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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DANIEL WAYNE COOK, Petitioner, v. CHARLES RYAN, Director of Arizona Department of Corrections, Arizona State Prison – Florence Complex, Respondent.	No. 97-cv-146-PHX-RCB **Reply on Motion for Relief from Judgment Pursuant to Rule 60(b)(6)**

The State's Response concedes the most important principle involved in this motion. (Dkt. 119, hereinafter "Response.") Relief under Rule 60(b)(6) is available if the moving party shows "extraordinary circumstances justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). The State does not dispute the existence of "extraordinary circumstances." Instead, the State makes but two arguments. One – that this Rule 60(b) motion represents a "second or successive" application for habeas corpus relief – is based upon a misunderstanding or mischaracterization of exactly *which* habeas claim is involved here. The second misperceives that the purpose of this

motion is not to now adjudicate the merits of the claim that *is* involved, which the State prematurely seeks to do; but rather to determine that there is a claim which qualifies, under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), for determination on the merits because the ineffectiveness of post-conviction counsel excuses the failure of state court exhaustion.

I. The Claim involved here has nothing to do with Cook's already-resolved claim of ineffectiveness-induced waiver of trial counsel; and therefore is not barred as a "second or successive application."

In order to successfully argue that this Rule 60(b) Motion is prohibited, as supposedly constituting a "second or successive" application, the State discusses and argues about a claim that is not involved in this motion. It says that the claim here is "more properly viewed" as a successive petition because it "address[es] a claim (Cook's allegation that his decision to represent himself was based on pre-trial counsel's ineffectiveness . . .)" which had already been resolved on the merits by this Court. Response at 1; s*ee also* Response at 5 ll. 5 – 7 ("Cook argued that his pre-trial counsel's ineffectiveness forced him to choose to represent himself, and that his wavier of counsel was thus involuntary."); *id.* at 6 ll. 10 – 14 ("Cook's Rule 60 motion seeks review of his claim that trial counsel was constitutionally ineffective, . . . in the context of Cook's claim that counsel's ineffectiveness led to Cook's decision to represent himself."); *id.* at 9 ll. 2 – 9 (conflating *Faretta* issue with *Martinez* issue).

But this motion has *nothing to do with* the claim "that deficiencies by pre-trial counsel that allegedly led Cook to represent himself at trial." *Id.* at 9. As clearly stated in the Rule 60(b) Motion, at 2, n.2, what is involved here is "Habeas Claim 3(a): Trial counsel was ineffective for failing to investigate and develop a mitigation plan." And, while the claim about self-representation was resolved on the merits, Claim 3(a) was *not.* It was held procedurally barred. The State even concedes that this section of Claim 3 –

1 the section that Cook seeks to have this Court review – was found procedurally barred
2 during Cook's federal habeas proceedings. *See* Response at 6, n.1.
3 A motion made pursuant to Rule 60(b) will not be construed as a successive habeas
4 petition where it "attacks, not the substance of the federal court's resolution of a claim on
5 the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez*
6 *v. Crosby*, 545 U.S. 524, 532 (2005). Here, Cook is not attacking the substance of this
7 Court's resolution of Claim 3(a), but rather arguing that "previous ruling which precluded
8 a merits determination was in error." *Gonzalez*, 545 U.S. at 532, n.4.
9 Therefore, the entire argument by the state that the Motion is barred as
10 "successive" is totally immaterial.
11
12 **II. The State does not dispute that there are here "exceptional circumstances" justifying application of Rule 60(b)(6).**
13 Although spending much time arguing about the already-resolved waiver-of-
14 counsel claim in order to press its "successive application" argument, the State
15 acknowledges, as it must, the existence of Claim 3(a) as the basis for the Rule 60(b)
16 motion. Response at 5 ll. 13 – 17; *id.* at 6 n. 1. However, it does not dispute Cook's
17 argument that, applying the six factors that may be considered in evaluating whether
18 extraordinary circumstances exist, *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir.
19 2009), extraordinary circumstances *do* exist here. Rule 60(b) Motion, Dkt. 118, at 3 – 6.
20 The only attention it pays to the *Phelps* factors is to note them. Response pp. 7, 8. It does
21 not dispute in any way Cook's explanation why, applying those factors, this is an
22 appropriate case for relief under Rule 60(b).
23 Thus, the crux of the dispute between the parties is very simple. It is whether Cook
24 has failed to establish but *one* of the two requirements, under *Martinez v. Ryan*, 132 S. Ct.
25 1309 (2012), for this Court to consider claim 3(a) on the merits. The *Martinez* Court
26 explained that to demonstrate cause for a default, a petitioner would be required to

establish (1) that his initial-review post-conviction lawyer was ineffective under the standard of *Strickland v. Washington,* 466 U.S. 668, (1984), and (2) that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S. Ct. at 1318. As explained at length in his Rule 60(b) Motion, Cook can do both. Importantly, the State does not dispute or contest that Cook has fulfilled step (1), *supra* – that his "initial-review post-conviction lawyer was ineffective." It only disputes whether Cook's underlying claim is "substantial." But its arguments are made on invalid grounds.

III. Under *Martinez*, establishing that an underlying claim is "substantial" does not involve making an ultimate decision on the merits, which is what the State seeks. Instead, it requires merely a showing equivalent to the issuance of a certificate of appealability.

The State asks this Court to hold that Cook's underlying ineffectiveness claim is insubstantial, without ever acknowledging what it means under *Martinez* for a claim to be "substantial." And it seeks, under the guise of a *Martinez* substantiality argument, to defeat the very reason that the Supreme Court decided *Martinez.* That is, the State wants this Court to deny Cook's claim on the merits without ever having a hearing or allowing the development and presentation of the evidence. To do this would pervert the very purpose for which the Supreme Court decided *Martinez.*

The Court made a special exception to the rule of *Coleman v. Thompson,* 501 U.S. 722 (1991), because of its "particular concern" about a claim of ineffective assistance of trial counsel, which "is a bedrock principle in our justice system." *Martinez,*113 S. Ct. at 1318. It recognized that when an attorney in an initial-review collateral proceeding is ineffective, not only is it likely that no state court at any level will decide the trial counsel claim, but without holding such ineffectiveness to be "cause," "*no* court will review the prisoner's claims." *Id.* at 1316. And perhaps most importantly for this motion, the Court

1 noted that its rule was also designed to remedy the problem that *if* the state court had
2 considered the ineffectiveness-of-trial-counsel claim, but with a prisoner having only
3 ineffective post-conviction counsel, the state proceeding "may not have been sufficient to
4 ensure that proper consideration was given to a substantial claim." *Id.* at 1318. Yet the
5 state wants this Court to hold that Cook's claim is not "substantial," based upon an at-best
6 flawed, very unacceptable state court proceeding and record. This is unacceptable.

7 Further, the State's argument ignores the lower threshold established by *Martinez*
8 for a claim such as Cook asserts here to be given full merits consideration in federal
9 habeas proceedings.

10 Because of the concerns noted above, the *Martinez* court held that if the claim is a
11 "substantial one"—that is, if it has "some merit"—then counsel's unreasonable failure to
12 raise the claim in initial-review collateral proceedings will allow a federal court to
13 examine the claim for the first time notwithstanding the state procedural misstep.
14 *Martinez, supra.* at 1318 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)).

15 In determining whether a "substantial claim" has been pled for *Martinez* purposes,
16 one must not overstate the showing required, at this "*Martinez* stage," of the strength of
17 the underlying claim that was not heard in state court owing to counsel's deficient
18 representation in collateral proceedings. This motion does not put in issue the actual
19 claim, and it would be both premature and unfair to Cook for the Court to gauge the
20 merits of his claim when he has never had the opportunity to present it effectively and
21 completely. The Court in *Martinez* expressly tied the strength of the underlying claim
22 necessary for excusing a procedural default to the quantum of potential merit necessary to
23 obtain certification to litigate the claim in a federal habeas appeal—the standard for
24 issuing a certificate of appealability. That standard requires a showing that "reasonable
25 jurists could debate whether (or, for that matter, agree that) the petition should have been
26 resolved in a different manner or that the issues presented were adequate to deserve

encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). A court applying this standard need not—indeed, *must* not—fully consider the claim on its merits. *See Miller-El*, 537 U.S. at 336. It need not conclude even that the claim will be found meritorious. *See id.* at 337. It can conclude that the underlying claim is sufficiently strong "in some instances where there is no certainty of ultimate relief." *Id.*

Determining "substantiality" requires only two findings: First, that the claim is not frivolous. Second, that the claim is worthy of further judicial examination. Having taken such a "quick look" at the underlying claim, *Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000) (quoting *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000)), the court may then return to the true focus of the *Martinez* inquiry—whether it was unreasonable for counsel not to raise the underlying claim, a claim that is significantly meritorious, in initial-review collateral proceedings. *See Martinez*, 132 S. Ct. at 1318 (cause to excuse a procedural default may be established "where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under" *Strickland v. Washington*, 466 U.S. 668 (1984)).

The State urges this Court to resolve the *merits* of the underlying *Strickland* claim, before Cook is even allowed to litigate the claim. The State's argument is premature. The State's argument demands the very kind of merits inquiry of the underlying claim that the *Miller-El* standard rules out. To accept the State's argument would be to encourage courts to find no cause to excuse a procedural default whenever the petitioner would not prevail on the underlying defaulted claim. But the Court in *Martinez* meant for cause to exist whenever counsel failed to raise even a debatable claim in initial-review collateral proceedings. After all, the reason for *Martinez* is to allow a habeas court to adjudicate the claim. This means with full opportunity to present evidence at an evidentiary hearing by this Court, inasmuch as no state court record meeting the strictures of § 2254(e) exists;

and to conduct discovery as necessary to convert the information already known into evidence admissible in such a hearing. To deny the motion based upon the State's argument that Cook hasn't proven a meritorious claim meeting the *Martinez* standard risks depriving state prisoners of full hearings on substantial claims that should have been raised in initial-review collateral proceedings.

What has thus far been established is enough to prompt a grant of Rule 60(b) relief without delving into the State's merits-based arguments. But if this Court deems such arguments to have any relevance at all, they should nonetheless be rejected as invalid.

IV. The State ignores extensive precedent confirming that if trial counsel ineffectiveness prejudices a defendant, relief can be granted even if that defendant subsequently represents himself.

Citing *Faretta v. California*, 422 U.S. 806, 834, n. 46 (1975), Response at 2, 8, the State argues that Cook is completely prevented from claiming ineffectiveness of his trial counsel simply because later Cook represented himself. *Faretta* does not say that. Indeed, in the very statement from *Faretta* cited by the State, the Supreme Court says, very particularly, that a self-representing defendant is precluded from raising *his own* representation as constitutionally ineffective. *Id.* The State ignores completely the precedent cited in Cook's Rule 60(b) Motion, which clearly hold that if prejudice occurs as a result of the appointed lawyer's ineffectiveness, relief can be granted.

As noted in the Rule 60(b) Motion, at 29, (and not responded to by the state), there *can* be a claim of ineffectiveness of trial counsel, even though a prisoner takes over his own representation, if it meets both the performance and prejudice prongs of *Strickland*, 466 U.S. 668 (1984). *E.g. United States v. Fessel*, 531 F.2d 1275 (5th Cir. 1976); *State v. Dunster,* 278 Neb. 268, 276, 769 N.W.2d 401, 408 (2009); *Hance v. Kemp*, 258 Ga. 649, 373 S.E.2d 186 (1988); *see also Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983); *Rodriguez v. State*, 763 S.W.2d 893, 896 (Tex. Ct. App. 1988). "Where a defendant is initially

represented by counsel but subsequently requests to proceed pro se, he may allege that counsel was ineffective at least up to the point where the defendant began to represent himself." *Jelink v. Costello*, 247 F.Supp.2d 212, 265 (E.D. N.Y. 2003). Indeed, even where there is hybrid representation, ineffectiveness of the lawyer within the limited scope of the duties assigned to or assumed by counsel, is grounds for relief, if prejudice is shown. *Jelink*, 247 F.Supp.2d at265; *People v. Bloom*, 48 Cal.3d 1194, 259 Cal. Rptr. 669, 774P.2d 698, 718 (1989). And there is no doubt that Cook was prejudiced.

Trial counsel has a duty to "conduct a thorough investigation of the defendant's background," *Wiggins v. Smith*, 539 U.S 510, 522 (2003)(internal citations omitted), *immediately* upon appointment to the case. ABA Guideline 11.8.3.A (1989) ("preparation for the sentencing phase, in the form of investigation, *should begin immediately upon counsel's entry into the case*") (emphasis added).

Here, appointed counsel's failure immediately to undertake the investigation and preparation of a mitigation case – a task that is very time consuming, and virtually impossible for a defendant to accomplish from a jail cell, starting only weeks before trial – severely prejudiced Cook. As the Supreme Court said in *Martinez, supra,* "while confined to prison the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance . . ." 1309 S.Ct. at 1317. A timely and adequate mitigation investigation would have developed evidence of Cook's social history and mental illnesses in a way that was never presented to the prosecutor or the judge before a sentence of death was imposed.

Counsel has an important and substantial role to raise mitigating factors not only for sentencing but also "to the prosecutor initially." *Wiggins,* 539 U.S. at 524. Specifically, Cook has demonstrated that had Keller conducted a mitigation investigation and presented it to the prosecutor, then the death sentence would not have been sought. The lawyer who prosecuted Cook, after being informed of the recently-discovered

extensive mitigation matters, furnished a declaration stating: "Had I been informed of this mitigating information regarding Mr. Cook's severely abusive and traumatic childhood and his mental illnesses, I would have not sought the death penalty in this case." *See* Rule 60(b) Motion Ex. 2, ¶9.

V. Cook's self-representation, and his statements at sentencing, do not justify denying this motion.

Applying a higher standard than simply determining the existence of a "substantial" claim, the State argues that Cook cannot succeed on this claim because he "declined to present any evidence to the Court" on mitigation, and said the "[o]nly sentence I will accept from this Court at this time is the penalty of death." Response at 3.

In *United States v. Fessel,* 531 F.2d 1275 (5th Cir. 1976), the Fifth Circuit addressed an issue analogous to the one presented here. In that case, the defendant argued that his counsel was ineffective for failing to gather records and seek expert assistance to prepare an insanity defense. *Id.* at 1278. The defendant ultimately represented himself and asked the court for a continuance so he could secure an expert and records to support his defense. *Id.* at 1277. The court denied defendant's request. The Fifth Circuit reversed the conviction, finding that the defendant received ineffective assistance despite the fact that he ultimately represented himself at the trial.

The circumstances regarding Cook's sentencing proceedings are nearly identical. Here, Cook's incompetent trial attorney failed to investigate and develop his client's social history and mental health background to provide to the experts who evaluated Cook to determine competency to stand trial and at the time of the crime. The pretrial evaluations were done without the necessary background and life history; they were incomplete. When Cook represented himself, he asked the court in preparation for sentencing to appoint another expert for the purposes of telling his life story. The court, much like the court in *Fessel*, denied Cook's reasonable request. Tr. 8/4/88 at 4. Thus,

because trial counsel failed in his duties before trial, the result was Cook being sentenced on an incomplete record through no fault of his own. The fact that Cook presented no evidence was due to the court denying him the resources to present expert evidence.

The State's focus on Cook's comment at sentencing demonstrates the flaw in its approach. No hearing covered the topic, because of the ineffectiveness of post-conviction counsel. Part of that ineffectiveness was post-conviction counsel's failure to develop this part of the record; why did Cook say what he said? The trial court's denial of Cook's request for expert assistance is enough to meet the requirement of "substantiality," but a developed record may well provide further support to Cook's ineffectiveness claim.

Another argument by the State is that Cook did not explain at the state post-conviction evidentiary hearing why he personally could not have developed mitigation evidence prior to trial or prior to sentencing while representing himself; and that most of the information Cook claims should have been developed relate to his own background and mental health history, which were topics he was aware of and could have presented. Response, at 9. There are numerous obvious answers. The most important one is that the lack of such an explanation was caused by post-conviction counsel's ineffectiveness in not covering this issue at the state-court hearing. Cook can't be blamed for failing to explain something that he was never asked.

Secondly, as the *Martinez* court said, "while confined to prison the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance . . ." 1309 S.Ct. at 1317. To think otherwise is pure fantasy. Thirdly, Cook asked for help because, as he told the trial court, he was manic depressive, that his conviction had been "traumatic" and "screwed up my head considerably." Tr. 8/4/88 pp. 3, 4. Finally, to be persuasive as mitigation, there needed to be *evidence* presented; not just Cook talking about his life. That was impossible – Cook was in jail. Fourth, Cook was not an expert psychologist, psychiatrist, neurologist, social worker, mitigation expert, nor trained in any

other discipline required to present the kind of mitigation now in the record. With all due respect to the State, it is hard to take at all seriously its contention that a real, actual, mitigation case – that so pivotal part of the jurisprudence of death sentencing – could have been investigated, analyzed, converted into witness and other admissible testimony, and explained, by Cook, alone from his jail cell and then by himself at sentencing.

VI. Conclusion

There is but one issue. Does Cook have a "substantial" claim, of a kind that would justify a certificate of appealability? No lesser body than the United States Supreme Court has said that he does. In 2011, it stayed Cook's execution over this issue. *Cook v. Arizona,* No. 10-9742 (U.S. April 4, 2011). That meant that a majority of the Court thought his claim was substantial enough that it was likely to grant him relief. *E.g. Barefoot v. Estelle,* 463 U.S. 880 (1983). Ultimately it chose not to review his case, but that does not detract from the Court's recognition that Cook's claim is a substantial one.

RESPECTFULLY SUBMITTED this 25th day of June, 2012.

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