No. 18-6680 & 18A510

IN THE

Supreme Court of the United States

ROBERTO MORENO RAMOS,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari
to the Fifth Circuit Court of Appeals

PROOF OF SERVICE

I hereby certify that on November 14, 2018, one copy of Respondent's Brief in Opposition was sent by mail and electronic, to Danalynn Recer, 2307 Union Street, Houston, Texas, 77007, dlrecer@aol.com. All parties required to be served have been served. I am a member of the Bar of this Court.

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RESPONDENT'S BRIEF IN OPPOSITION

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This is a capital case.

QUESTIONS PRESENTED

More than a year after this Court denied certiorari on Ramos second federal habeas petition, Ramos returns to the Court seeking review of the Fifth Circuit's denial of his motion to recall the mandate from his 2002 federal habeas appeal, filed a week prior to his execution date. His petition raises the following issue:

1. Whether the Fifth Circuit erred in applying the "miscarriage of justice" standard of *Calderon v. Thompson*, 523 U.S. (1198), demanding that Ramos show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty?

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERITORARI

Petitioner Roberto Moreno Ramos is scheduled to be executed after **6:00 p.m., Wednesday, November 14, 2018**, for the capital murder of Leticia Ramos, his wife, and Abigail and Jonathan Ramos, his children. Ramos brutally murdered his wife and two youngest children, then dug a hole and buried them in his bathroom floor because he had plans to marry another woman. His belated attempt to obtain review of his conviction and death sentence by asking the lower court to recall a sixteen-year old mandate is insupportable, and not a matter worthy of this Court's attention. This is an extraordinary remedy that Ramos wholly fails to demonstrate he is entitled to. As such, there is no reason to grant Ramos's petition for certiorari review.

STATEMENT OF THE CASE

I. Facts of the Crime

A. Evidence Demonstrating Ramos's Guilt of Capital Murder.

The lower court, in a prior opinion denying a COA on Ramos's initial federal habeas petition, adequately summarized the facts of the offense in this case:

> In November 1991, Mr. Robert Moreno Ramos began an extramarital affair with Ms. Marisa Robledo, and in January 1992, they made plans to marry. Although Mr. Ramos was already married and had a family, he told Ms. Robledo that he was giving shelter to a widow and her two children.
>
> On February 7, 1992, a neighbor heard a woman's scream and vulgar language emanating from the Ramos house. Over the next few days, members of the family's church visited the Ramos residence. Mr. Ramos told them that the family was moving to California to handle the affairs of his recently departed mother and that they were too busy to say goodbye.
>
> On February 10, 1992, Mr. Ramos married Ms. Robledo. When Mr. Ramos's cousin inquired as to the whereabouts of his family on March 4, 1992, Mr. Ramos said they had died in a car accident and that the bodies had been cremated. Finally, after nearly two months of conflicting explanations as to his family's whereabouts, Mr. Ramos's sister-in-law alerted the police of the disappearance of Mr. Ramos's wife and children. On March 30, 1992, the police arrived at Mr. Ramos's home to question him about his missing family. Over the course of twenty minutes, Mr. Ramos gave several contradictory accounts of his family's whereabouts; Mr. Ramos told police that his family was in Austin, San Antonio, and Mexico. Mr. Ramos voluntarily accompanied officers to the police station where he was arrested on various traffic warrants.
>
> On April 6, 1992, officers searched the Ramos home and discovered

> extensive blood evidence throughout the house, most notably the bedroom, hallway, and bathroom. All of the family's clothes, as well as the children's toys, had been secreted away in the attic. On April 7, 1992, Mr. Ramos told officers that, upon returning home one day in February, he found his wife and children dead. He further stated that a few days later, he dug a hole in his bathroom floor and buried them. He later changed his story, claiming that after finding his children dead and his wife mortally wounded from an apparently self-inflicted wound, he ultimately delivered the fatal blow to her head with a hammer.
>
> Officers obtained a search warrant and exhumed the bodies of his wife and two children from underneath the newly-tiled floor in Mr. Ramos's bathroom. All victims died from blunt head injuries, most likely caused by blows from a hammer. A miniature sledge hammer with blood stains was recovered from Mr. Ramos's residence in Mexico. A forensic pathologist testified that all the victims died and were buried within a 12 to 24 hour time period and that it was very unlikely that the injuries to Mr. Ramos's wife were self-inflicted.

Ramos v. Cockrell, 32 Fed. Appx. 126, 2002 WL 334626 *1 (5th Cir. 2002).

B. Evidence Supporting Ramos's Sentence of Death

In addition to the abundant evidence presented at the guilt/innocence phase of trial concerning how Ramos callously murdered his wife and children, the State also presented evidence during the punishment phase that demonstrated Ramos's violent and dangerous nature. The State first presented Ramos's nineteen-year-old son, Osmar Ramos, who testified that when he was growing up his father had been verbally and physically abusive towards him. 84 RR 7-8, 15. Ramos would hit Osmar with "pipes or whatever he could get his hands on." 84 RR 8. Osmar testified that when the family was living in

Chicago, Ramos hit him with a belt—leaving scratches and bruises—and then told his son to wear some of Ramos's clothes to school so the marks would not show. 84 RR 9. One time, Ramos tied a telephone wire around Osmar's penis and put an iron and books on the other end as weight. 84 RR 10. Ramos frequently beat Osmar's mother, and he would put gray duct tape over her mouth so the neighbors would not hear her scream. 84 RR 10-11. Once, when Osmar's mother went to bail a cousin out of jail, Ramos got angry and beat her up, leaving blood all over the kitchen floor. 84 RR 11. When Osmar was eight years old, Ramos held Osmar's head under water in the bathtub because Osmar was taking too long with a bath. 84 RR 12. During another incident, when Osmar was telling his father that he wished he had not been born and felt like killing himself, Ramos said, "You want to die? Go ahead, do it," gave him a loaded pistol and pointed it at Osmar's mouth. 84 RR 12-13. Ramos abused Osmar's mother about twice a month, and "there wouldn't be a month, a day in a month where none of that would go on at home." 84 RR 13. Osmar testified that in his opinion, Ramos would continue to commit criminal acts of violence. 84 RR 15.

Osmar also identified State's Exhibits 213 through 215 as pictures of his brother Jonathan. 84 RR 15. Further, he testified that in June 1988, his father sent the family to live with Osmar's uncle in Austin, after telling them

that he was going to build another house in Progreso. 84 RR 16. The family returned to Progreso in March 1989. 84 RR 17. On cross examination, Osmar stated that he had wanted to commit suicide when he was twelve years old because Ramos was making his life miserable, "verbally and abusively." 84 RR 17. He agreed that he had attempted suicide years later because "some woman dumped [him]," but also because when he had tried to discuss the situation with Ramos, his father refused to speak with him. 84 RR 18. The last time he saw his mother was on November 2, 1989, in Progreso. 84 RR 20. Before the murders, Osmar had moved to Austin and was living with friends. 84 RR 18-19.

In addition, the State presented evidence implicating Ramos in the disappearance of another woman to whom he was married. Basilisa Hernandez Silva testified that her daughter, Maria Elena Aguilar Hernandez, married Ramos in June 1988 in Reynosa, Mexico, and that she had not seen her daughter since 1989. 84 RR 31. Ramos's and Silva's daughter lived for several months with Silva's sons in Mexico, before moving somewhere in the United States in 1989. 84 RR 32. Ramos told Silva they were living close to Fort Worth, and that they had a son named Ulises Jonathan. 84 RR 33. She never saw the child. 84 RR 33. When Ramos visited Silva in Reynosa, he told her that her daughter was fine, and she should not worry about her. 84 RR 33. He brought

her a letter from her daughter. 84 RR 34. Additionally, he showed her pictures of her grandson, Ulises Jonathan. 84 RR 34; SX 213-215.

Finally, Miguel Aguilar Hernandez, Silva's son, testified that his sister Maria married Ramos in Reynosa in June 1988. 84 RR 36-37. He stated that he does not know his sister's whereabouts, and that the last time he saw her, she was moving with Ramos to Fort Worth. 84 RR 37. After the marriage, Ramos and Maria lived in the Hernandez apartment for approximately six months. 84 RR 38. Ramos told him that he worked for a construction company in Fort Worth. 84 RR 38. Ramos and Maria were building a house in Reynosa, but the house was never finished. 84 RR 39. Ramos told Hernandez that he and Maria had a son named Jonathan Ulises Ramos. 84 RR 40. Hernandez never saw the baby in person, nor did he speak to his sister about the baby, but Ramos gave him photographs of the child. 84 RR 40; SX 213-215.

II. Relevant Procedural History

A. Initial State Court and Federal Habeas Proceedings

Ramos was indicted, convicted, and sentenced to death in Hidalgo County, Texas, for the February 7, 1992 capital murders of Leticia Ramos, Abigail Ramos, and Jonathan Ramos. 1CR 2 (Indictment); 2 CR 315 (Judgment).[1] The Court of Criminal Appeals of Texas (CCA) affirmed Ramos's

1 "CR" refers to the Clerk's Record of pleadings and documents filed with the trial court preceded by volume number and followed by page numbers. "SHCR" refers

conviction and sentence on direct appeal in an unpublished opinion delivered on June 26, 1996. *Ramos v. State*, 934 S.W.2d 358 (Tex. Crim. App. 1996). The Supreme Court then denied his petition for certiorari review of his direct appeal. *Ramos v. Texas*, 520 U.S. 1198 (1997).

Through court-appointed counsel, Ramos filed an application for state writ of habeas corpus pursuant to Article 11.071 of the Texas Code of Criminal Procedure which was denied after the CCA adopted the trial court's findings of fact and conclusions of law recommending that relief be denied. *Ex parte Ramos*, Application No. 35,938-01 at 81-93; *Ex parte Ramos*, 977 S.W.2d 616 (Tex. Crim. App. 1998); I SHCR 2, cover. Ramos then filed his first petition for writ of habeas corpus in the federal district court but was denied relief on May 2, 2000. *Ramos v. Johnson*, No. 7:99-CV-00134 (S.D. Tex. 2000); Docket Entry ("DE") 2, 15. Thereafter, the lower court denied Ramos a COA, and his petition for writ of certiorari was again denied by the Supreme Court. *Ramos v. Cockrell*, 32 Fed. Appx. 126 (5th Cir. 2002), *cert. denied*, 537 U.S. 908.

B. Post-*Avena* Proceedings.

On March 31, 2004, the International Court of Justice issued the *Avena*[2]

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to the Clerk's Record of the state habeas proceedings, preceded by volume number and followed by page number.

2 *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 (Judgment of March 31, 2004).

decision determining that, based on violations of the Vienna Convention, fifty-one named Mexican nationals, including Ramos, were entitled to receive review and reconsideration of their convictions and sentences through the judicial process in the United States. President George W. Bush issued a memorandum to his Attorney General on February 28, 2005, suggesting state courts would give effect to the *Avena* decision by reviewing the convictions and sentences of the Mexican nationals in question, including Ramos.

Following the president's memorandum, Ramos filed his second state habeas application alleging his Vienna Convention claims for the first time. That application was dismissed by the CCA as successive on March 7, 2007.[3] *Ex parte Ramos*, No. 35,938-02 (Tex. Crim. App. 2007), *Per Curiam* Order dated March 7, 2007 (unpublished). The Supreme Court denied Ramos's petition for writ of certiorari of that decision a year later. *Ramos v. Texas*, 552 U.S. 1295 (2008).

A week after the dismissal of his successive state application, Ramos filed a second habeas corpus petition in the federal district court alleging the

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3 The Texas court consolidated Ramos's successive state application with the applications of Ruben Ramirez Cardenas (No. 48,728-02), Cesar Roberto Fierro (No. 17,425-05), Ignacio Gomez (52,166-02), Humberto Leal (No. 41,743-02), and Felix Rocha (No. 52,515-03). All are among the fifty-one Mexican nationals who were the named subjects of the *Avena* lawsuit, and all of their cases were dismissed for failure to meet the requirements of Texas Code of Criminal Procedure Article 11.071, Section 5.

same Vienna Convention violation. *Ramos v. Quarterman*, No. 7:07-cv-0059 (S.D. Tex. 2007); DE 1. After a brief stay was issued pending this Court's ruling in *Medellin v. Texas,* 552 U.S. 491 (2008), a case concerning the identical issue raised by Ramos in his second federal petition, the district court dismissed Ramos's second petition as successive under 28 U.S.C. § 2244(b)(3) and transferred the case to the Fifth Circuit. DE 10, 13. The Fifth Circuit, finding that Ramos's Vienna Convention claim was not ripe when he filed his first federal petition in 1999, determined that his second-in-time petition was not successive and stayed Ramos's appellate proceedings in order to allow him to return to the district court to further litigate his claim. *Ramos v. Thaler*, No. 08-70044 (5th Cir. 2009), *Per Curiam* Order dated October 30, 2009.

Ramos filed his amended petition asserting his *Avena* claim on June 29, 2010. DE 24. Nearly three years later, after briefing was completed, but while the petition remained pending, Ramos filed a Motion for Leave to File a Second Amended § 2254 Petition, wherein he sought permission to amend his petition to include new IATC claims complaining about counsel's presentation at both the guilt-innocence and punishment phases of trial. DE 38. Based on the Magistrate's Report and Recommendation, the district court denied Ramos's motion to file a second amended petition and, in a separate order, dismissed Ramos's *Avena* claim. DE 55 (Magistrate's Report and Recommendations on

Motion to Amend); DE 58 (Magistrate's Report and Recommendations on *Avena* claim); DE 71 (District court's order denying Motion to Amend); DE 72 (District court's order denying *Avena* claim). In addition, the district court denied a COA on Ramos's *Avena* claim. DE 72.

Ramos then sought permission from the lower court to appeal the district court's denial of relief on his Vienna Convention claim and its refusal to grant him leave to amend. The Fifth Circuit denied Ramos's application for a COA on both issues, *Ramos v. Davis,* 653 Fed.Appx. 359 (5th Cir. 2016), and the Supreme Court denied certiorari review, 137 S.Ct. 2116 (2017).

On August 15, 2018, Ramos's execution date was set by the trial court for November 14, 2018. A week prior to today, Ramos filed a subsequent application for writ of habeas corpus in the state trial court and the CCA, as well as a motion to stay the execution and a motion suggesting that the CCA reopen Ramos's original state habeas proceedings. The CCA dismissed that writ as successive and denied both motions. *Ex parte Ramos*, No WR-35,938-03, slip op. at 3 (Tex. Crim. App. Nov. 12, 2018). On the same day that he filed his successive state writ application, Ramos also filed motion to recall the mandate and a motion to stay the execution in the court below. Both motions were denied. *Ramos v. Cockrell*, No. 00-40633 (5th Cir. Nov. 12, 2018). The present petition followed.

REASONS FOR DENYING THE PETITION

The question that Ramos presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*. Here, Ramos advances no compelling reason to review his case, and none exists.

Ramos alleges that he was deprived of his statutory right to conflict-free counsel in his initial federal habeas proceedings that resulted in the failure of his ability to litigate his claim that trial counsel was ineffective for failing to adequately investigate, discover, and present mitigation evidence during the punishment phase of his trial. He argues that the lower court should have recalled its mandate to permit him the opportunity to litigate this claim with new, conflict-free counsel. But as set out below, Ramos fails to demonstrate that the court below abused its discretion or that he is otherwise entitled to the exceptional relief he seeks. Initially, because he does not even attempt to establish his innocence, he cannot demonstrate that an extraordinary circumstance exists to recall the mandate in these federal habeas proceedings. Ramos essentially attempts and end run around a motion for post-judgment

relief under Federal Rule of Civil Procedure 60(b)(6), a motion that he concedes would fail. Mot. Recall Mandate at 17.

I. The Lower Court Properly Applied this Court's Decision in *Calderon*.

In a capital case, a federal court of appeals may recall its mandate to revisit the merits of an earlier denial of habeas corpus relief *only* in "extraordinary circumstances" in order "to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence."[4] *Calderon v. Thompson*, 523 U.S. 538, 549–50 (1998) (finding that the appellate court abused its discretion by recalling its mandate without finding a miscarriage of justice). This is especially true in federal habeas reviews of state court convictions as there are "'profound societal costs that attend the exercise of habeas jurisdiction,'" *id*. at 555 (quoting *Smith v. Murray*, 477 U.S. 527, 539 (1986)), and because the "State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief." *Id* at 556.

Specifically, the federal habeas miscarriage of justice exception requires Ramos to either show factual innocence or that he is ineligible for his death sentence. *See Thompson*, 523 U.S. 538, 550 (citing *Sawyer v. Whitley*, 505 U.S.

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[4] In *Fierro v. Johnson,* the lower court noted that *Thompson* left open the possibility that cases involving fraud on the court might "be entitled to different treatment." 197 F.3d 147, 153 (5th Cir. 1999) (citing *Thompson,* 523 U.S. at 557). Here, however, Ramos has not alleged fraud on the court.

333, 339 (1992)). To meet the standard, Ramos must prove either that no reasonable juror would have found petitioner guilty beyond a reasonable doubt, or that (by clear and convincing evidence) no reasonable juror would find him eligible for the death penalty. *Id.* at 550–60 (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995) and *Sawyer v. Whitley*, 505 U.S. at 339). This requires Ramos to muster "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. This is a demanding standard—"in virtually every case, the allegation of actual innocence has been summarily rejected." *Id.*; *see House v. Bell*, 547 U.S. 518, 538 (2006) ("[I]t bears repeating that the *Schlup* standard is demanding and permits review only in the 'extraordinary' case.").

The Fifth Circuit rejected Ramos's motion to recall the mandate because he "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 trial," and "mitigating evidence cannot meet the miscarriage of justice standard." Petitioner's Appendix 2 at 4 (citing *Bell v. Thompson,* 545 U.S. 794, 812 (2005), *Sawyer,* 505 U.S. at 345-47), and *Rocha v. Thaler,* 626 F.3d 815, 825 (5th Cir. 2010)). Ramos faults the lower court for following this Court's precedent. But

he offers no authority that would justify such a departure.

According to Ramos, *Calderon* and its subsequent decision in *Gonzalez v Crosby*, 545 U.S. 524 (2005), suggest that this "miscarriage of justice" standard articulated in those cases only apply in cases implicating AEDPA's successive-writ bar. Petition at 16-18. This argument is not persuasive. Aside from failing to assert authority supporting this proposition, the cases itself do not support it. Initially, *Gonzalez* does not address the standard applicable to a motion to recall the mandate. Instead, it addresses the petitioner's Rule 60(b) motion. *Gonzalez*, 545 U.S. at 533-34. Ramos did not file that here. Furthermore, this Court did not so limit its decision in *Calderon*. The Court stated that in consider a motion to recall the mandate it "must be guided by the general principles underlying our habeas corpus jurisprudence." 523 U.S. at 554. Although *Calderon* addressed the successive-writ bar under 28 U.S.C. § 2254, it did not limit its consideration of general habeas principles to that alone.

Even if Ramos's motion to recall the mandate constitutes a successive petition, it nevertheless undermines AEDPA's underlying concerns with comity and finality. As set out in the section below. Ramos's motion to recall the mandate is essentially an end run around a post-judgment motion for relief that would not succeed in the district court because it is untimely. The lower

court did not, therefore, err is denying Ramos's motion, and further review is not warranted.

II. The Lower Court Properly Denied Relief Because Ramos Fails to Demonstrate Extraordinary Circumstances.

As previously stated, recall of the mandate is an extraordinary remedy. This Court noted in *Calderon* that, "[t]he sparing use of the power demonstrate it is one of last resort, to be held in reserve against grave, unforeseen contingencies." Those circumstances do not exist here.

First, Ramos does even attempt, as required by *Calderon,* to make out a case that he is actually innocent of capital murder or the death penalty. He does not allege that he is factually innocent of the crime, or offer any evidence that would support such an assertion. Furthermore, Ramos's underlying *Wiggins* claim, in which he asserts that his trial attorneys failed to fully investigate evidence relevant to mitigation at punishment, does not allege actual innocence or ineligibility for the death penalty. *See Thompson*, 523 U.S. 538, 549–50 (citing *Sawyer*, 505 U.S. at 339). As the Fifth Circuit explained in *Rocha v. Thaler*, "[t]he quality of the mitigation evidence the petitioner would have introduced at sentencing has no bearing on his claim of actual innocence of the death penalty" because "[e]vidence that might have persuaded the jury to decline to impose the death penalty is irrelevant under *Sawyer*. The only question is whether the petitioner was eligible for the death penalty." 626 F.3d

at 825–26. For this reason alone, the lower court was justified in denying Ramos's motion to recall the mandate.

Beyond that the circumstances here are no "unforeseen." In the lower court, Ramos cited *Mendoza v. Stephens*, 783 F.3d. 203 (5th Cir. 2015), and *Speer v. Stephens*, 781 F.3d 784 (2015), to support his assertion that the court of appeals has previously granted relief to similarly situated petitioners and ought to do so here. But these cases, do not support the extraordinary remedy requested here. And the Fifth Circuit was not called upon to set aside a sixteen-year-old mandate in *Speer* and *Mendoza* in order to appoint new, conflict-free counsel. Petitioners in both cases filed timely requests in the district court before filing a timely appeal in the Fifth Circuit for relief. Rather than help Ramos, these cases serve only to highlight the dilatoriness of his motion.

In *Mendoza*, the Fifth Circuit held that, "[i]n the interest of justice, it is appropriate to appoint additional counsel for Mendoza 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." 783 F.3d at 208. The court also considered the fact that *Martinez v. Ryan*, 556 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2014), could potentially excuse the procedural default of previously unraised IATC claims. *Id*. at 208-209. The court then

remanded the case to the district court to appoint new counsel. *Id*. at 211. The Court remanded *Speer* for similar reasons. 781 F.3d at 786-87. Both cases were decided on March 30, 2015.

Ramos's original federal habeas petition filed Kyle Welch, the attorney Ramos alleges labored under a conflict of interest, was denied by the district court on May 2, 2000. ECF No. 15. Welch was replaced by Larry Warner and David Sergi on June 5, 2001. *See* ECF No. 20. Not only has Ramos been represented by conflict-free counsel for the last seventeen years, but he was represented by current counsel at the time that *Speer* and *Mendoza* were handed down. Relying on these cases, Ramos could have, within a reasonable time after March 30, 2015, filed a motion in the district court under Rule 60(b)(6) attempting to reopen the original federal habeas proceedings so that conflict-free counsel could assert the new IATC claims. He did not do so.[5] Nor could he now.

The Fifth Circuit has held that a Rule 60(b) motion must be filed within a reasonable time, "unless good cause can be shown for the delay." *Clark v. Davis*, 850 F.3d 770, 780 (5th Cir. 2017). Whether a Rule 60(b) motion has been filed within a reasonable time is a case-specific inquiry. *Id*. Timeliness

5 Ramos did file a motion to amend his successive petition to include his IATC claim, but this Court affirmed the district court's decision that the amendment constituted a successive petition. *Ramos v. Davis*, 653 Fed.Appx.at 363-65.

is typically "measured as of the point in time when the moving part have grounds to make [a Rule 60(b) motion, regardless of the time that has elapsed since the entry of the judgment." *Id*. The court has recognized that Rule 60(b) motions have been properly denied as untimely where the motion was filed as few as five months after the pertinent date, *Clark v. Davis*, 850 F.3d 770, 782 (5th Cir. 2017) (citing *Tamayo v. Stephens*, 740 F.3d 986, 991 (5th Cir. 2014) (per curiam) (less than eight months); *Pruett v. Stephens*, 608 F.App'x 182, 185-86 (5th Cir. 2015) (petitioner waited nineteen months after *Martinez* to file a Rule 60(b)(6) motion, and fourteen months after *Trevino* to raise the IATC claim in state court); *Paredes v. Stephens*, 587 F.App'x 805, 825 (5th Cir. 2014) (petitioner waited thirteen months after *Trevino* to file Rule 60(b)(6) motion). In *Tamayo*, the court held that the petitioner's Rule 60(b) motion was untimely where it was filed almost eight months after the Supreme Court issued the opinion on which the petitioner relied in seeking relief from judgment. 740 F.3d at 991.

Ramos offers no explanation as to why his complaint regarding conflict-free counsel could not have been raised in the district court three years earlier in a more aptly filed Rule 60(b)(6) motion. The extremely narrow standard required for recalling the mandate in a federal habeas proceeding simply does not permit a petitioner access to this remedy to excuse dilatoriness on his part.

In *Calderon*, this Court highlighted the State's compelling interest in finality:

> A State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief. At that point, having in all likelihood borne for years "the significant costs of federal habeas review," *McCleskey v. Zant*, 499 U.S. 467,]490–491 [ ], the State is entitled to the assurance of finality. When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. See generally *Payne v. Tennessee*, 501 U.S. 808, [ ] (1991). To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," *Herrera v. Collins*, 506 U.S. 390, 421, [ ] (1993) (O'CONNOR, J., concurring), an interest shared by the State and the victims of crime alike.

523 U.S. at 556.

The extreme dilatory nature of Ramos's request cut against his ability to demonstrate "extraordinary circumstances." Had he diligently pursued the more readily available remedies in district court in a timely manner, he would not have had to pursue such a rare remedy. The lower court did not, therefore err in refusing to grant his request to recall the mandate. This Court should deny certiorari review.

III. Ramos is Not Entitled to a Stay of Execution because He Fails to Demonstrate that He is Likely to Succeed on His Motion to Stay the Mandate.

Assuming that this Court possesses jurisdiction to consider Ramos's motion for a stay of execution, "[t]he party requesting a stay bears the burden

of showing that the circumstances justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Before utilizing that discretion a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citations omitted) (internal quotation marks omitted). A stay of execution "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id*. (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)); *see Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."). Because there is no chance of success on the merit of his motion, because there is a strong interest in enforcing this conviction, and because this is a last-minute filing, a stay should be denied.

CONCLUSION

For the foregoing reasons, Ramos has presented no compelling reason to warrant this Court's review, and his petition for writ of certiorari should be denied.

Respectfully submitted,

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