CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN HENRY RAMIREZ,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

Appendix

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Appendix	**Description**
Appendix A	*Ramirez v. Davis*, 2019 WL 2622147 (5th Cir. 2019)
Appendix B	Order in *Soliz v. Davis*, 2:12-cv-410 (S.D. Tex. January 3, 2019)

CERTIFICATE OF SERVICE

I hereby certify that, on the 24th day of October 2019, a true and correct copy of this motion was mailed by first-class U.S. mail to:

AAG Jennifer Morris
Office of the Attorney General
Postconviction Litigation Division
P.O. Box 12548, Capitol Station
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Seth Kretzer

Tab A

United States District Court
Southern District of Texas
ENTERED
January 04, 2019
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOHN H RAMIREZ,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. 2:12-CV-410
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

ORDER

John Henry Ramirez is an inmate on Texas's death row. After exhausting state appellate and habeas remedies, Ramirez filed a federal petition for habeas corpus relief in 2013. This Court denied Ramirez's federal habeas petition in 2015. Ramirez now moves for relief from judgment under Federal Rule of Civil Procedure 60(b). D.E. 78. The Court DENIES Ramirez's motion for the reasons discussed below.

I. BACKGROUND

Ramirez moves for relief from judgment under Rule 60(b)(6), known as the "catchall provision." *Solis v. Dretke*, 436 F. App'x 303, 306 (5th Cir. 2011). Ramirez argues that the Court should reopen judgment because Michael C. Gross, the attorney who represented him on state habeas review, also represented him in his initial round of federal habeas proceedings. Ramirez contends that, because the performance of state habeas counsel may forgive some procedural obstacles to habeas review under *Martinez v. Ryan*, 566 U.S. 1 (2012), Gross operated under a conflict of interest and could not argue that he had performed deficiently in state court. Ramirez argues that, "at the

minimum, Gross's conduct qualifies as [] a defect in the integrity of his habeas proceedings" which requires reopening judgment under Rule 60(b). D.E. 78, p.4. Ramirez's Rule 60(b) motion only identifies one claim that Gross's alleged conflict prevented him from advancing: "Trial counsel failed to uncover clearly mitigating evidence" in violation of *Strickland v. Washington*, 466 U.S. 668, 687 (1984) and *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). D.E. 78, p.10.

Adjudicating Ramirez's Rule 60(b) motion requires an extensive review of his trial proceedings, the issues Gross raised in state and federal court, and the arguments Gross allegedly failed to raise.

A. Trial

In 2004, Ramirez killed Pablo Castro by stabbing him twenty-nine times during an attempted robbery. The State of Texas charged Ramirez with capital murder. Clerk's Record, p.2; Tex. Penal Code § 19.03(a)(2). Ramirez stood trial in the 94th Judicial District Court for Nueces County, Texas.[1]

At the heart of the matter now before this Court, Ramirez challenges his trial counsel's efforts to secure a life sentence. After the jury convicted Ramirez of capital murder, the trial court held the punishment phase of the trial. The State called numerous witnesses to describe Ramirez's history of lawlessness. The defense began its punishment case by calling Ramirez's father to provide insight into his upbringing.

[1] The trial court appointed Edward F. Garza and John Grant Jones to represent Ramirez at trial. The Court will refer to Ramirez's trial attorneys collectively as "trial counsel."

When court resumed the next morning, however, trial counsel announced that Ramirez had ordered them not to call additional witnesses.

Ramirez's choice to end the punishment case was not rashly taken. Ramirez explained that he had long before decided to limit his mitigation defense because he wanted to spare his family from testifying about traumatic events and he did not want to spend the rest of his life in prison. Once the trial court assured that Ramirez had made his decision competently and voluntarily, the defense ended its punishment-phase case. Under Ramirez's direction, the defense's closing argument consisted of reading a single verse from the Bible.

On December 8, 2008, Ramirez was sentenced to death. That same day, the trial court appointed Gross to represent Ramirez in his state habeas proceedings.

B. State Post-Conviction Review

Gross hired a mitigation investigator and mental-health expert to assist in preparing a state habeas application. On April 11, 2011, Gross filed an application for state habeas corpus relief on Ramirez's behalf. The state habeas application raised six claims and spanned 117 pages. Importantly, the state habeas application said that trial counsel "fail[ed] to properly investigate and discover mitigating evidence" and cited *Wiggins v. Smith*, 539 U.S. 362 (2003). State Habeas Record at 107. Ramirez argued that trial counsel should have called witnesses to describe his turbulent, abusive, and loveless childhood. Ramirez supported his claim with several affidavits, including one from his mother. State Habeas Record at 150-57. The state habeas court summarized the content of the affidavits as "traumatic events that occurred during Ramirez's childhood,

including his parent's divorce, abandonment by his father, the tough neighborhood that he grew up in, abusive conduct by his mother, seeing his mother being stabbed by one of her boyfriends, and being shot himself . . . ." State Habeas Record at 534. Acknowledging Ramirez's choice to end the punishment case, the state habeas application argued that trial counsel "were ineffective in failing to recognize that [he] was unable and incompetent to direct counsel to not call any further witnesses . . . ." State Habeas Record at 117.

The state habeas court held a three-day hearing in which several witnesses, including both trial attorneys, testified. On January 9, 2012, the state habeas court entered findings of fact and conclusions of law and recommended that the Texas Court of Criminal Appeals deny habeas relief.[2] The state habeas court provided three reasons for denying Ramirez's ineffective-assistance claim: (1) Ramirez instructed his attorneys to end the mitigation case; (2) trial counsel provided competent representation in handling mitigating evidence; and (3) alleged deficiencies in trial counsel's representation did not result in a reasonable probability of a different result.

C. Initial Round of Federal Review

The circumstances that give rise to Ramirez's Rule 60(b) motion began in March 2012, when the Supreme Court decided in *Martinez v. Ryan*, 566 U.S. 1 (2012), that a state habeas attorney's representation can overcome a federal procedural bar. Prior to *Martinez*, an attorney's negligence in a postconviction proceeding could not forgive the

[2] The state habeas court found that Ramirez defaulted consideration of some claims by not making a contemporaneous objection at trial, which resulted in a federal procedural bar when Ramirez reurged the claims on federal review. D.E. 34 at 9-10. Ramirez does not challenge that procedural ruling in his Rule 60(b) motion.

default of federal habeas claims. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). *Martinez* carved out a "narrow exception" that would allow federal courts to review an ineffective-assistance-of-trial-counsel claim that a state habeas attorney had failed to litigate. *Martinez*, 566 U.S. at 422.

The Fifth Circuit, however, muted the influence of *Martinez* by holding that it did not apply to capital habeas cases arising out of Texas courts. Starting with *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012), the Fifth Circuit issued a series of decisions distinguishing Texas's habeas review from that involved in *Martinez*. *See Foster v. Thaler*, 481 F. App'x 229 (5th Cir. 2012); *Newbury v. Thaler*, 476 F. App'x 336 (5th Cir. 2012); *Ayestas v. Thaler*, 475 F. App'x 518 (5th Cir. 2012); *Gates v. Thaler*, 476 F. App'x 336 (5th Cir. 2012).

Accordingly, on October 19, 2012, when this Court appointed Gross to represent Ramirez "throughout his federal habeas proceedings," D.E. 2, nothing in law or procedure discouraged a Texas state habeas attorney from continuing to represent his client on federal habeas review. In fact, under the heading "Continuity of Representation," the CJA Guide to Judiciary Policy stated (and still states) that "in the interest of justice and judicial and fiscal economy, unless precluded by a conflict of interest, presiding judicial officers are urged to continue the appointment of state post-conviction counsel, if qualified . . . when the case enters the federal system." 7A Guide to Judiciary Policy § 620.70.

On May 28, 2013, however, the Supreme Court decided in *Trevino v. Thaler*, 569 U.S. 413 (2013), that *Martinez* applies to Texas cases. Gross never argued that *Martinez* or *Trevino* raised any concerns about Ramirez's representation.

On October 6, 2013, Ramirez filed a federal habeas petition raising five grounds for relief. D.E. 6. Ramirez's federal petition included the same ineffective-assistance-of-trial-counsel arguments that he had exhausted in state court. Most relevant to the issues now before the Court, Ramirez again argued that trial counsel was ineffective in preparing and presenting a case for mitigation. Ramirez's federal petition relied on the same basic facts and evidence as he did in state court.

In 2015, this Court denied Ramirez's federal petition for a writ of habeas corpus. The Court considered Ramirez's *Wiggins* claim on the merits and, applying the deferential standard found in the Anti-Terrorism and Effective Death Penalty Act, found that the state habeas court's decision was not contrary to, or an unreasonable application of, federal law. D.E. 34, pp.30-46.

Gross represented Ramirez in the subsequent appellate proceedings. The Fifth Circuit refused to certify any issue for appellate review. *Ramirez v. Stephens*, 641 F. App'x 312 (5th Cir. 2016). The Supreme Court denied Ramirez's subsequent motion for a petition for a writ of certiorari.

D. Appointment of New Counsel

The State of Texas scheduled Ramirez's execution for February 2, 2017. On January 27, 2017, Gregory W. Gardner filed two motions on Ramirez's behalf: a motion to stay his execution, D.E. 44, and a motion for new counsel, D.E. 43. Ramirez based his

motion to stay on two arguments: (1) Gross's representation created an inherent conflict under *Martinez* that prevented the litigation of potential claims, and (2) Gross abandoned him by not filing a clemency petition.

As to the first argument, the Court held that the record was "inadequate to decide whether *Martinez* may allow Ramirez to raise viable new claims in a Rule 60(b) motion, a successive federal habeas proceeding, or a successive state action." D.E. 48, p.4. The Court, however, stayed Ramirez's execution based on his second argument: Gross failed to represent his client as the execution date neared.[3] Accordingly, the Court substituted counsel and stayed Ramirez's execution. The Fifth Circuit affirmed. *Ramirez v. Davis*, 675 F. App'x 478, 479 (5th Cir. 2017).

E. Rule 60(b) Motion

On August 20, 2018, Ramirez filed an Opposed Motion for Relief from Judgment Pursuant to Federal Rules of Civil Procedure 60(b). D.E. 74. Ramirez subsequently amended his motion. D.E. 78.

According to Ramirez, Gross "had conflicts of interest after he litigated his state-habeas application. Had he kept abreast of caselaw affecting his appointment, he would have known not to ask this Court to appoint him to litigate Mr. Ramirez's federal habeas proceedings." D.E. 78, p. 5. Ramirez argues that this Court should have appointed conflict-free counsel early in the habeas process, thus allowing the development of claims

[3] Ramirez had shown an "express intent that Gross remove himself from the case," yet "Gross did not move to substitute counsel or notify the court of a needed change in representation." D.E. 48, p.7. This Court held that: "Gross knew that Ramirez wanted someone to file a clemency petition, but at that point effectively stopped acting on Ramirez's behalf. Gross had a duty to either (1) inform the Court of his client's wishes and seek the substitution of new counsel or (2) ensure that a clemency petition was filed on his client's behalf. Gross did neither. Gross' inaction prevented judicial consideration of whether the circumstances required the substitution of counsel." D.E. 48, pp.7-8.

without requiring Gross to argue his own incompetence. D.E. 78, p. 10. "Ramirez's argument is straightforward: Gross's conflict in the prior federal proceedings in this Court triggers an equitable exception in favor of allowing claims to be heard when presented by counsel who are not conflicted." D.E. 78, p. 9.

According to Ramirez, "[t]he deficient performance by Gross in state habeas is manifest: he did not adequately present a claim that trial counsel failed to *investigate* mitigation evidence adequately." D.E. 78 at 11 (emphasis added). Ramirez supports this argument with a BBC documentary about his case. Ramirez highlights two interviews from the video that contain information trial counsel allegedly failed to develop: (1) "a terrible combination of serious mental illness and childhood trauma" as described by his mother, Priscilla Martinez and (2) comments from the victim's son that he wanted Ramirez to receive a life sentence. D.E. 78, pp.14-15. Ramirez relies only on the BBC documentary; he has not supported the allegations in his Rule 60(b) motion with affidavits from proposed witnesses.

Respondent has filed an opposition to Ramirez's Rule 60(b) motion. D.E. 79. Respondent argues that Ramirez's motion is, effectually, a successive habeas petition that this Court lacks jurisdiction to consider. Alternatively, Respondent argues that the Rule 60(b) motion is untimely, does not demonstrate extraordinary circumstances, is unreviewable, and lacks merit. Ramirez has not filed any reply.

II. Procedural Requirements of Rule 60(b)

Before turning to the question of whether Ramirez's pleading is actually a successive habeas petition, the Court finds that he has not complied with procedural

requirements for filing a Rule 60(b) motion. "To succeed on a Rule 60(b) motion, the movant 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." *In re Edwards*, 865 F.3d 197, 203 (5th Cir. 2017). As discussed below, Ramirez's Rule 60(b) motion (1) was not filed in a timely manner, and (2) does not present extraordinary circumstances justifying post-judgment relief.

A. Timeliness

Respondent argues that to the extent Ramirez has filed a proper Rule 60(b) motion, he did not do so in a timely manner. A party must file a Rule 60(b) motion "within a reasonable time" unless good cause is shown. Fed. R. Civ. P. 60(c)(1).[4] Rule 60(b) does not set a fixed time as "reasonable," but instead looks at the facts and circumstances of each case. *See Associated Marine Equip, LLC v. Jones*, 407 F. App'x 815, 816 (5th Cir. 2011). The basis for Ramirez's Rule 60(b) -- the alleged conflict of interest created by Gross's appointment in federal court -- arose when the Supreme Court decided *Trevino* in 2013. *See Clark v. Davis*, 850 F.3d 770, 781 (5th Cir. 2017). Ramirez's Rule 60(b), filed years later, raises questions about timeliness.

The Fifth Circuit's reasoning in *In re Paredes*, 587 F. App'x 805 (2014), shows that Ramirez did not raise his *Martinez* arguments in a timely manner. Like in the instant proceedings, Gross represented the inmate in *Paredes* on both state and federal review.

[4] If a party moves for relief under 60(b)(1) through (3), he must file a motion "no more than a year after the entry of the judgment." Fed. R. Civ. P. 60(c)(1); *see also Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) ("Rule 60(b) contains its own limitations, such as the requirement that the motion be made within a reasonable time and the more specific 1-year deadline for asserting three of the most open-ended grounds of relief (excusable neglect, newly discovered evidence, and fraud)") (quotation omitted). Ramirez relies on Rule 60(b)(6)'s catch-all provision. D.E. 78, p.2.

The district court rendered judgment in *Paredes* in 2007. Paredes contacted conflict-free counsel in June 2014 and, through his new attorney, filed a Rule 60(b)(6) motion in October 2014, arguing that Gross's representation had created a conflict of interest. The Fifth Circuit found that Paredes's Rule 60(b) motion was not timely. The Fifth Circuit held that the timeliness of Paredes's motion did not depend on the date when new counsel represented him, but at a minimum "when *Trevino* issued." *Id*. at 825. Because Paredes filed his Rule 60(b) motion 17 months after *Trevino*, it was not timely.

The Fifth Circuit reached a similar conclusion in *Clark,* 850 F.3d at 770, another case in which the same attorney represented the inmate on state and federal habeas review. In *Clark*, however, the district court had not entered judgment when the Supreme Court handed down *Martinez*. The inmate in *Clark* argued that "the relevant date for determining timeliness of his Rule 60(b)(6) motion is the date on which the federal district court permitted new counsel to be substituted . . . ." *Id*. at 782. The Fifth Circuit, however, reiterated its holding from *Paredes*: "the touchstone for Clark's Rule 60(b) motion, which is that [the attorney] had a conflict of interest, came into existence on May 28, 2013, the date of the *Trevino* decision." *Id*. at 781. The inmate in *Clark* did not request the appointment of conflict-free counsel until a year after *Trevino*, making his subsequent Rule 60(b)(6) motion untimely. *See id*. at 781-83; *see also Pruett v. Stephens*, 608 F. App'x 182, 187 (5th Cir. 2015) (finding untimely a Rule 60(b)(6) motion filed 19 months after *Trevino*).

The Fifth Circuit's analysis in *Paredes*, *Clark*, and *Pruett* shows that Ramirez did not file his Rule 60(b) motion in a timely manner. Even though Gross remained his

attorney, Ramirez "had a basis for the contention that Gross had a conflict of interest" when *Trevino* was decided in 2013. *Paredes*, 587 F. App'x at 824. That Ramirez himself may not have known about *Trevino* is of no moment. The Fifth Circuit has held that "unawareness of the *Trevino* decision could be described, at best, as mistake, inadvertence, or excusable neglect in keeping apprised of the law that pertained to his state conviction." *Id*. Ramirez, however, did not raise the *Martinez*/*Trevino* issue before judgment or on appeal, waiting instead to advance the concern days before an execution date.

Even after the Court appointed conflict-free counsel on January 31, 2017, D.E. 48, Ramirez still waited until August 20, 2018, to file a Rule 60(b) motion. D.E. 74.[5] Ramirez bases his Rule 60(b) motion on Gross's conflict of interest that allegedly kept him from raising a *Wiggins* claim, and specifically one including information contained in a BBC documentary produced in 2017. In arguing for the appointment of conflict-free counsel in early 2017, Ramirez emphasized the potential conflict posed by Gross's representation. D.E. 43, 44. Ramirez, however, still waited 18 months to file his Rule 60(b) motion in August 2018. Ramirez has not shown why he did not have access to information contained in the BBC video earlier or why he did not interview proposed witnesses after the appointment of conflict-free counsel. Ramirez unreasonably delayed in filing his Rule 60(b) motion.

[5] The parties filed a joint motion for a scheduling order that would allow Ramirez to file a "supplemental brief" after the time for filing a Rule 60(b) motion had expired. D.E. 70.

Because Ramirez has not provided any explanation for why he delayed seeking post-judgement relief, the Court finds that his 60(b) motion is untimely. *See Edwards*, 865 F.3d at 209.

B. Extraordinary Circumstances

Even though a court may reopen judgment for "any other reason that justifies relief," Federal Rule of Civil Procedure 60(b)(6), an inmate must still show "extraordinary circumstances," which "rarely occur in the habeas context." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). Ramirez does not describe what extraordinary circumstances justify Rule 60(b) relief, but he presumably relies on the alleged conflict in Gross's representation caused by *Martinez*. The Fifth Circuit, however, has repeatedly held that "the change in decisional law effectuated by *Martinez* . . . is insufficient, on its own, to demonstrate 'extraordinary circumstances.'" *Haynes v. Davis*, 733 Fed. App'x. 766, 769 (5th Cir. 2018), *petition for cert. filed* (Oct. 29, 2018) (No. 18-6471); *see also Beatty v. Davis*, ___ F. App'x ___, 2018 WL 5920498, at *5 (5th Cir. Nov. 12, 2018); *Raby v. Davis*, 907 F.3d 880 (5th Cir. 2018); *Edwards*, 865 F.3d at 208; *Pruett*, 608 F. App'x at 185; *Hall v. Stephens*, 579 F. App'x 282, 283 (5th Cir. 2014); *Paredes*, 587 F. App'x at 825; *Diaz v. Stephens*, 731 F.3d 370, 375-76 (5th Cir. 2013); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012); *Hernandez v. Thaler*, 630 F.3d 420, 430 (5th Cir. 2011). Further, the Fifth Circuit has rejected the related argument that extraordinary circumstances result from a potential conflict posed by a continuity in representation. *See Beatty*, 2018 WL 5920498, at *5 ("*Martinez* and *Trevino* did not create a new right to

conflict-free counsel on collateral review; they provide only remedial relief to procedural bars standing in the way of presenting defaulted claims in federal courts.").

Extraordinary circumstances are particularly absent in this case because Ramirez has already received all the relief he has requested under *Martinez*. This Court has already considered the merits of a *Wiggins* claim. The *Wiggins* claim Ramirez proposes in his Rule 60(b) motion does not fundamentally differ from much of that Gross raised in his initial petition.[6] Moreover, Ramirez's Rule 60(b) motion does not take into account a fatal flaw in his *Wiggins* claim: Ramirez directed his attorneys to end the presentation of mitigating evidence. Ramirez has not identified anything in potential trial testimony similar to the information from the BBC documentary that would have changed his decision. In sum, Ramirez has not shown that the circumstances are so extraordinary to warrant reopening the judgment.

III. SUCCESSIVE PETITION

Respondent also argues that Ramirez's Rule 60(b) motion is actually a successive federal habeas petition. "Because of the comparative leniency of Rule 60(b), petitioners sometimes attempt to file what are in fact second or successive habeas petitions under the guise of Rule 60(b) motions." *Edwards*, 865 F.3d at 203. In *Gonzalez v. Crosby*, the

[6] The Supreme Court in *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), made it clear that federal habeas review "focuses on what a state court knew and did." "The import of *Pinholster* is clear: because [an inmate's] claims have already been adjudicated on the merits, § 2254 limits [federal] review to the record that was before the state court." *Lewis v. Thaler*, 701 F.3d 783, 791 (5th Cir. 2012). The Fifth Circuit has held that "*Martinez* does not apply to claims that were fully adjudicated on the merits by the state habeas court because those claims are, by definition, not procedurally defaulted." *Escamilla v. Stephens*, 749 F.3d 380, 394 (5th Cir. 2014); *see also Villanueva v. Stephens*, 619 F. App'x 269, 276 (5th Cir. 2015); *Allen v. Stephens*, 619 F. App'x 280, 290 (5th Cir. 2015). Once a state habeas court has denied a claim on the merits, *Martinez* "may not function as an exception to *Pinholster*'s rule that bars a federal habeas court from considering evidence not presented to the state habeas court." *Escamilla*, 749 F.3d at 395. Simply, "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Under *Pinholster*, the Court cannot consider new evidence Ramirez's Rule 60(b) motion suggests he may develop.

Supreme Court stated that Rule 60(b) motions cannot "impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." 545 U.S. at 532.[7]

"To bring a proper Rule 60(b) claim in a habeas proceeding, a movant must show a non-merits-based defect in the district court's earlier decision on the federal habeas petition." *Runnels v. Davis*, ___ F. App'x ___, 2018 WL 3913662, at *6 (5th Cir. 2018) (quotation omitted). A valid Rule 60(b) motion generally "alleges 'that a previous ruling which precluded a merits determination was in error -- for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.'" *Edwards*, 865 F.3d at 203 (quoting *Gonzalez*, 545 U.S. at 532 n.4). A Rule 60(b) motion is also proper when it "challenges 'not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings' . . . . " *In re Coleman*, 768 F.3d 367, 371 (5th Cir. 2014) (quoting *Gonzalez*, 545 U.S. at 532). On the other hand, a successive petition generally: "(1) presents a new habeas claim (an 'asserted basis for relief from a state court's judgment of conviction'), or (2) 'attacks the federal court's previous resolution of a claim on the merits.'" *Edwards*, 865 F.3d at 203 (quoting *Gonzalez*, 545 U.S. at 530). A Rule 60(b) motion that alleges omissions on the part of federal habeas counsel "ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably," and is thus properly recharacterized as a successive petition. *Runnels*, 2018 WL 3913662, at *6.

[7] A district court lacks jurisdiction to consider a successive habeas petition until a circuit court authorizes successive proceedings. *See* 28 U.S.C. § 2244(b)(3)(A).

Gross raised a *Wiggins* claim in his initial federal petition. The initial federal petition argued that "defense attorney's performance, in failing to properly investigate and discover mitigation evidence in a capital case, falls below an objective standard of reasonableness and thereby prejudices the defense." D.E. 6, p. 115. The initial petition also said that trial counsel did not "properly investigate[] the case" and should have "called . . . witnesses to testify," including Ramirez's mother. D.E. 6, p.117. This Court understood Ramirez's claim to be that "trial counsel made inadequate efforts to investigate and prepare evidence to militate for a life sentence." D.E. 34, p.30.

Ramirez's Rule 60(b) motion argues that trial counsel did not "reasonably investigate[] Mr. Ramirez's mental state and traumatic history" and thus did not call two specific witnesses. D.E. 78, p.14. At its core, this is the same claim Gross included in the initial federal petition.[8] Ramirez may suggest that he can develop new evidence to

[8] Seeking to distinguish the arguments in his Rule 60(b) motion from those raised earlier, Ramirez contends that Gross never advanced a *Wiggins* claim based on the *investigation* of mitigating evidence. D.E. 78, p. 11. Ramirez bases this argument on a single finding of fact made by the lower habeas court: "The Court finds that Ramirez has not raised a complaint in his present application that his trial attorneys were ineffective for failing to investigate mitigating evidence . . . ." Ramirez, however, also concedes that the lower court's findings are contradictory on whether Gross raised a claim challenging the investigation of mitigating evidence. This is the first time that either party has disputed whether Gross exhausted a *Wiggins* claim based on the investigation of mitigating evidence. The habeas application filed by Gross repeatedly referenced deficiencies in counsel's investigation of evidence. State Habeas Record at 107-19. Gross premised the proposed findings and conclusions on counsel's failure to investigate and present mitigating evidence. State Habeas Record at 419-29. Importantly, in a state habeas hearing, Gross disputed the prosecution's argument that he had not raised a failure-to-investigate claim. When the State argued that the habeas application "was [not] premised on failure to develop mitigating evidence," but that the "whole crux of it was failure to present mitigating evidence after the client made a decision," Gross argued:

> My ground on the writ is failure to present . . . mitigating evidence and . . . it's a *Wiggins* issue, and *Wiggins* says you have to do a mitigation investigation and present mitigating evidence, and our ground is failure to present mitigating evidence under *Wiggins* and it's progeny .. . . And *Wiggins* says you have to do a mitigation investigation, you have to be ready . . . for mitigation before trial in order to put on mitigation properly.

State Writ Hearing at 21-22. Even though the lower habeas court eventually signed, without alteration, the State's proposed findings that contradictorily said that Gross did not include a *Wiggins* claim, the record amply shows that Gross exhausted that claim in state court. Gross included the same claim, using the same evidence, in the federal petition.

support a *Wiggins* claim, but "a motion that seeks leave to present newly discovered evidence in support of a claim previously 'denied is, if not in substance a habeas corpus application, at least similar enough that failing to subject it to the same requirements would be inconsistent with the statute.'" *Runnels*, 2018 WL 3913662, at *6 (quoting *Gonzalez*, 545 U.S. at 531 (citation and internal quotation marks omitted)); *see also Coleman*, 768 F.3d at 373 ("Coleman raises essentially the same claim here, albeit with additional affidavits, and thus her claim is barred as previously raised under section 2244(b)(1).").

Even to the extent that Ramirez appears to argue that the claim raised in his Rule 60(b) motion is different from that advanced in state court or in his federal petition, it is still a successive petition. A "Rule 60(b) motion seek[ing] to re-open the proceedings for the purpose of adding new claims . . . is the definition of a successive claim. *Edwards*, 865 F.3d at 204-05; *see also Runnels*, 2018 WL 3913662, at *6; *Tamayo v. Stephens*, 740 F.3d 986, 990 (5th Cir. 2014).

Ramirez argues that "Gross's conduct qualifies as [] a defect in the integrity of his habeas proceedings" so his motion falls outside of the Antiterrorism and Effective Death Penalty Act (AEDPA)'s successive-petition provisions. D.E. 78, p.4. In essence, Ramirez argues that Gross's ineffectiveness in not supplementing the *Wiggins* claim he raised in state court justifies an equitable exception to AEDPA's successiveness prohibition. Ramirez, however, has not pointed to any case creating an equitable exception to section 2244(b) based on conflict. *See Williams v. Kelley*, 858 F.3d 464, 473 (8th Cir. 2017) (refusing to find a defect in the underlying proceedings when the same

attorney represented the inmate in state and federal habeas review). Further, AEDPA precludes "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings" from being "a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Gross's representation cannot free Ramirez from AEDPA's prohibition on successive habeas petitions.

This Court, therefore, will also deny Ramirez's Rule 60(b) motion because it is a successive habeas petition.

IV. Conclusion

The Court finds that Ramirez has not shown that his Rule 60(b) motion is timely or warranted by extraordinary circumstances. Alternatively, this Court lacks jurisdiction to consider Ramirez's Rule 60(b) motion which is, in reality, a successive habeas petition. The Court, therefore, **DENIES** his Rule 60(b) motion. D.E. 78. Under the appropriate standard, 28 U.S.C. §2253(c), the Court finds that no issue relating to Ramirez's Rule 60(b) motion requires appellate review.

ORDERED this 3rd day of January, 2019.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

Tab B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 26, 2019
Lyle W. Cayce
Clerk

No. 19-70004

JOHN H. RAMIREZ,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:12-CV-410

Before KING, DENNIS, and OWEN, Circuit Judges.

KING, Circuit Judge:*

John Ramirez, a Texas death-row inmate, applies for a certificate of appealability to challenge the district court's order rejecting his motion to reopen the judgment denying his 28 U.S.C. § 2254 application. We DENY Ramirez's application for a certificate of appealability. To the extent Ramirez seeks to assert a new substantive claim to relief, we interpret his application

* Pursuant to 5TH CIR. R. 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 CIR. R. 47.5.4.

for a certificate of appealability as a motion for authorization to file a second § 2254 application, and we DENY that motion.

I.

A.

A Texas jury convicted John Ramirez in 2008 of capital murder for killing Pablo Castro. The evidence at trial showed that Ramirez confronted Castro outside a convenience store in Corpus Christi, stabbed him 29 times, and robbed him of $1.25, apparently to purchase drugs. *See generally Ramirez v. Stephens*, 641 F. App'x 312, 314 (5th Cir. 2016) (unpublished). At the sentencing phase of Ramirez's trial, defense counsel made an opening statement and presented Ramirez's father as a mitigation witness. But after Ramirez's father testified, Ramirez instructed counsel not to present any further mitigation evidence and not to argue against the death penalty in summation.

Defense counsel informed the trial court of Ramirez's request. Lead counsel said he fruitlessly tried to persuade Ramirez otherwise but was ultimately "inclined" to follow Ramirez's instructions. The court questioned Ramirez, who confirmed that it was his own decision not to present further mitigation evidence and that he had reached this decision "a long time ago." Dr. Troy Martinez, a clinical psychologist who had worked on Ramirez's mitigation case, testified that he met with Ramirez and concluded Ramirez reached this decision voluntarily and intelligently. The defense accordingly rested without calling further mitigation witnesses or presenting further mitigation evidence. At Ramirez's request, counsel read a Bible verse in lieu of a closing argument. The jury answered the Texas special questions in favor of death, and the trial court accordingly entered a judgment sentencing Ramirez to death.

The Texas Court of Criminal Appeals ("TCCA") affirmed Ramirez's conviction and sentence on direct appeal. *Ramirez v. State*, No. AP-76100, 2011 WL 1196886 (Tex. Crim. App. Mar. 16, 2011) (not designated for publication). Ramirez, through attorney Michael Gross, filed an application for habeas corpus in state court alleging five constitutional violations, including ineffective assistance of trial counsel. Ramirez argued that his trial counsel were ineffective for six separate reasons, including counsel's "failure to present mitigating evidence" in violation of *Wiggins v. Smith*, 539 U.S. 510 (2003). In making this argument, Ramirez first faulted trial counsel for failing to sufficiently investigate his social history. Ramirez noted that prior to trial, counsel spoke only to his mother and two grandmothers. And trial counsel spoke to Ramirez's father for only about ten minutes outside the courtroom before his testimony. Ramirez asserted that trial counsel should have spoken to his aunt, sister, and half-brother, and he recounted a litany of potentially mitigating information from his past that trial counsel might have learned had they conducted a fuller mitigation investigation. Next, Ramirez faulted trial counsel for failing to recognize that he was "unable and incompetent to direct counsel to not call any further witnesses during the punishment phase of the trial."

In its findings of fact and conclusions of law, the trial court framed Ramirez's mitigation claim as limited to an argument that trial counsel were ineffective in failing to recognize Ramirez was incapable of directing counsel to rest his mitigation case. Nevertheless, the trial court made findings of fact on trial counsel's mitigation investigation and concluded that Ramirez failed to prove that trial counsel's "investigation and development of mitigation evidence was deficient in any way." It alternatively concluded that any error in investigating Ramirez's mitigation case did not prejudice Ramirez "both in light of the mitigation evidence that was already available to the defense and

in light of Ramirez's own decision not to present a mitigation defense at trial." The court accordingly concluded that trial counsel were not constitutionally ineffective for any of the reasons Ramirez alleged; alternatively, it concluded that Ramirez affirmatively waived any error bearing on the punishment phase by choosing not to present a mitigation case. It concluded his other claims for relief failed as well. The TCCA adopted the trial court's findings and conclusions in full and thus denied Ramirez relief. *Ex parte Ramirez*, No. WR-72,735-03, 2012 WL 4834115 (Tex. Crim. App. Oct. 10, 2012) (not designated for publication).

Ramirez thereafter filed a motion in the federal district court to have Gross appointed as federal habeas counsel pursuant to 18 U.S.C. § 3599(a)(2). The district court granted the motion. Ramirez then filed a 28 U.S.C. § 2254 application, again through Gross. Substantially repeating the argument that he made in his state-court application, Ramirez argued that trial counsel provided constitutionally ineffective assistance by failing to conduct a sufficient mitigation investigation and by failing to recognize that Ramirez was not mentally competent to waive his mitigation defense.

The district court denied Ramirez's application. In addressing his ineffective assistance of counsel claim, it deferred to the state court's finding that Ramirez was competent when he asked trial counsel to cease his mitigation defense. It also deferred to the state court's conclusion that trial counsel conducted an adequate mitigation investigation, observing that in his opening argument in the penalty phase of Ramirez's trial, "counsel provided broad outlines of what evidence the defense wanted to present," which "correspond[ed] with the details found in the habeas affidavits." Moreover, citing to our decision in *Sonnier v. Quarterman*, 476 F.3d 349, 362 (5th Cir. 2007), the district court held that Ramirez's competently made instruction to counsel to terminate his mitigation defense prevented him from arguing

counsel was ineffective for not presenting further mitigation evidence. We denied Ramirez's request for a certificate of appealability, *Ramirez v. Stephens*, 641 F. App'x 312 (5th Cir. 2016) (unpublished), and the Supreme Court denied certiorari, *Ramirez v. Davis*, 137 S. Ct. 279 (2016).

B.

Not long before Ramirez filed his § 2254 application, the Supreme Court issued its decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), which introduced a notable change to federal habeas procedure. As elaborated upon further below, these cases held that under certain circumstances, if a § 2254 applicant defaults on a meritorious ineffective assistance of trial counsel claim by not raising it in his initial application for postconviction relief in state court, then state postconviction counsel's ineffective assistance in not raising that argument in state court can constitute cause to overcome the default in federal court. A successful *Martinez–Trevino* argument allows the applicant to bring the defaulted claim for the first time in federal court. *See Trevino*, 569 U.S. at 416-17.

In January 2017, about a week before he was scheduled to be executed, Ramirez filed motions to substitute counsel and to stay his execution. Through new counsel, Ramirez argued that Gross labored under a conflict of interest during Ramirez's federal habeas proceedings because *Martinez* and *Trevino* put Gross's duty to represent Ramirez at odds with Gross's interest in protecting his professional reputation. If Gross had failed to raise a meritorious ineffective assistance of counsel claim in Ramirez's state-court habeas application, then Gross's duty to Ramirez during the federal proceedings would have required Gross to argue that he provided Ramirez with ineffective assistance during the state-court habeas proceeding. The district court granted both motions. We denied the State's subsequent motion to vacate the stay. *Ramirez v. Davis*, 675 F. App'x 478 (5th Cir. 2017) (unpublished) (per curiam).

More than a year and a half later, Ramirez filed in the district court the present motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6), in which he urges the court to vacate its judgment denying his § 2254 application. He also argues that Gross's conflict of interest entitled him to bring a new claim that trial counsel failed to uncover certain mitigating evidence. Specifically, Ramirez says that trial counsel failed to discover that Castro's son did not support Ramirez's death sentence and that when Ramirez was nine-years old, he witnessed his mother's boyfriend stab his mother. He insists that trial counsel were ineffective for failing to discover and present this evidence at trial, and that Gross was ineffective for failing to discover and present it in his state and federal habeas applications.

The district court denied Ramirez's motion. It held that he did not meet the two requirements to bring a Rule 60(b)(6) motion: he failed to bring the motion "within a reasonable time" and he failed to show "extraordinary circumstances" warranting relief from judgment. Alternatively, the district court concluded that Ramirez's motion was an unauthorized second § 2254 application. It accordingly denied the motion and declined to grant Ramirez a certificate of appealability ("COA"). Ramirez now asks us for a COA.

II.

As a threshold matter, we must consider whether Ramirez's motion is a so-called true Rule 60(b) motion or a successive § 2254 application. In the alternative to rejecting Ramirez's motion on the merits, the district court concluded it was an unauthorized successive § 2254 application. The district court erred by considering this as an alternative matter. The Antiterrorism and Effective Death Penalty Act divests the district court of jurisdiction to hear successive unauthorized § 2254 applications; thus, to the extent the district court concluded Ramirez's motion was a successive § 2254 application, the district court should have dismissed the motion or transferred it to this court

for authorization. *See* 28 U.S.C. § 2244(b)(4); *Burton v. Stewart*, 549 U.S. 147, 152 (2007).

Nevertheless, we conclude Ramirez's motion, at least in part, was a true Rule 60(b) motion. "[T]here are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) the motion attacks a 'defect in the integrity of the federal habeas proceeding,' or (2) the motion attacks a procedural ruling which precluded a merits determination." *Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)). A § 2254 applicant need not satisfy § 2244(b)'s authorization requirement for the district court to consider such a motion. *See id.* at 343. By contrast, a motion that "seeks to add a new ground for relief" or "attacks the federal court's previous resolution of a claim *on the merits*" is the "functional equivalent of [an] unauthorized successive § 2254 petition[]," so the applicant must comply with § 2244(b) before the district court can review the motion. *Id.* (quoting *Gonzalez*, 545 U.S. at 532).

In *Clark v. Davis*, 850 F.3d 770 (5th Cir. 2017), we considered a § 2254 applicant's Rule 60(b) motion with a premise identical to Ramirez's Rule 60(b) motion: i.e., that counsel filed his § 2254 application while under a conflict of interest because counsel also represented the applicant in his state-court postconviction proceedings. *See id.* at 773. We concluded that to the extent the motion alleged that counsel's conflict of interest created a defect in the integrity of the § 2254 proceedings, it was a true Rule 60(b) motion. *See id.* at 779-80. Therefore, the district court had jurisdiction to consider at least part of Ramirez's Rule 60(b) motion, so we will consider Ramirez's COA application to the extent it is premised on his argument that he was denied conflict-free counsel during his federal habeas proceedings.

In addition to arguing that Gross's alleged conflict of interest provides grounds for relief from judgment, Ramirez also appears to assert that Gross's

conflict of interest entitles him to file a new claim for relief without vacating the district court's prior judgment. In his motion, Ramirez argues that "[e]ven if Ramirez does not qualify for relief under Rule 60, . . . Gross's conflict in the prior federal proceedings in [the district court] triggers an equitable exception in favor of allowing claims to be heard when presented by counsel who are not conflicted." Ramirez cites no authority supporting such an exception to § 2244, and the plain text of § 2244 and its jurisdictional character are incompatible with Ramirez's equitable argument. *Cf. United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015) (explaining jurisdictional bars are not subject to equitable exceptions).

As we see it, Ramirez has two options at this stage in the litigation: Rule 60 or § 2244. He cites no authority, and we know of none, suggesting a third, equitable path. Accordingly, the district court did not have jurisdiction to entertain Ramirez's motion to the extent it asserts substantive claims without seeking to vacate the district court's judgment. We will nevertheless construe the portion of Ramirez's COA application repeating these arguments as a motion for authorization to file a second § 2254 application. *See United States v. Ennis*, 559 F. App'x 337, 338 (5th Cir. 2014) (unpublished) (per curiam) (construing COA application in the alternative as motion to file successive 28 U.S.C. § 2255 motion).

III.

We turn first to Ramirez's application for a COA to challenge the denial of his true Rule 60(b) motion. A § 2254 applicant may not appeal a district court's ruling without first obtaining a COA. *See Buck v. Davis*, 137 S. Ct. 759, 773 (2017). This includes appeals from orders denying true Rule 60(b) motions. *See Hernandez v. Thaler*, 630 F.3d 420, 428 & n.37 (5th Cir. 2011). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional

claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). When the district court based its ruling on procedural grounds, the COA applicant must additionally show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). On a merits appeal, we review a district court's order denying a Rule 60(b) motion for abuse of discretion; thus, the question at the COA stage is "whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Buck*, 137 S. Ct. at 777.

Rule 60(b) provides six grounds on which the district court can vacate a judgment. Ramirez seeks relief under Rule 60(b)(6) specifically, which is a catchall provision that authorizes vacatur for "any other reason that justifies relief." To reopen judgment via Rule 60(b)(6), a movant must clear two hurdles. First, "[a] motion under Rule 60(b)(6) must be made 'within a reasonable time,' 'unless good cause can be shown for the delay.'" *Clark*, 850 F.3d at 780 (footnotes omitted) (first quoting Fed. R. Civ. P. 60(c)(1); then quoting *In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004)). Second, "relief under Rule 60(b)(6) is available only in 'extraordinary circumstances.'" *Buck*, 137 S. Ct. at 777 (quoting *Gonzalez*, 545 U.S. at 353).

The district court concluded that Ramirez met neither requirement. We consider in turn whether each conclusion was debatably an abuse of discretion.

A.

Rule 60(c)(1) does not provide a fixed time limit for filing a Rule 60(b)(6) motion. Rather, it prescribes a reasonableness standard, which requires the court to consider "the 'particular facts and circumstances of the case.'" *Clark*, 850 F.3d at 780 (quoting *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994)). In weighing reasonableness, "[w]e consider

'whether the party opposing the motion has been prejudiced by the delay in seeking relief and . . . whether the moving party had some good reason for his failure to take appropriate action sooner.'" *Id.* (omission in original) (quoting *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930 (5th Cir. 1976)); *see also* 11 Charles Alan Wright et al., Federal Practice and Procedure § 2866 (3d ed. 2012) ("What constitutes reasonable time necessarily depends on the facts in each individual case. The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and whether the moving party had some good reason for the failure to take appropriate action sooner." (footnotes omitted)).

The district court determined that Ramirez's motion was untimely because he filed it 5 years after *Trevino* was decided and 18 months after the district court appointed conflict-free counsel. Relying on our decisions in *Clark*, *Pruett v. Stephens*, 608 F. App'x 182 (5th Cir. 2015) (unpublished) (per curiam), and *In re Paredes*, 587 F. App'x 805 (5th Cir. 2014) (unpublished) (per curiam), the district court concluded this was an unreasonable amount of time for Ramirez to wait to file his motion. We held in each of those cases that a § 2254 applicant untimely filed a Rule 60(b)(6) motion challenging counsel's *Trevino* conflict. In *Clark*, the applicant waited 16 months after *Trevino* was decided and 12 months after conflict-free counsel was appointed, 850 F.3d at 782; in *Pruett*, the applicant waited 19 months after *Trevino* was decided and 21 months after conflict-free counsel was appointed, 608 F. App'x at 185-86; and in *Paredes*, the applicant waited 17 months after *Trevino* was decided and 13 months after conflict-free counsel was appointed, 587 F. App'x at 825.

Ramirez argues that these cases do not represent a "bright line in the sand." He insists that his delay is excusable up until January 31, 2017, because he was represented by Gross during that time, who did not alert Ramirez to his potential conflict. Beyond January 31, 2017, Ramirez says his delay was

excusable because the State consented to his timeline for filing the present motion after the district court stayed his execution.

On first blush, *Clark* appears to foreclose Ramirez's argument that his delay should be excused for the period he was represented by Gross. The § 2254 applicant in *Clark* raised a similar argument, which we rejected. *See* 850 F.3d at 782. But *Clark* is distinguishable from the case at hand. The applicant in *Clark* was actively represented by state-appointed conflict-free counsel in state court during the same period that conflicted counsel was representing him in federal court. *Id.* at 783. And although the applicant's state-appointed counsel could not represent the applicant in federal court, we explained that state-appointed counsel could have advised the applicant to seek new federal counsel. *Id.* Moreover, we noted that the applicant was "physically present in August 2013 when the state trial court considered whether a conflict of interest had arisen in the wake of *Trevino*." *Id.* Therefore, the applicant in *Clark* could not claim ignorance of the potential conflict.

Paredes is more analogous. The § 2254 applicant in *Paredes* also argued that his delay should be excused for the period during which he was represented by conflicted counsel because counsel did not raise the possibility that *Trevino* created a conflict of interest. We rejected this argument, explaining that the applicant's "unawareness of the *Trevino* decision could be described, at best, as mistake, inadvertence, or excusable neglect in keeping apprised of the law that pertained to his state conviction." 587 F. App'x at 824. But *Paredes*—an unpublished opinion—is not precedential. And although we find it well reasoned and persuasive, it does not resolve the question beyond reasonable debate.

Reasonable jurists could also debate whether Ramirez's 18-month delay in filing his Rule 60(b)(6) motion after conflict-free counsel was appointed was unreasonable. On February 10, 2018, about a year after the district court

stayed Ramirez's execution, Ramirez and the State filed a joint motion for a scheduling order, under which Ramirez would file a "supplemental brief" by July 16, 2018. The district court granted the motion. Ramirez thereafter filed an unopposed motion to extend that deadline to August 20, 2018, which the district court also granted.

We concluded in *Clark*, *Pruett*, and *Paredes* that the district courts acted within their discretion in finding Rule 60(b)(6) motions untimely when similar amounts of time elapsed between the point at which the § 2254 applicants were appointed conflict-free counsel and the point at which they filed their motions. Nevertheless, the Rule 60(c)(1) timeliness inquiry requires fact-specific, case-by-case inquiry. And here, that the State agreed to the post-stay schedule—albeit after an unexplained one-year delay—suggests that the delay did not significantly prejudice the State, which is one of the key factors in the Rule 60(c)(1) analysis.[1] Reasonable jurists could conclude that the district court abused its discretion in ruling that Ramirez's Rule 60(b)(6) motion was untimely.

B.

We hold, however, that no reasonable jurists could conclude that the district court abused its discretion in ruling that Ramirez failed to show extraordinary circumstances justifying Rule 60(b)(6) relief. Courts are free to "consider a wide range of factors" in determining whether extraordinary circumstances exist. *Buck*, 137 S. Ct. at 778. "These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of

[1] The scheduling order specifically contemplated Ramirez filing a "supplemental brief." It is not entirely clear what the parties meant by that. But the State previously represented to us that it believed Ramirez's only potential route to attack Gross's conflict of interest would be through a Rule 60(b) motion. It is therefore apparent that the State expected Ramirez to file a Rule 60(b) motion, so we attach no significance to the joint scheduling motion's reference to supplemental briefing instead.

undermining the public's confidence in the judicial process.'" *Id.* (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 874, 863-64 (1988)). Moreover, a Rule 60(b)(6) movant must show that he can assert "a good claim or defense" if his case is reopened. *Id.* at 780 (quoting Wright et al., *supra*, § 2857). Extraordinary circumstances justifying Rule 60(b)(6) relief "will rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535.

As we understand his argument, Ramirez asserts that extraordinary circumstances exist because *Trevino* created a conflict of interest that prevented Gross from adequately representing him in his federal habeas proceeding and non-conflicted counsel would have asserted a meritorious *Trevino* claim. We agree with Ramirez's opening premise—*Trevino* created a potential conflict of interest in Gross's representation of Ramirez during his federal habeas proceedings. *Cf. Christeson v. Roper*, 135 S. Ct. 891, 893-94, 896 (2015) (finding counsel was conflicted and needed to be substituted because § 2254 applicant's equitable-tolling argument required asserting counsel committed serious misconduct). But no reasonable jurist would conclude that conflict-free counsel could have asserted a meritorious *Trevino* claim or, for that matter, that Ramirez could now assert a meritorious *Trevino* claim if his case were reopened with conflict-free counsel.

Typically, if a § 2254 applicant's claim would be procedurally defaulted in state court, then the federal habeas court may not consider the defaulted claim absent a showing of cause and prejudice. *See Coleman v. Goodwin*, 833 F.3d 537, 540 (5th Cir. 2016). Prior to *Martinez*, the Supreme Court's longstanding rule held that state postconviction counsel's ineffective assistance did not constitute cause to excuse a procedural default in federal court. *See Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). But in *Martinez*, the Court carved out a narrow exception to this rule. It held that if state law requires an ineffective assistance of counsel claim to be brought for the first

time in a collateral proceeding, then state postconviction counsel's ineffective assistance in failing to raise a substantial ineffective assistance of trial counsel claim excuses that claim's default. *See Martinez*, 566 U.S. at 17. In *Trevino*, the Court expanded *Martinez* ever so slightly to situations, as is the case in Texas, in which state law formally allows ineffective assistance of trial counsel claims to be brought on direct appeal but procedural rules deny prisoners a meaningful opportunity to do so. *See Trevino*, 569 U.S. at 429. The Court has repeatedly emphasized that *Martinez* and *Trevino* create only a narrow rule, *see Trevino*, 569 U.S. at 428; *Martinez*, 566 U.S. at 9, and it has since declined to extend the rule to excuse defaulted claims of ineffective assistance of appellate counsel, *see Davila v. Davis*, 137 S. Ct. 2058, 2062-63 (2017).

It is beyond debate that Ramirez cannot claim the benefit of *Trevino*. As an initial stumbling point, he does not identify a defaulted claim that conflict-free counsel could have raised. Ramirez argues that Gross failed to present a claim in state court that trial counsel were ineffective in conducting a deficient mitigation investigation. But Gross indeed raised such claim. True, the state court characterized Ramirez's mitigation claim as arguing only "that, 'counsel were ineffective in failing to recognize that [Ramirez] was unable and incompetent to direct counsel to not call any further witnesses during the punishment phase of the trial,' and that '[d]efense counsel's performance was deficient in failing to present this mitigation testimony'" instead of arguing "that his trial attorneys were ineffective for failing to investigate mitigation evidence." This characterization is baffling when read against Ramirez's state-court habeas application, which spends nine pages discussing the mitigation evidence that trial counsel should have, but did not, discover—and even more so when read against the state court's own findings and conclusions rejecting the proposition that trial counsel conducted a constitutionally ineffective mitigation investigation.

But whether the state court believed that Ramirez defaulted on his deficient-investigation claim makes no difference here because the federal district court did not treat this claim as defaulted. The district court characterized Ramirez's argument in his § 2254 application as "contend[ing] that trial counsel made inadequate efforts to *investigate and prepare* evidence to militate for a life sentence." (emphasis added). And it concluded:

> Ramirez has not shown that the state habeas court's decision was contrary to, or an unreasonable application of, federal law. The defense team investigated mitigating evidence for the punishment phase. In his opening argument, trial counsel provided broad outlines of what evidence the defense wanted to present. The substance of the road map trial counsel placed before the jury corresponds with the details found in the habeas affidavits. Ramirez has not identified any witness other than family members who could provide testimony exceeding trial counsel's opening argument.

Thus, even if Gross did err in not presenting a deficient-investigation claim in state court, his failure to raise a *Trevino* argument in federal court made no difference; the district court considered this claim regardless of default.

What Ramirez really argues is that Gross rendered ineffective assistance in preparing his state habeas application by failing to discover certain additional evidence that might have convinced the state court that trial counsel's mitigation investigation was constitutionally deficient. *Martinez* and *Trevino* do not provide a vehicle for Ramirez to raise such an argument. When a state court considers a claim on the merits, a federal habeas court's review is limited to the state-court record. *See Cullen v. Pinholster*, 563 U.S. 170, 185 (2011). Thus, even if Ramirez had conflict-free counsel file his § 2254 application, conflict-free counsel would have been bound to the record Gross developed in state court. There may be an argument in favor of creating a *Martinez*-type exception to *Pinholster* to allow introduction of evidence in a

federal habeas court that, but for counsel's ineffective assistance, would have been introduced in state court. But we have no power to create an exception to *Pinholster*, and given the Court's reluctance to extend *Martinez* and *Trevino* further than it has, we doubt the Court would create such an exception either.[2]

The problems with Ramirez's *Trevino* argument do not end with his failure to identify a procedural default. Even if reasonable jurists would debate whether *Trevino* provides some vehicle for Ramirez to bring his current argument—either because he defaulted on his deficient-investigation claim or because *Trevino* creates an exception to *Pinholster*—no reasonable jurist could conclude that Ramirez has "a substantial claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 17. A "substantial" ineffective assistance of trial counsel claim is one that "has some merit." *Id.* at 14. Judging the substantiality of Ramirez's underlying claim thus requires us to apply the familiar standard from *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a prisoner claiming ineffective assistance of counsel must make two showings: (1) "that counsel's representation fell below an objective standard of reasonableness," *id.* at 687-88; and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Here, assuming reasonable jurists would debate whether Ramirez's new evidence provides some merit to Ramirez's deficient-performance argument, no reasonable jurist would find any merit in Ramirez's prejudice argument. As the state court, the district court, and this court have all previously found, Ramirez's knowing and intelligent decision to cut short his mitigation defense renders irrelevant the quality of trial counsel's mitigation investigation.

[2] Ramirez acknowledges the problem *Pinholster* poses for his argument, but he does not suggest a solution.

Moreover, our caselaw makes clear "that when a defendant blocks his attorney's efforts to defend him . . . he cannot later claim ineffective assistance of counsel." *Roberts v. Dretke*, 356 F.3d 632, 638 (5th Cir. 2004).

In his present motion, Ramirez does not seek to relitigate whether he was competent when he ordered his attorneys to cease their mitigation defense. The only argument he makes in favor of *Strickland* prejudice is that "[h]ad trial counsel taken steps to secure [Ramirez's mother's] attendance, Ramirez would not have discontinued the presentation of mitigating evidence and [his] mother's vital testimony would have been considered by the jury militating against the imposition of the death penalty." Ramirez provides no evidentiary support for his assertion that he would have continued with his mitigation defense if his mother were there to testify. In fact, this proposition is at odds with the state court's findings about Ramirez's reasons for waiving his mitigation defense: "to avoid putting his family through the process of pleading for his life and to avoid a life sentence in prison."

In sum, even if we were to reopen the district court's judgment and allow Ramirez to relitigate his § 2254 application with conflict-free counsel, Ramirez has failed to identify a meritorious claim he could bring. *See Buck*, 137 S. Ct. at 779-80. Accordingly, no reasonable jurist would debate the district court's conclusion that Ramirez has failed to show extraordinary circumstances warranting Rule 60(b)(6) relief. We accordingly deny Ramirez's application for a COA.

IV.

We now turn to the part of Ramirez's COA application that we construe as a motion for authorization to file a second § 2254 application. Section 2244(b)(1) prohibits a § 2254 applicant from relitigating any claim in a second or successive habeas application that the applicant raised in a prior § 2254 application. *See Williams v. Thaler*, 602 F.3d 291, 301 (5th Cir. 2010). As

discussed above, Ramirez raised his deficient-investigation claim in his original § 2254 application, and the district court rejected it on the merits. Accordingly, he may not raise it anew in a second § 2254 application.

Alternatively, interpreting Ramirez's deficient-investigation claim as a new claim, Ramirez fails to make the showing required to bring a new claim in a second § 2254 application. Section 2244(b)(2) states:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Ramirez's deficient-investigation claim would fail on either ground. Capital defendants have had a right to a sufficient mitigation investigation since at least 2003 when the Court decided *Wiggins*. *See* 539 U.S. at 534. Further, although Ramirez relies on newly discovered evidence, he asserts that trial counsel and Gross should have discovered this evidence sooner. And even to the extent that any of Ramirez's new evidence could not have been discovered sooner, this evidence relates only to Ramirez's mitigation defense, not to his innocence of Castro's murder or his ineligibility for the death penalty. It thus does not provide Ramirez with a basis for relief via § 2244(b)(2)(B). *See In re*

Rodriguez, 885 F.3d 915, 918 (5th Cir. 2018) (comparing § 2244(b)(2)(B) to manifest miscarriage of justice doctrine); *see also Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (holding that "existence of additional mitigating evidence" is not manifest miscarriage of justice). Therefore, Ramirez fails to make the prima facie showing needed for authorization to file a second § 2254 application.

V.

We DENY Ramirez's application for a certificate of appealability. To the extent Ramirez's Rule 60(b) motion seeks to assert a new substantive claim, we interpret it as a motion for authorization to file a second § 2254 application and DENY that motion.