the merits."[3] *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *Adams v. Thaler*, 679 F.3d 312, 318 (5th Cir. 2012) (applying the *Nken* factors to a motion for a stay of execution). Because Ramos's motion to recall the mandate fails, as discussed above, he cannot make such a showing. Therefore, both his motion to recall the mandate and his motion for a stay of execution are DENIED.

[3] Ramos must additionally show that he would "be irreparably injured absent a stay," that granting the stay would not "substantially injure the other parties interested in the proceeding," and that the public interest supports granting the motion. *Nken*, 556 U.S. at 426. Because Ramos cannot demonstrate a likelihood of success on the merits, we decline to address the remaining factors.