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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Daniel Wayne Cook, Petitioner, -vs- Charles Ryan, et al., Respondents.	CIV–97–146 PHX–RCB **RESPONSE TO MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6)** **CAPITAL CASE**

Petitioner Daniel Wayne Cook's Motion for Relief from Judgment Pursuant to Rule 60(b)(6) is based on the United States Supreme Court's recent decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), in which the Court held that ineffective assistance of post-conviction counsel may be cause to overcome a procedural default on an underlying ineffective-assistance-of-counsel claim in a federal habeas proceeding. Cook's motion is more properly viewed, however, as a second or successive federal habeas petition addressing primarily a claim (Cook's allegation that his decision to represent himself was based on pre-trial counsel's ineffectiveness) that was rejected on the merits in state and federal court.

Prior to filing a successive petition in this Court, a petitioner must obtain permission from the Ninth Circuit. Cook has not done so, and this Court thus lacks jurisdiction to consider Cook's pleading.

Assuming Cook's petition is treated as a properly-filed Rule 60 motion, he has failed to establish the extraordinary circumstances necessary to reopen his prior habeas proceeding. Cook's underlying ineffective-assistance-of-counsel claim is not substantial, because Cook represented himself at trial and sentencing. Although he urges that he would not have represented himself if his counsel had been effective prior to withdrawing representation, Cook did not assert deficient performance as the reason for deciding to represent himself, and his claim that the trial court did not conduct an adequate colloquy prior to letting Cook represent himself has been rejected on the merits in state and federal court.

Having represented himself at trial and sentencing, Cook is precluded from obtaining any relief based on an allegation of ineffective assistance of counsel. *See Faretta v. California*, 422 U.S. 806, 824 fn. 46 (1975). Furthermore, Cook chose not to present mitigation at sentencing. Accordingly, assuming that his pre-trial counsel should have investigated information relating to possible avenues of mitigation (most of which involve facts known to Cook at the time of sentencing), his claim of ineffective assistance of pre-trial counsel is moot. *See Schriro v. Landrigan*, 550 U.S. 465, 476 (2007). This Court should summarily reject Cook's request for relief.

DATED THIS 18th day of June, 2012.

Respectfully submitted,

s/ Kent E. Cattani
Division Chief Counsel

Attorney for Respondents

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND.

Cook is on death row in Arizona for two 1987 murders. *State v. Cook*, 821 P.2d 731, 738 (Ariz. 1992). Cook and his roommate John Matzke tortured, sodomized, and killed Carlos Cruz Ramos and Kevin Swaney in Cook and Matzke's apartment in Lake Havasu City, Arizona. *Id.* at 736–37. The torture included burning one of the victims with a cigarette and stapling his foreskin to a chair. *Id*. When Matzke reported the murders to the police, officers went to the apartment, advised Cook of his *Miranda* rights, and then asked him why there were two dead bodies in the apartment. Cook replied, "we got to partying; things got out of hand; now two people are dead." When asked how they died, Cook said, "my roommate killed one and I killed the other." *Id*. at 737.

Prior to trial, Cook sought to represent himself. After an exhaustive colloquy, the trial court granted Cook's request to represent himself at trial and sentencing. *Id* at 737-38. At sentencing, Cook declined to present any evidence to the court. *Id*. at 737. After complaining that he was not given proper access to the Mohave County law library, Cook told the trial judge that the "[o]nly sentence I will accept from this Court at this time is the penalty of death, your Honor. I have nothing further." *Cook v. Schriro*, 538 F.3d 1000, 1011 (9th 2008). The trial court sentenced Cook to death after finding three aggravating circumstances (pecuniary gain, especially cruel, heinous or depraved, and multiple murders) and no mitigation sufficiently substantial to warrant leniency. *Id*. at 1011-12.

On direct appeal, Cook pursued, among other arguments, a claim that the trial court erred by allowing him to waive appointed counsel. *Cook*, 821 P.2d at 738-39. The Arizona Supreme Court rejected the claim on the merits:

> When Cook moved to waive his defense counsel and proceed in propria persona, the trial court cautioned him at length about the hazards of self-representation and described the problems Cook was likely to encounter. *See Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541

> (defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.'") (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 242, 87 L. Ed. 268 (1942)). The trial court then carefully determined that Cook was competent to waive his counsel and that Cook's decision to do so was voluntary. On this record, we find no error. While Cook certainly lacked a lawyer's skills, the record demonstrates that he was intellectually competent, understood the trial process, and was capable of making—and did make—rational decisions in managing his case. This is all the competence that is required. *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541 ("a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation . . . . The record affirmatively shows that [defendant] was literate, competent, and understanding, and that he was voluntarily exercising his informed free will").

Cook, 821 P.2d at 739.

After independently reviewing aggravating and mitigating circumstances, the Arizona Supreme Court upheld the death sentences imposed by the trial judge, noting that "both murders were so especially cruel, heinous, and depraved that it [is] needless to belabor the issue. There is no doubt in our minds that each of these crimes of brutal and senseless torture, sodomy, and murder falls clearly within § 13–703(F)(6), if not at the extreme end of the spectrum." *Id*. at 752.

Cook pursued post-conviction relief in Mohave County Superior Court in 1994, raising nine claims, including ineffective assistance of pre-trial counsel. The trial court conducted an evidentiary hearing, which included testimony from, among other witnesses, Cook, his co-defendant Matzke, and the attorney who represented Cook before Cook decided to represent himself. *See Cook*, 538 F.3d at 1012-23. Following the hearing, the court denied relief, finding Cook's ineffective-assistance claim both precluded (because it could have been raised when Cook chose to represent himself or on direct appeal) and meritless. Cook filed a petition for rehearing, which was a prerequisite to seeking further review in

the Arizona Supreme Court. He did not include, however, a claim of ineffective assistance of counsel in his petition for rehearing. The Arizona Supreme Court denied review of his subsequently-filed petition for review. *See id*. at 1013.

In 1997, Cook filed a petition for writ of habeas corpus, which this Court denied in March 2006. Cook argued that his pre-trial counsel's ineffectiveness forced him to choose to represent himself, and that his waiver of counsel was thus involuntary. *See Cook*, 538 F.3d at 1015-16. Cook further argued that court-appointed pre-trial counsel was ineffective for failing to investigate and prepare his case for trial and sentencing. This Court denied Cook's claim that pre-trial counsel's ineffectiveness forced self-representation, noting that there is no Supreme Court case law that requires a trial court, faced with a defendant who wants to represent himself, to inquire why he wants to exercise his right to self-representation. *See id.* at 1015. This Court further found that Cook's claim regarding pre-trial counsel's alleged failure to investigate and prepare mitigation evidence was procedurally defaulted because his post-conviction counsel did not properly preserve the claim for review after raising it in the trial court. *See id*. at 1026-29.

A unanimous panel of the United States Court of Appeals for the Ninth Circuit upheld this Court's decision denying federal habeas relief, *id*. at 1031, and the United States Supreme Court denied Cook's request for certiorari review. *Cook v. Schriro*, 129 S. Ct. 1033 (2009).

In 2009, Cook filed a second petition for post-conviction relief in which he raised a claim relating to ineffective assistance of pre-trial counsel, as well as claims relating to Arizona's lethal-injection protocol. The trial court rejected Cook's ineffective-assistance claim as precluded because it could have been raised in a prior proceeding.

In 2010, Cook filed a third petition for post-conviction relief, again raising a claim of ineffective assistance of pre-trial counsel. The state courts found the

claim precluded, and the United States Supreme Court, after delaying resolution of Cook's petition for writ of certiorari pending the resolution of the *Martinez* case, subsequently denied certiorari review.

II. COOK'S MOTION CONSTITUTES A SECOND OR SUCCESSIVE HABEAS PETITION THAT SHOULD BE SUMMARILY DISMISSED.

Rule 60(b) may not be used to avoid the prohibition in 28 U.S.C. § 2244(b) against second or successive petitions. *Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005). A Rule 60(b) motion constitutes a second or successive habeas petition when it advances a new ground for relief or "attacks the federal court's previous resolution of a claim *on the merits*." *Id*. at 532. Here, Cook's Rule 60 motion seeks review of his claim that trial counsel was constitutionally ineffective, which was raised and rejected on the merits in his first federal habeas proceeding in the context of Cook's claim that counsel's ineffectiveness led to Cook's decision to represent himself. *Cook*, 538 F.3d at 1015-17.[1]

Before a second or successive petition is filed in the district court, the applicant must move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3)(A). Any claim that was presented in a prior habeas application "shall be dismissed." 28 U.S.C. § 2244(b)(1); *Gonzalez*, 545 U.S. at 529-30. The Supreme Court has clarified that a motion—even if it is presented as a Rule 60 motion—that advances a claim that "was also 'presented in a prior application'" must be dismissed without further analysis. *Gonzalez*, 545 U.S. at 530 (quoting 28 U.S.C. § 2244(b)). Because this Court and the Ninth Circuit have already addressed the merits of Cook's claim that he was forced to represent himself because of pre-trial counsel's

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[1] Cook also raised a claim in his federal habeas petition that pre-trial counsel was ineffective for failing to adequately investigate mitigation. That claim, which was rejected as procedurally defaulted, *see Cook*, 538 F.3d at 1024-25, is moot, however, as discussed *infra* because Cook affirmatively waived presentation of mitigation.

alleged ineffectiveness, this Court should summarily dismiss Cook's motion as an improper successive habeas petition. 28 U.S.C. §2244 (b)(1); *Gonzalez*, 545 U.S. at 529-30.

III. ASSUMING COOK'S PLEADING IS A PROPERLY-FILED RULE 60 MOTION, *MARTINEZ* DOES NOT CREATE THE EXTRAORDINARY CIRCUMSTANCES REQUIRED TO REOPEN THE JUDGMENT DENYING COOK'S FIRST HABEAS PETITION.

To reopen a final judgment, Cook must establish one of the grounds under Rule 60(b). A motion under subsection (b)(6) must be brought "within a reasonable time," Fed.R.Civ.P. 60(c)(1), and requires a showing of "extraordinary circumstances." *Gonzalez*, 545 U.S. at 535.

Cook contends that the Supreme Court's decision in Martinez constitutes an extraordinary circumstance under Rule 60(b)(6) and *Gonzalez*. In *Martinez*, the Supreme Court held that to "protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* [*v. Thompson*, 111 S. Ct. 2546 (1991),] that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Martinez*, 132 S. Ct. at 1315. Consequently, the Court held that, in states like Arizona, which require ineffective-assistance-of-trial-counsel claims to be raised in an initial-review collateral proceeding, failure of collateral-review counsel to raise a substantial trial-ineffectiveness claim may provide cause to excuse the procedural default of such a claim. *Id.*

In *Phelps v. Alameida*, 569 F.3d 1120, 1135-40 (9th Cir. 2009), the Ninth Circuit directed that, when a petitioner seeks post-judgment relief under Rule 60 based on an intervening change in the law, district courts should balance several factors on a case-by-case basis.[2] *See also Lopez v. Ryan*, 2012 WL 1676696 at *4-

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[2] These factors include but are not limited to: (1) whether "the intervening change (continued ...)

*7. In the present case, however, such an analysis is unnecessary because the change in law at issue in *Martinez* implicates only a "substantial" underlying claim of ineffective assistance of trial counsel. *Martinez*, 132 S. Ct. at 1318. Here, Cook represented himself at trial and sentencing and is thus precluded altogether from pursuing an independent claim of ineffective assistance of trial counsel. *Faretta*, 422 U.S. at 824 n. 46 ("Whatever else may or may not be open to him on appeal, a defendant who represents himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"). Thus, Cook cannot prove a "substantial" claim of ineffective assistance of counsel.

Precluding claims of ineffective assistance of counsel when a defendant represents himself makes sense not only as a matter of logic, but also because it would be impossible to know what counsel would or would not have done had he remained on the case. In the instant case, for example, Cook's primary arguments relate to an alleged deficiency in investigating mitigation, and Cook faults the judge who rejected his post-conviction claim for observing that there might have been a "flurry of activity" before trial. (Motion, at 13.) In fact, because Cook was sentenced prior to Arizona's change to jury sentencing, an attorney representing Cook could have sought additional time to investigate mitigation before sentencing because there was not a concern about releasing the jury between trial and sentencing. Accordingly, Cook's assertion of ineffective-assistance is based on speculation about what an attorney might or might not have done had he remained

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(... continued)

in the law . . . overruled an otherwise settled legal precedent;" (2) whether the petitioner was diligent in pursuing the issue; (3) whether "the final judgment being challenged has caused one or more of the parties to change his position in reliance on that judgment"; (4) whether there is "delay between the finality of the judgment and the motion for rule 60(b)(6) relief"; (5) whether there is a "close connection" between the original and intervening decisions at issue in the Rule 60(b) motion; and (6) whether relief from judgment would upset the "delicate principles of comity governing the interaction between coordinate sovereign judicial systems." *Phelps*, 569 F.3d at 1135-40.

on the case as counsel of record.

Martinez does not purport to change the colloquy required under Faretta before permitting a defendant to represent himself. Accordingly, Cook's reliance on Martinez is unavailing. And, even if Martinez were applicable in a case where a defendant represented himself, Cook would not be entitled to relief because this claim was addressed and rejected on the merits in Cook's federal habeas proceeding, see Cook, 538 F.3d at 1015-17, and the claim would not be cognizable in a Rule 60 motion. Accordingly, Cook's argument that deficiencies by pre-trial counsel that allegedly led Cook to represent himself at trial and sentencing fails.

Furthermore, even if Cook had not chosen to represent himself, any claim of deficient performance by counsel in investigating potential mitigation evidence would be moot in light of Cook's decision not to present any mitigation evidence at sentencing. See Landrigan, 550 U.S. at 476 (holding that because defendant instructed his counsel not to bring any mitigation to the attention of the sentencing court, the trial court properly rejected defendant's post-conviction claim that counsel should have developed additional mitigation evidence). Most of the information Cook claims should have been developed relate to his own background and mental health history, which were topics Cook was aware of and could have presented at sentencing had he chosen to do so. His voluntary waiver of mitigation precludes his current claim.

Finally, Cook was granted an evidentiary hearing during his first state post-conviction proceeding to develop his claim of pre-trial ineffective assistance of counsel. At that hearing, Cook did not explain why he personally could not have developed any alleged mitigation evidence prior to trial or prior to sentencing while representing himself. Cook's belated attempt to assert mitigation (more than 20 years after trial) is unavailing; it cannot overcome the procedural bar to a claim of ineffective assistance of counsel that Cook created by choosing to represent

himself.

Cook has not established a colorable claim of ineffective assistance of pre-trial counsel, much less a "substantial" claim of ineffective assistance of trial or sentencing counsel such that *Martinez* would provide a basis for overcoming a procedural default ruling. Accordingly, this Court should summarily reject Cook's Rule 60 motion.

DATED THIS 18th day of June, 2012.

Respectfully submitted,

s/ Kent E. Cattani
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I hereby certify that on June 18, 2012, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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