23-6227

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Jose Antonio Cortez — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, Director — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jose Antonio Cortez
(Your Name)

11637 Kilkirk Lane
(Address)

Dallas, Texas. 75228
(City, State, Zip Code)

(210) 365-0185
(Phone Number)

QUESTION(S) PRESENTED

QUESTION No. 1

Whether the court of appeals side-stepped the requirements of a Certificate of Appealability under Title 28 U.S.C., Section 2253(c)(2) when the court of appeals required the Petitioner to show that the district court abused its discretion in denying the Petitioner's Motion pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure that resulted in a decision based on the merits of the appeal when the issue before the court of appeals was only whether the district court's decision was debatable?

The court of appeals should have issued a Certificate of Appealability because reasonable jurist could debate the district court's conclusion that the Petitioner was not deprived of his constitutional right to a unanimous jury verdict because a criminal defendant has always had a constitutional right to a unanimous jury verdict under the 6TH Amendment to the United States Constitution.

QUESTION No. 2

Whether a Motion filed by a habeas corpus petitioner under the provisions of Rule 60(b)(6) of the Federal Rules of Civil Procedure is to be considered not filed in a reasonable time when there is no evidence that the opposing party has been prejudiced or harm by the purported delay in the filing of the motion?

The court of appeals should have issued a Certificate of Appealability because reasonable jurist could dbated the district court's conclusion that the Petitioner's motion pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure was not made within a reasonable time when the district court's determination was not based on any guiding rules or principles; and the Petitioner was not provided with the opportunity to show good cause to excuse the lenght of delay as to deprive the Petitioner of his constitutional rights to Due Process under the 14TH Amendment to the United States Constitution.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: Ken Paxton, Attorney General, State of Texas.

RELATED CASES

1. Case No. #SA-18-CA-0923-FB, United States District Court Western District of Texas, San Antonio Division, Styled: Jose Antonio Cortez v. Lorie Davis, Director, TDCJ-CID.

2. Case No. #04-93-00128-CR, Fourth Court of Appeals, State of Texas, Styled: Jose Antonio Cortez v. The State of Texas.

3. Case No. #WR-87,766-03, Texas Court of Criminal Appeals, Styled: Ex Parte Jose Antonio Cortez.

TABLE OF AUTHORITIES CITED

TABLE OF CONTENTS

INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 03, 2023.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: at cover, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure; Rule 60(b)(6): On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons (6) any other reason that justifies relief.

Federal Rules of Civil Procedure; Rule 60(c): A motion under Rule 60(b) must be made within a reasonable time - and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

Title 28 U.S.C., Section 2253(c)(1): Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from - (A) the final order in a habeascorpus proceeding in which the detention complained of aries out of process issued by a State court.

Title 28 U.S.C., Section 2253(c)(2): A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Texas Penal Code, Section 22.021(a)(1)(A)(i): A person commits an offense, if the person, intentionally or knowingly, causes the penetration of the anus or sexual organ of another person by any means, without that person's consent. Regardless of whether the person knows the age of the child at the time of the offense, intentionally or knowingly causes the penetration of the anus or sexual organ of a child by any means.

Texas Penal Code, Section 21.11(a)(1): A person commits an offense if, with a child younger than 17 years of age, whether the child is of the same or opposite sex and regardless of whether the person knows the age of the child at the time of the offense, the person, engages in exual contact with the child or causes the child to engage in sexual contact.

United States Constitution, Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witneses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment: No State shal make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted on October 29, 1992, by a Grand Jury sitting for the 226TH Judicial District Court of Bexar County, Texas, for the alleged offense of Aggravated Sexual Assault of A Child and Indecency with A Child By Contact, in Case No. #1992-CR-6828, Styled: The State of Texas v. Jose Antonio Cortez.

The indictment charged the Petitioner with three (3) separate Counts. Count III of the indictment was dismissed by the prosecution.

Count I of the indictment charged the Petitioner with the alleged offense of Aggravated Sexual Assault of A Child under two (2) Paragraphs. Paragraph A, alleged that the Petitioner committed the offense of aggravated sexual assault of a child by causing the penetration of the female sexual organ by placing his male sexual organ in the female sexual organ of the alleged victim. Paragraph B, alleged that the Petitioner committed the offense of aggravated sexual assault of a child by causing the penetration of the aunus by placing his male sexual organ in the anus of the alleged victim.

Count II of the indictment charged the Petitioner with the alleged offense of Indecency with A Child by Contact under two (2) Paragraphs. Paragraph A, alleged that the Petitioner committed the offense of indecency with a child by engaging in sexual contact with the alleged victim by touching the female sexual organ of the alleged victim with the intent to arouse and gratify his sexual desire. Paragraph B, alleged that the Petitioner committed the offense of indecency with a child by engating in sexual contact with the alleged victim by touching the anus

of the alleged victim with the intent to arouse and gratify his sexual desire.

Under each of the Counts of the indictment, the Paragraphs were pled in the injunctive.

Petitioner entered a plea of not guilty before a jury, and on February 16, 1993, the jury found the Petitioner guilty of the offense of aggravated sexual assault of a child and indecency with a child by contact. The jury assessed punishment at forty-five (45) confinement upon each count.

Under each of the Counts of the indictment, the Jury Charge allowed the jury to find the Petitioner guilty in the disjunctive upon the Paragraphs pled in the indictment.

The Judgment and Senence was appealed to the Fourth Court of Apeals for the State of Texas, that were affirmed by that court on October 12, 1994, in Case No. #04-93-00128-CR, Styled: Jose Antonio Cortez v. The State of Texas. The Texas Court of Criminal Appeals refused the Petitioner's Petition for Discretionary Review on March 01, 1995, in Case No. #PD-1432-94, Styled: In re Jose Antonio Cortez.

Petitioner challenged the constitutionality of the Judgment and Sentence under the provisions of Title 28 U.S.C., Section 2254 et seq. before the United States District Cout for the Western District of Texas, San Antonio Division, in Case No. #SA-18-CA-0923-FB, Styled: Jose Antonio v. Lorie Davis, Director, TDCJ-CID, arguing that he was actually innocent because (1) the jury charge allowed him to be convicted by a less than unanimous verdict for separate offenses, (2) his conviction

violated the Double Jeopardy Clause because he was punished multiple times for one act, and (3) the Jury Charge was unconstitutionally vague.

On February 28, 2019, the district court delivered a Memorandum Opinion & Order dismissing the petition as time-barred under the provisions of Title 28 U.S.C., Section 2244(d), and sua sponte denied a Certificate of Appealability (COA). Petitioner sought a COA with the United States Court of Appeals for the Fifth Circuit, and on November 01, 2019, that court delivered an Order denying a COA in Case No. #19-50302, Styled: Jose Antonio Cortez v. Lorie Davis, Director, TDCJ-CID. The United State Supreme Court denied Certiorari.

Petitioner filed and tendered a Motion For Releif From Judgment with the district court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Petitioner questioned whether the district court was obligated to set aside its prior judgment dismissing the petition given an intervening decision by the the United States Supreme Court in Ramos v. Louisiana, 140 S.Ct. 1390 (2020) that presented a supervening change in Constitutional law regarding a State criminal defendant's rights to a Unanimous Verdict. Petitioner argued that this supervening change in constitutional law as now applied to the States allowed the court to reconsider whether the petition was time-barred in view of his claim of actual innocence based on a non-unanimous verdict, because prior to the Ramos decision the claim as presented was a matter of State law and not federal law at the time the issue was before the court, and therefore would not have been

entertained by the court.

On November 17, 2022, the district court delivered an Order denying the Petitioner's Motion for Relief From Judgment, in Case No. #SA-18-CA-0923-FB, Styled: Jose Antonio Cortez v. Bobby Lumpkin, Director, TDCJ-CID. (Appendix B).

The district court held that it had jurisdiction to consider the Petitioner's Rule 60(b) motion because it attacked, not the substance of the district court's resolution of the claim on the merits, but some defect in the integrity of the federal habeas corpus proceeding, Citing, Gonzalez v. Crosby, 125 S.Ct. 2641 (2005).

In its decision, the district court held that; (1) the motion was untimely because the Ramos opinion was issued in April 2020, over two and a half years prior to the filing of the motion, thus, Petitioner did not show a good cause to excuse the lenght of delay, therefore the motion was not made within a reasonable time; (2) the district court assuming that the motion was timely, Petitioner did not establish an extraordinary circumstance sufficient to justify reopening the court's judgment, because the Petitioner's federal habeas petition was denied as untimely and Petitioner did not demonstrate that the Ramos opinion would alter that determination, either by establishing his actual innocence or presenting an argument for equitable tolling, The district court doubted the applicablility of Ramos to the Petitioner's case, because Texas law required a unanimous jury verdict prior to the issuance of Ramos, and that unanimity is not violated by a jury charge that presents the jury with

the option of choosing among various alternative manner and means of committing the same statutorily defined offense, plus the United States Supreme Court had determined that the new rule announced in Ramos requiring jury unanimity does not apply retroactively on federal collateral review. Citing, Edwards v. Vannoy, 141 S.Ct. 1547/(2021).

From this decision, Petitioner timely filed a Notice of Appeal with the United States Court of Appeals for the Fifth Circuit, and sought the issuance of a COA from that court.

On July 03, 2023, the United States Court of Appeals for the Fifth Circuit, denied the Petitioner request for the issuance of a COA in Case No. #23-50023, Styled: Jose Antonio Cortez v. Bobby Lumpkin, Director, TDCJ-CID. (Appendix A). The court of appeals held that the Petitioner fail to show that reasonable jurists could debate whether the district court abused its discretion in denying the Petitioner's Rule 60(b) motion.

From this decision, Petitioner sought a Panel Rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure, that was construed by the court of appeals as one for "Reconsideration." Petitioner questioned whether the court of appeals had properly determined that he was not entitled to the issuance of a COA based on the contention that he failed to show that the district court abused its discretion by denying the Rule 60(b) motion when it was shown that the district court in considering and addressing the motion abused its discretion when it fail to analyze and apply the law correctly in considering and addressing the merits of the issue presented; and whether

the abuse of discretion standard was a requirement under Title 28 U.S.C., Section 2253(c)(2) for the issuance of a COA. Without addressing the issues, the court of appeals denied the Petitioner's motion for panel rehearing, as construed, on August 02, 2023. (Appendix C).

REASONS FOR GRANTING THE PETITION

In Hohn v. United States, 118 S.Ct. 1969 (1998), this Court established that it has jurisdiction to review denial of applications for a COA because those denials were judicial in nature. This Court found that it had jurisdiction and power to review such judicial decisions under Title 28 U.S.C., Section 1254. This Court explained that Section 2253(c)(1) confes the jurisdiction to issue a COA upon the court of appeals ather than a "judge" acting under his or her own seal. Therefore, the Petitioner presents a tenable and viable argument that the undersigned Circuit Judge in this case that denied the Petitioner's request for the issuance of a COA did not have the authority or jurisdiction to consider and address the Petitioner's request. Thus, the petition pursuant to Rule 10(a) of the Supreme Court Rules calls for an exercise of this Court's supervisory power and question of whether the Circuit Judge had the authority and power to deny the Petitioner's request for issuance of a COA independetly. Pursuant to Rule 10(c) of the Supreme Court Rules, this is a question of Federal law that has not been settled by this Court and should be settled by this Court.

The only "clear" jurisdicational language in Title 28 U.S.C., Section2253 appears in Section 2253(c)(1) in it's plain terms - "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals" that establishes that until a certificate of appealability has been issued a federalcourts of appeal lacks jurisdiction to rule on the merits of appeals from a habeas petitioner.

See., Gonzalez v. Thaler, 132 S.Ct. 641 (2012). This Court has interpreted the terms of the statute to confer jurisdiction on the court of appeals rather than a "judge" acting under his or her own seal. See., Hohn. However, this Court has referred to the terms "circuit justice or judge" issues a COA. See., Gonzalez, and Miller-EL v. Cockrell, 123 S.Ct. 1029 (2003).

Therefore, this Court has created a conflict upon a jurisdictional question regarding the authority of a federal court of appeals circuit judge to issue a COA acting under his or her own seal, that should be resolved by this Court.

The question before this Court is whether the court of appeals should have issued a COA to appeal the district court's denial of the Petitioner's Rule 60(b) Motion?

This Court has instructed that when a habeas petitioner seeks a COA, the court of appeals should limit its examination to a threshold inquiry into the underlying merits of his claims and that this inquiry does not require full consideration of the factual or legal bases supporting the claims. This Court instructed, that the habeas petitioner need only demonstrate a substantial showing of the denial of a constitutional right and that the habeas petitioner will satisfy this standard by demonstrating that jurist of reason could disagree with the district court's resolution of the case, or that the issue presented were adequate to deserve encouragement to proceed further. As instructed by this Court, the habeas eptitioner need not convince a judge, or, for that matter, three (3) judges that he will prevail, but must demonstrate that reasonable

jurists would find the district court's assessment of the constitutional claims debatable or wrong. For review is whether the court of appeals should have issued a COA from the district court's determination.

In the instant case, the court of appeals side-stepped the COA requirements by holding that the Petitioner failed to show that the district court "abused its discretion" by denying the Rule 60(b) Motion. (Appendix A). The court of appeals stated that the Petitioner failed to show that reasonable jurists could debate whether the district court abused its discretion in denying the Petitioner's Rule 60(b) Motion. This standard was far greater than the standard of review required under Section 2253(c)(2) as interpreted by this Court in Miller-El, that a habeas petitioner will satisfy this requirement by demonstrating that jurist or reason could disagree with the district court's resolution of the case or that the issue presented were adequate to deserve encouragement to proceed further.

Whether the Petitioner demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong does not require that the Petitioner also demonstrate an "abuse of discretion" for the entitlement of a COA. This is not the standard of review mandated by this Court in Miller-EL.

To the substance of the district court's merit based ruling upon the Petitioner's Rule 60(b) Motion. In this case, the district court's decision was merit based on the issue of whether the Petitioner's constitutional rights were violated because

of a "Non-Unamimous Verdict," a claim that was presented in the federal habeas petition and was not considered and addressed.

It is to note that at the time the Petitioner presented the claim, the claim would not have been considered a constitutional violation but a matter of State law until this Court's decision in Ramos. The district court considered and addressed the contours of the Petitioner's claim, that was also presented as a Due Process Violation, when it referred to an issue of law that unanimity is not violated by a Jury Charge that presents the jury with the option of choosing among various alternative manners and means of committing the same statutorily defined offense that went to the heart and graveman of the Petitioner's claim.

To the contrary, at this stage, it is whether the court of appeals should have issued a COA in view of Section 2253(c)(1), and for the sake of the Petitioner's argument, whether the district court abused it's discretion when it determined that the Petitioner was not deprived of his consitutional rights to a unanimous jury verdict because unanimity is not violated by a Jury Charge that presents the jury with the option of choosing among various alternative manner and means of committing the same statutorily defined offense?

In Buck v. Davis, 137 S.Ct. 759 (2017), this Court held that a court of appeals should limit it examination at the certificate of appealability stage to a threshold inquiry into the underlying merit of the claims, and ask only if the district court's decision was debatable.

Following this Court's directive from Buck, when a reviewing court inverts the statutory order of operation and first decides the merits of the appeal, then justifies its denial of a COA based on its adjudication of the actual merits, it has placed too heavy a burden on the habeas petitioner at the COA stage.

Relief is available under subsection (b)(6), however, only in extraordinary circumstances, and this Court has explained that such circumstances will rarely occur in the habeas corpus context. Gonzalez. In Buck the court of appeals concluded that Buck's case was not extraordinary at all in the habeas context, and this Court held that the question for the court of appeals was not whether Buck had shown extraordinary circumstances or shown why Texas's broken promise would justify relief from the judgment because these were ultimate merits determination the court of appeals should not have reached, and the court of appeals should have imited its examination at the COA stage to a threshold inquiry into the underlying merit of the claim and sak only if the district court's decision was debatable.

In this case, the court of appeals held that the Petitioner fail to show that the district court "abused its discretion" in the denial of the Petitioner's Rule 60(b)(6) motion, which under the directive of this Court's decision in Buck was a decision based on the merits of the appeal.

In a two (2) part examination of the case, the fist is whether reasonable jurists could debate the district court's conclusion that the Petitioner was not deprived of his constitutional rights to a unanimous verdict, and second whether reasonable

jurists could debated the district court's conclusion that the Petitioner did not make the necessary showing to reopen this case under Rule 60(b)(6).

The resolution of the issue should begin with whether the Petitioner's constitutional claim fails on the merits. Prior to this Court's decision in Ramos, the Petitioner did not have a constitutional right to a Unanimous Verdict, however, Texas recognized under its body of law and Constitution a criminal defedant's rights to a unanimous verdict. O'Brien v. State, 544 S.W.3d 376 (Tex.Cr.App. 2018). At the time, of the Petitioner's claim before the district court, the claim would have presented only a matter of State law beyond the reach of the district court to resolve until the Ramos decision, although Texas mandated such a right as a matter of due process. In the mist of the district court's decision, the claim was reolved. The district court held that the Petitioner did not establish an extraordinary circumstance sufficient to justify reopening the judgment because Texas law required a unanimous jury verdict prior to the issuance of this Court's decision in Ramos, and that uninimity is not violated by a jury charge that presents the jury with the option of choosing among various alrenative manner and means of committing the same statutorily defined offense, that went to the graveman of the Petitioner's claim that he is actually innocent because he was deprived of his constitutional right to a unanimous jury verdict because State law did not provide the jury with the option of choosing among various alternative manner and means of committing the type of offense for which he was convicted

although contained within the same statute defining the offenses.

In the instant case, the Petitioner was charged with the alleged offense of Aggravated Sexual Assault of A Child under Section 22.021 of the Texas Penal Code. The Petitioner was charged in CountyI with the alleged offense of aggravated sexual assault of a child by causing his male sexual organ to penetrate the female sexual organ of the victim in Paragrah A. Paragraph B, stated that the Petitioner caused his male sexual organ to penetrate the anus of the victm. The indictment pled the offenses in the injunctive, however, the Jury Charge presented the offenses in the disjunctive.

Under Texas law, it has been established that Section 22.021 of the Texas Penal Code does not permit a disjunctive jury charge, and thab by submitting the charge offenses in the disjunctive makes it possible for the jury to return a non-unanimous verdict upon distinct statutory offenses. Under Texas law, the allowed unit of prosecution for aggravated sexual assault is penetration.

A defendant may be prosecuted for a many statutorily specified body parts that is penetrated. For example, penetration of the sexual organ is a distinct offense from penetration of the anus. Vick v. State, 991 S.W.2d 830 (Tex.Cr.App. 1999), and Hernandez v. State, 631 S.W.3d 120 (Tex.Cr.App. 2021). Similarly, the allowable unit of prosecution for Indency with A Child, is sexual contact. Long v. State, 401 S.W.3d 642 (Tex.Cr.App. 2003); touching of the breast, anus, and gentials are distinct offenses.

Therefore, it can be reasonably concluded that reasonable

jurists could debate the district court's conclusion as applied to the facts of this case, that the Jury Charge did not violate the Petitioner's constitutional rights to a unanimous verdict, when the Jury Charge allowed the jury to find the Petitioner guilty of two (2) separate and distinct offense charged in th disjunctive, wherein six (6) members of the jury could have found the Petitioner guilty of causing the penetration of the female sexual organ, and six (6) members of the jury could have found the Petitioner guilty of causing the penetration of the anus. Given the prosecution's argument that it did not matter and the jury could reach a verdict accordingly, the Petitioner was deprived of his constitutional rights to a unanimous verdict.

Now, to the matter of whether of whether the Petitioner made the necessary showing to reopen this case under Rule 60(b)(6)?

From the onset, the procedural ruling in this case was that the Petitioner's federal habeas petition was time-barred.

The first, was that the motion pursuant to Rule 60(b)(6) was untimely because the Petitioner waited over two (2) and a half (½) years in filing the motion after the Ramos decision, and that as a result of such the Petitioner did not show good cause to excuse this leghty delay, thus, the motion was not made in a reasonable time. Under Rule 60(c), a motion under Rule 60(b) must be made within a reasonable time only for reasons specified in subsection (1), (2), and (3), which has no bearing on subsection (6) for any reasons that justifies relief, which must be within one (1) after the entry of judgment. Rule 60(c)

is silent on the matter of "reasonable time," and provides no statutory guidience as to its meaning.

In the instant case, the Petitioner was not provided with the opportunity explain or show cause as to why the motion was not presented within a reasonable time, although, this Court has not defined "reasonable time" within the meaning of Rule 60(b)(6), in light of the Petitioner's argument that the Ramos Rule announced a new rule of criminal procedure. The district court did not state why the two (2) year delay was unreasonable in light of it's statement that the motion was not made in a reasonable time, which can be taken that the presentment of the claim two (2) years after the Ramos decision was not reasonable, a matter that cannot be assessed in absent of prejudice or harm in the delay, if any.

Further, the district court did not expound on the contours of the Petitioner's claim of actual innocence based on the non-unanimous verdict.

Therefore, reasonable jurist could debate whether the district court's assessment of the issue was correct, or that such procedural ruling was correct.

Further, this Court should take the time to consider what amounts to a reasonable time in presenting a Rule 60(b)(6) motion, absent the showing of prejudice or harm on the opposing party, as in this case, the prosecution. There is no criteria or guidience to be used in determining what is considered to be unreasonable in the absent of harm or prejudice to the opposing party. Cf., Barker v. Wingo, 92 S.Ct. 2182 (1972); enumerating

a balance test for gauging the denial of a criminal defendant's rights to a speedy trial.

The Courts deciesion in Ramos for the most part did not impose a new constitutional rule of criminal law, but confirmed a constitutional right enjoyed by all criminal defendants under the 6TH Amendment to the United States Constitution incorporated against the States under the 14TH Amendment to the United States Constitution as a matter of Due Process. This Court merely interpreted a susbtantial part of a criminal defendant's constitutional rights to a trial by jury under the 6TH Amendment to the United States Constitution that did not implement an intervening change in criminal law procedure, although this Court announced in Edewards v. Vannoy, 141 S.Ct. 1547 (2021) that the Ramos decision announced a new rule in criminal procedure because it was not dictated by prior precedent. However, the procedure was clearly dictated by the 6TH Amendment to the United States Constitution and was only further interpreted by this Court in Ramos with respect to a criminal defendant's rights to a trial by jury as already enumerated by the 6TH Amendment to the United States Constitution. This Court's decision in Edwards that the Ramos rule was a new rule in criminal procedure was merely a way with words to shadow a long ungiven constitutional right to a uanimous jury verdict under the 6TH Amendment to the United States Constitution.

This Court should take the opportunity to revisit it's decision in Edwards establishing that the Ramos decision announced a new rule of criminal procedure because it was not dictated

by precedent. Just because a measure of law is not dictated by precedent does not mean that it was not dictated within and by the United States Constitution itself during, before and after a criminal defendant's trial to undermine the retroactivity of a decision that merely interpreted a statute or the Constitution when the issue and/or matter has always existed within the plain writing of the text itself...

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jose Antonio Cortez

Jose Antonio Cortez

Date: October 23, 2023