No. 12-16562

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL WAYNE COOK,

Petitioner/Appellant

vs.

CHARLES L. RYAN, Director, Arizona Department of Corrections

Respondent/Appellee

On Appeal from the United States District Court
for the District of Arizona, Phoenix

Dist. Ct. No. 2:97-cv-00146-RCB

OPENING BRIEF

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JURISDICTIONAL STATEMENT

The District Court's jurisdiction of this habeas corpus case arises under 28 U.S.C. § 2254. This Court has appellate jurisdiction under 28 U.S.C. § 1291. This is an appeal from a district court order denying a motion for relief under Fed. R. Civ. P. 60(b)(6). An order granting or denying relief under Rule 60 is final and appealable. *See Harman v. Harper*, 7 F.3d 1455, 1457 (9th Cir. 1993). The order denying relief was filed July 9, 2012. Doc. 122. The notice of appeal was timely filed July 11, 2012. Doc. 123. Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) held that the threshold test for determining whether an underlying ineffectiveness claim is "substantial" is the test established for the issuance of a Certificate of Appealabilty. Therefore the Supreme Court intended that a trial-counsel ineffectiveness claim should be adjudicated under the normal habeas process, and not as an abbreviated mode of deciding the merits of such a claim. Was it error for the District Court to decide the merits of Cook's ineffective-assistance-of-trial counsel claim, without discovery and a hearing, but instead solely on the papers presented to demonstrate that his claim was "substantial" as defined in *Martinez*?

2. Did the District Court err in holding that the ineffectiveness of post-conviction counsel as described in Cook's Rule 60(b)(6) motion was not that of a "trial level" post-conviction counsel, and therefore that the rule of *Martinez* was inapplicable to Cook's motion?

3. Did the District Court abuse its discretion in holding that the "factors" established by this Court, in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), for determining whether "extraordinary circumstances" existed which warranted relief under Rule 60(b)(6) were not met; particularly inasmuch as the State had expressly waived any argument that "extraordinary circumstances" were lacking?

STATEMENT OF THE CASE

Cook filed a Rule 60(b)(6) motion for relief from the judgment dismissing his habeas claim that his trial counsel had been ineffective in failing to investigate or prepare a mitigation case. The District Court and this Court both had earlier held that under *Coleman v. Thompson*, 501 U.S. 722 (1991) that claim had been precluded, rejecting Cook's argument that the ineffectiveness of his post-conviction counsel constituted "cause" to overcome the claim preclusion. *Cook v. Schriro*, 2006 U.S. Dist. LEXIS 14523 (D. Ariz. 2006); *Cook v. Schriro*, 538 F.3d 1000 (9th Cir. 2008). Cook's motion was brought under the authority of *Martinez v. Ryan*, 132 S.

Ct. 1309 (2012), which held that in limited circumstances the ineffectiveness of post-conviction counsel *could* constitute cause to excuse failure to exhaust claims of ineffective trial counsel.

Cook's motion was supported not only by the pre-existing record, but by twenty-five evidentiary exhibits, including sixteen witness declarations. None of these witnesses or sources of evidence had ever been had ever been sought by Cook's trial and first post-conviction counsel, nor could have been by counsel in federal habeas proceedings because of the order of the District Court precluding the claim and the District Court's refusal to grant investigative and expert funding to appointed counsel. Cook's motion asked the District Court to hold, under the *Martinez* standard for a "substantial claim," *i.e.*, the low threshold standard for issuing a Certificate of Appealability, that his claim fell under *Martinez*, and therefore "cause" existed to allow district court adjudication in habeas proceedings. Cook asked the District Court to recognize that he was entitled to plenary habeas adjudication of his trial-counsel-ineffectiveness claim, including discovery and an evidentiary hearing.

Instead of applying *Martinez* for its limited purpose of deciding whether "cause" existed to permit Cook's claim to go forward, the District Court adjudicated the merits of the claim, under the guise of determining

whether it was "substantial," and denied the Rule 60(b)(6) motion.

Cook has timely appealed that denial.

STATEMENT OF FACTS

1. Introductory statement.

This case is back before this court because at every step of the way in this capital prosecution, Daniel Cook has been deprived of the effective assistance of counsel to defend him in a critical stage of his prosecution: the investigation, preparation and presentation of a mitigation case for sentencing. Under the Sixth Amendment's guarantee of effective counsel, its guarantee that a defendant may call witnesses on his behalf, and the Eighth Amendment jurisprudence of the Supreme Court, Cook was entitled to have a competent lawyer prepare a mitigation case, and was entitled to have that mitigation case tried to the sentencing judge. But Cook has never had a proper mitigation trial. While the state court and the District Court have discussed a paper record, which ultimately resulted from the preparation of a thorough mitigation case when the federal public defender's capital habeas unit was appointed co-counsel for Cook in 2009, no proper mitigation case *trial*, with witnesses and presentation of evidence, has ever occurred. This statement of facts will discuss how such a failure occurred at each stage of his prosecution.

2. Pretrial performance of Cook's appointed counsel, related to investigation and preparation of a mitigation case.

The relevance of what appointed lawyer Claude Keller did, or did not do, before trial stems from the requirement to show "ineffective performance" for the underlying claim of ineffectiveness of trial counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). As Cook established in his Rule 60(b)(6) motion, Keller did nothing to develop a mitigation case. Virtually all that Keller did before trial related to determining Cook's competency, and exploring a possible insanity defense. What Keller did while obtaining medical experts on the issue of competence should have alerted him to the need to investigate and prepare a mitigation case, but it did not.

Keller testified at a post-conviction evidentiary hearing, which was focused on the constitutionality of Cook's choice between incompetent counsel and self-representation. He acknowledged that he had not previously handled a capital case. (ER 244.) Keller acknowledged that between his original retention in the summer of 1987, and April of 1988 when Cook asked to represent himself, he had not settled on a defense; and indicated that among the possibilities was "diminished capacity," (ER 248-49), which is not a defense in Arizona. He did not testify explicitly that he had

undertaken no action whatsoever to investigate or prepare a mitigation case, but that fact was implicit from his testimony that he had done virtually no investigation of any kind. The lack of further detail about Keller's failure to do any work on a mitigation case is attributable to post-conviction counsel's ineffective work on the issue. That counsel did not ask any questions about whether Keller had conducted any mitigation investigation despite the fact that Keller's pretrial ineffectiveness for failing to develop a mitigation plan was an issue upon which the hearing was granted. But even with the paucity of the record that *does* exist, it is clear that there is a serious claim of ineffective performance by Keller. As was presented in more detail in Cook's Rule 60 motion, Keller's performance does not remotely approach what established standards require. (*See* ER 046-49.)

3. The District Court thought that obtaining two doctor reports on competency represented effective performance; and that their contents were the equivalent of a proper mitigation case.

Ironically, the District Court held that the two physicians' competency reports "made it evident that pre-trial counsel obtained a substantial number of records and background information concerning Petitioner." (ER 017-019.) The District Court ultimately rested a holding both that Cook could show no ineffective performance by Keller, and could show no prejudice,

upon the contents of these reports. (*Id.*) The District Court concluded that the statements in these reports were fully equivalent to the mitigation case that could have been – and in 2010 finally was – developed. But the doctors' reports pale in comparison to what was available, and was later developed.

The report of psychologist Daniel W. Wynkoop, Ed. D., was prepared for the purpose of determining whether Cook was competent to stand trial and to assess Cook's mental state at the time of the crime. (ER 305.) The report gave a cursory overview of Cook's life, noting that he had an unstable early home life, had a record of juvenile delinquency, and began abusing drugs and alcohol at an early age. (ER 305-06.) It reported repeated hospitalizations for depression and suicide, and that Cook had difficulty maintaining employment. (ER 306.) While the report also noted that Cook was sexually abused at a boys' home and a bus station, it has no development of information on these facts. (ER 305.) The District Court also failed to consider the fact that Dr. Wynkoop evaluated Cook one month after he evaluated Cook's codefendant and had heard the codefendant's version of the crime. (ER 074.) This could have affected the neutrality of Dr. Wynkoop. (*Id.*)

The report of psychiatrist Eugene R. Almer, M.D., was mostly

duplicative of Dr. Wynkoop, although also emphasizing other aspects of Cook's family circumstances. (ER 218.) Dr. Almer's focus, like Dr. Wynkoop's, was to determine competency to stand trial and Cook's mental state at the time of the crime. Dr. Almer also noted Cook's beginning use of alcohol and drugs in his teen years, his time spent in foster and group homes, and incidents of juvenile delinquency. (ER 219.) Based upon, *inter alia*, transcripts of interviews of Cook's mother and stepfather, it described Cook's mother as manic depressive and alcoholic, and frequently hospitalized. (ER 218.)

Based upon these two reports, the District Court concluded that Keller's failure to prepare a mitigation case was neither deficient performance, nor did it prejudice Cook. (ER 18.) In reaching this conclusion, the District Court ignored the uncontested opinion of psychiatrist Donna Schwartz-Watts, who stated that evaluations conducted for the purpose of determining competency to stand trial and assessing criminal responsibility are distinct from evaluations that would occur in preparation for a capital sentencing. (ER 076.) As Dr. Schwartz-Watts indicated, "[a]n evaluation for a capital sentencing requires an extensive review of records and ample time and opportunity to evaluate the defendant, especially in light of the difficult victims of abuse experience in disclosure."

(ER 076-77.) The Court's conclusion cannot be reconciled with the major differences between the two doctor reports, and the later-developed mitigation case.

4. There is a much more significant mitigation case involving Cook's childhood and family life.

The District Court equated two paper reports summarizing Cook's hellacious life with a constitutionally required mitigation investigation. There is much more to be said; and it would make a powerful mitigation case if presented at a proper trial.

Wanda Meadows, at age seventeen, married a drug addict and alcoholic named Gordon Cook. (ER 114.) They had a daughter named Debrah. (ER 114.) Eleven months later, in 1961, Wanda gave birth to Cook three months' prematurely. He weighed three pounds, two ounces at birth. (ER 115.) While Wanda was pregnant with Cook, she consumed alcohol and was physically abused by Gordon. She received no prenatal medical treatment. (ER 114; 066.)

Even as an infant, Cook was not safe from abuse: his father Gordon beat him and Debrah with a belt and burned them. When Cook was only five months old, Gordon burned Cook's penis with cigarettes. (ER 115.) Cook's mother was a "predator and sex abuser," mentally ill, and a

"prescription pill junkie." (ER 118; 126; *see also* 116.) When discussing Cook's mother, a counselor reported he had "never talked to a colder, more heartless person in his many years of social work." (ER 203.)

After a period of homelessness, Wanda left and divorced Gordon. She gave Cook and Debrah to their grandmother Mae and step-grandfather Jim Hodges when the children were only five and six years old. (ER 115.) Cook and Debrah were neglected and repeatedly abused by their grandparents, both physically and sexually. (ER 115; 119; 066.)

Their step-grandfather Jim repeatedly sexually abused Cook and Debrah, and also forced them to have sex with each other at very young ages. (ER 066; 119; 115.) Jim took pornographic pictures of Cook and his sister engaging in forced sexual activity on the family's living room floor. As just a little boy, Cook also witnessed his sister being sexually abused by their grandfather, and would hear Debrah crying in bed. (ER 066; 119; 115.)

Cook and his sister also suffered physical abuse and neglect by their grandparents. As punishment, Cook and his sister would be tied to chairs. (ER 115; 066.) Both grandparents drank a lot of alcohol and dragged Cook and his sister in and out of taverns. The grandparents also failed to properly feed the children, often giving them things like a single piece of pie for dinner. Once, Cook got sick from eating his first real meal of cottage cheese

and fruit. After he was sick, his grandparents forced him to eat his own vomit off the ground. (ER 118.)

While Cook and Debrah were living with their grandparents, Wanda would occasionally visit them. When she did, she would sexually abuse Cook. Cook would be asleep on the couch and wake up to find his clothes removed and his mother fondling him. Cook's mother would also beat her young son, and then fondle him to "make him feel better." (ER 067.) Eventually, Wanda remarried. Her new husband was a man twenty-three years older than she, who had many children of his own from several different relationships. (ER 119; 115; 162.) He was controlling and abusive. (ER 126.) Wanda moved to California with her husband, and Cook and his sister went to live with their mother and her new family. (ER 067; 119; 115.)

Escaping his grandparents did little to improve life for Cook or Debrah. Their stepfather believed "they had bad genes or were from bad seed." (ER 163.) They were treated as outcasts. (ER 162; 119; 115.) Cook's stepfather was vicious with a belt, beat Cook, and yelled at him regularly. (ER 119-120; 115.) He also beat the children with what he called "The Board of Education." (ER 126.) He would make the children drop their trousers and bend over, and then he whipped them with the board. (ER

119-120; 115; 126.) Once when Cook was getting beaten with a belt by his stepfather, Cook grabbed onto the belt for dear life. His stepfather flung him back and forth in the air. (ER 120.)

Sexual abuse pervaded Cook's newly-blended home, too. There simply were no boundaries in this family. Cook and his younger half-brother were sexually abused by an older stepbrother. (ER 067.) Wanda sexually abused one of her stepsons. (ER 126.) Cook's sister and stepsister were sexually abused by their stepbrothers. (ER 120.) Cook's stepfather asked his own daughter, Cook's stepsister, to have sex with him. (ER 162.)

As a result, Cook's "home" between ages nine to fourteen was not only physically and sexually abusive but was also mentally and emotionally abusive. Wanda suffered from bipolar disorder. (ER 118; 116.) While Cook was growing up, Wanda attempted suicide on numerous occasions. (ER 067; 119.) Once when Wanda attempted to overdose on pills, she made Cook sit next to her bed. She told him she wanted him to watch her die. After Wanda's suicide attempts, Cook's stepfather would blame Cook and his sister, telling them it was their fault that their mother wanted to kill herself. (ER 067; 119.)

When he was not quite fifteen, Cook's mother gave custody of him to the State of California. (ER 116; *see also* ER 228.) He spent the remainder

of his teenage years bouncing from one foster home to another. Just like Cook's mother and the rest of his family, the State of California also failed to protect Cook from harm. (ER 129.)

Cook's first stop in the child welfare system was at the McKinley Home for Boys in San Dimas, California, where he spent nearly two years. (ER 229-230.) While there, Cook was sexually abused by Howard Bennett, Jr., a house parent. Bennett used his position of trust to develop a "big brother" type of relationship with Cook, plying young Cook with cigarettes. (ER 146.) Bennett took advantage of Cook's vulnerability and trust in him for his own sexual gratification. Bennett reports: "I invited Cook into my room for a cigarette and began to touch him." (*Id.*) Bennett admits to masturbating Cook and having him perform oral sex. (*Id.*) Cook was even circumcised at age fifteen (ER 229), at the instruction of Bennett (ER 068).[1]

At McKinley, there was a "peek-a-boo room" which was used as a "time out room." (ER 142.) This room had a one-way mirror and Cook, along with other boys, would be subjected to abuse while adults watched from the other side. The administrator during Cook's time at McKinley was dismissed after allegations regarding sexual misconduct arose. (*Id.*) Cook

[1] Unsurprisingly, Bennett is now a registered sex offender in California, and is currently serving a 214-year prison sentence for raping, molesting, and sexually exploiting five young boys ranging from ages seven to fifteen in Pierce County, Washington. (ER 150-158.)

was forced to spend time in the "peek-a-boo room," naked and handcuffed to the bed, while Bennett would sexually abuse him. (ER 068.)

In addition to being sexually abused by a house parent, Cook was gang raped by several of the boys at McKinley. These boys were "Bennett's enforcers," and they would hogtie and then rape Cook when he would not submit to Bennett's sexual assaults. (ER 068.) Cook ran away from McKinley on several occasions. (ER 229.) While on the streets, Cook resorted to prostitution to survive. Life on the streets was hard, and during that time, Cook was raped and threatened at gunpoint. (ER 068.)

While at McKinley, Cook also experienced ongoing rejection by his mother and family. Cook's records indicate that his family promised him several times that he could move back home. However, each time they found an excuse not to take him. Without telling Cook, Wanda even left California and moved to Lake Havasu, Arizona, leaving Cook behind at McKinley. (ER 229.) After leaving McKinley at age sixteen, Cook spent his last two years as a child going from one group home to another. School records indicate that Cook lived with one group parent named Arlis Benton (now deceased) and another named Margaret Hayes. (ER 237.) Because the State of California lost his records, the number of other facilities in which Cook resided is unclear. (ER 144.) Even though Cook had escaped

McKinley, he still did not escape his abuser. Bennett tracked him down at another group home and met with him. (ER 147.)[2]

5. Cook's mental health as known before trial was significantly incomplete, and did not mirror later mental health evaluations.

The District Court also concluded that nothing materially different or new was developed in the 2010 mitigation case and the physician and psychologist reports obtained before trial. (ER 17.)

The District Court summarized Dr. Almer having reviewed numerous psychiatric, psychological and hospital records, reflecting depression, personality disorder problems and dysthymic disorder. (ER 17.)

The Court summarized Dr. Wynkoop's conclusions, stating that Cook had "adequate intellectual resources but some deficits in understanding cause and effect relationships, lack of social judgment, and some failure to understand the implications of his behavior." *Id*. Further, the District Court found, "Dr. Wynkoop diagnosed Petitioner as having a borderline personality disorder, with alcohol, amphetamine, and marijuana addictions.

[2] Just as the foregoing description of the mitigation case relating to Cook's childhood and youth is far more comprehensive and compelling than the history from the competency physicians' reports which the District Court thought to be sufficient if not equivalent, there is, similarly, a major difference between the description of Cook's adulthood taken from competency doctor reports, and the flesh-and-blood witness testimony about it which the 2010 investigation developed. *See* ER 040-43.

He observed nothing to suggest organic brain damage or thought disorder." *Id*. As discussed below, Cook *has* been diagnosed with organic brain damage and thought disorders, and that only occurred *after* a thorough and complete mitigation investigation had been undertaken.[3]

The thorough psychiatric and neuropsychological evaluations Cook finally received in 2010 showed a significantly different mental health condition for Cook.

Cook's history is replete with major mental illnesses. At the time of the crime, Cook had, and continues to have, post-traumatic stress disorder. (ER 077-79.) A principal criterion for this diagnosis is exposure to a traumatic event that is outside the range of usual human experience and would be markedly distressing to almost anyone. Cook was exposed to multiple-such traumas:

[3] One reason that the doctors who evaluated Cook before trial did not – or were not in a position to – diagnose the mental dysfunction that was diagnosed in 2010 resulted from another failing by Keller. In a supplemental report, filed in the state court record February 3, 1988, Dr. Almer recommended a neurological evaluation due to Cook's reported history of head trauma when run over by a car in 1983. Neuropsychiatrist Anthony Dvorak was appointed to do that evaluation, but did not complete it. He recommended that Cook be given an EEG to rule out seizure disorder, and CAT Scan to rule out possible intracranial lesion. Dvorak report, filed in State Court record March 7, 1988. While Keller asked for and received trial court approval for these tests (Motion Feb. 26, 1988, RA 52), that never occurred.

- Being burned on his penis with a cigarette by his father;
- Being sexually molested by his step-grandfather;
- Observing his step-grandfather molesting his sister;
- Being sexually molested by his mother;
- Being sexually molested by Howard Bennett while at the McKinley Home;
- Being sexually assaulted on the streets;
- Being the victim of physical abuse such as being forced to eat his own vomit, being tied to chairs, and being beaten regularly with a belt.

(ER 077.)

At the time of the crime Cook had, and continues to have, organic mental syndrome, not otherwise specified. (ER 079; 097.) This diagnosis indicates impairment in the etiology or pathophysiologic process which is unknown, and the organic mental syndrome is not classified as a delirium, dementia, or the other organic mental syndromes listed in the DSM-III-R. (ER 079.) In Cook's case "he has impairment in cognitive functioning as manifest by abnormal neuropsychological testing and a history of a closed head injury, use of substances that can cause cognitive impairment, a premature birth, and maternal use of alcohol during fetal development." (ER 079; 095.) Cook's organic brain dysfunction was confirmed through

neurological testing that demonstrated cognitive deficiencies, and which are further confirmed by his history of headaches, head injuries (including a car accident and sever blows to the head), and seizures. (ER 095.)

At the time of the crime, Cook had amphetamine delusional disorder. (ER 080.) The diagnosis of amphetamine delusional disorder requires organic delusional syndrome developing shortly after the use of amphetamine. Rapidly developing persecutory delusions are the predominant clinical feature for this diagnosis. (*Id.*) A manifestation of this disorder was that Mr. Cook was using crystal amphetamine at the time of the crime. Mr. Cook's co-defendant Matzke stated that Mr. Cook was telling the victim to take them to his leader. Mr. Cook accused the victim of being a spy. Matzke also reported that Mr. Cook was referring to Oliver North and the CIA, and that Mr. Cook kept asking Carlos about his leader in Nicaragua. Such statements were not reality based. (*Id.*) Cook's substance abuse disorder is a complication of PTSD. (ER 076.) His use of drugs and alcohol is a coping mechanism used to numb the pain from the chronic sexual, physical, and emotional abuse he suffered throughout his entire childhood.

6. Cook's self-representation did not moot Keller's ineffective performance and its resulting prejudice to Cook.

Cook undertook his own defense just before trial, with no mitigation case of any kind ready to present. Cook did so because he despaired of receiving a defense from Keller. The District Court's order contains some discussion of that choice (ER 004-005), but that issue, previously resolved by this Court, has no bearing on the present motion except as it might bear upon whether Cook was prejudiced by Keller's performance before being relieved. The District Court held that Cook had not been prejudiced because Keller had performed effectively, and had developed an adequate mitigation case; not because Cook replaced him just before trial. (ER 018-019.) Thus, although the state argued below that the mere fact that Cook undertook to represent himself at trial and sentencing defeats, *ipso facto*, the claim of Keller's ineffectiveness on the mitigation case, it does not.

After the guilty verdict, Cook was denied any expert assistance to develop, evaluate and present his background and mental health circumstances. (ER 298-299.) Furthermore, he was of course incarcerated and could not do the necessary investigative and preparatory work himself. Moreover, as he told the Court when asking for expert assistance, he was "manic depressive," and said that the guilty verdict was "a traumatic experience" which had "screwed up [his] head considerably since then." (ER 300.) Because Keller had not prepared a mitigation case while he

represented Cook and because Cook was denied expert assistance in putting on his mitigation case, Cook was left with a constitutionally inadequate capital sentencing hearing.

7. Cook's claim of ineffective trial counsel was ineffectively and incompletely handled by his post-conviction lawyer.

The remedy for Cook's deprivation of competent counsel for a mitigation case was a post-conviction hearing. There, Cook's appointed counsel should have properly pled, prepared, presented, and exhausted the claim of ineffective trial counsel. But they did almost none of those tasks, so a purported "evidentiary hearing" was woefully incomplete and inadequate.

Cook's first post-conviction counsel, John Williams, prepared a supplement to Cook's *pro se* post-conviction petition, which included allegations that trial counsel was ineffective. However, he only alleged that counsel was ineffective for sentencing purposes in not preparing a "mitigation plan." (RA 179, Supplement to Post-Conviction Petition Sept. 1, 1993.) [4] He did not allege trial counsel's failure to promptly, thoroughly investigate and prepare a mitigation case. Nor did he allege that Cook had been prejudiced by such trial counsel ineffectiveness. He did not allege any

[4] "RA" refers to record on appeal in state court; "RT" refers to the trial transcript from state court; "ME" refers to the minute entries from the state trial court.

facts about the mitigation case which could have been presented at sentencing.

Counsel Williams filed a motion for appointment of investigator. (RA 164, Jan. 11, 1993.) But the motion contained no explanation what the investigator would investigate, let alone that investigation of Cook's character, record, background, family life, mental and medical health conditions should be investigated.

When the State filed a motion to dismiss the petition, it noted that the supplemental petition "does not explain what kind of plan should have been developed" for mitigation. (RA 187, Dec. 3, 1993, at 17.) Notwithstanding that opportunity, when counsel Williams filed a Second Supplement to the post-conviction petition, which was explicitly stated to be intended to rebut the State's motion to dismiss, he did not respond to the State's raising of this deficiency relating to trial counsel's lack of mitigation efforts.

There is no evidence in the record and no indication that either Mr. Williams or any investigator took any action at all to investigate the mitigation case which could have been presented at trial. Thus, while he represented Cook, Williams did no preparation to present a case of "prejudice" under *Strickland v. Washington*.

Counsel Williams then moved to withdraw due to a conflict. (RA

196, Stipulation for Substitution of Counsel, Apr 20, 1994.) In the motion, Williams submitted a statement by attorney Michael Terribile that he would accept appointment and was familiar with the case. (*Id.*)

Despite being granted a hearing on the claim of trial counsel's failure to investigate and develop a mitigation plan, Terribile took no action to investigate the mitigation case which could have been presented at trial. (ER 240.) It is obvious that he conducted no mitigation investigation, because (i) he presented no such evidence at the evidentiary hearing conducted for the post-conviction proceedings; and (ii) subsequent investigations have revealed an extensive, compelling mitigation case. Rather than take responsibility as Cook's *only* attorney of record, Terribile relied upon conflicted counsel to tell him which witnesses should be presented. (ER 240.)

On December 2, 1994, an evidentiary hearing was held on the claim that Cook's trial counsel was ineffective. Post-conviction counsel presented testimony from several witnesses about appointed Counsel Keller's incompetency to defend major cases, including capital cases; his suitability only to handle simple matters like changes of plea; his unwillingness, let alone inability, to conduct a jury trial; and his failure to know current law, and citation of outdated authorities. (RT December 2, 1994, at 20, 21; 30-

34; 38, 39; 43-45; 62-66; 75, 76.) Unfortunately, although post-conviction counsel presented evidence of Keller's general incompetency, he did not adduce explicit testimony about Keller's failings in not investigating or preparing a mitigation case Cook's case. (*See generally id.*)

The post-conviction trial court denied the claim. (RT 2/3/95.)

After relief was denied, attorney Terribile failed Cook once again. He did not even present the issue of ineffective trial counsel in a motion for rehearing to the trial court, which was required under Arizona law at the time. *See State v. Bortz*, 169 Ariz. 575, 578, 821 P.2d 236, 239 (Ariz. Ct. App. 1991) ("only those claims preserved in the motion for rehearing" following denial of post-conviction relief by the trial court may be reviewed on appeal).

Terribile had no strategic reason for not asking the trial court to reconsider its decision on this claim. (ER 240-241.) Nor was he aware of the fact that failure to raise a claim would prevent a federal court from reviewing it during habeas corpus proceedings. (ER 241.) Because Mr. Terribile did not raise the claim to the trial court in the motion for rehearing, Cook's ineffectively-presented claim of ineffective assistance of trial counsel involving a mitigation case was not reviewed by the Arizona Supreme Court, and was later not reviewed on the merits by the District

Court, or this Court, in Cook's application for habeas corpus.

8. After the mitigation case was developed in 2010, Cook sought to obtain state-court relief on his newly discovered evidence. The trial court, while expressing opinions about the claim, summarily dismissed it instead of determining it on the merits.

After completion of Cook's federal habeas corpus litigation through the Supreme Court, this Court appointed the Arizona Federal Public Defender Capital Habeas Unit as co-counsel. *Cook v. Schriro*, No. 06-99005, Order Feb. 18, 2009. In contemplation of a clemency hearing to be conducted shortly before Cook's execution, the Capital Habeas Unit employed staff, experts, and investigators to prepare what became both a clemency presentation, and a demonstrably substantial mitigation case. Cook then filed a third post-conviction petition under Rule 32.1(e) and 32.1(h) of Arizona Rules of Criminal Procedure.[5] Cook's third post-conviction petition was based on the argument that his recent diagnoses of PTSD and organic brain dysfunction constituted newly discovered material

[5] As is discussed in the District Court's Order (ER 006), Cook had filed a second post-conviction petition in March 2009, which was primarily directed at claims related to the mode of lethal injection, but in which Cook continued to assert that the ineffectiveness of his first post-conviction counsel should constitute cause to allow him to obtain post-conviction relief upon a proper showing that his trial counsel had been ineffectiveness. The only significance of that proceeding is its importance in demonstrating Cook's continued diligence in pressing the claim that is now before this Court.

facts that "probably would have changed" his sentence. Ariz. R. Crim. P. 32.1(e). Cook also supported his state-court petition with the prosecutor's declaration indicating that he would not have sought the death penalty had he known of Cook's mitigation case. See Ariz. R. Crim. P. 32.1(h) (noting that relief can be obtained where petitioner has presented facts showing that the "court would not have imposed the death penalty").

The trial court summarily dismissed the post-conviction petition under Ariz. R. Crim. P. 32.6(c), which permits such summary dismissal if the claim "presents a material issue of fact or law which would entitle the defendant to relief under this rule . . . ." But in ruling on a motion to summarily dismiss the Petition for Post-Conviction Relief, the trial court applied the standard for determining such a petition on the merits, not summary disposition. For example, citing Ariz. R. Crim. P. 32.1(e) the Court wrote that the standard for avoidance of summary dismissal was that "newly discovered material facts probably exist and such facts *probably would have changed* the verdict or sentence." (*State v. Cook*, No. CR-9358, Order, Jan. 27, 2011, at 1 (Mohave County Superior Court)) (emphasis supplied). Similarly, the Court indicated that it would have the authority to "summarily deny relief upon any determination that there are not *meritorious reasons* shown why the claim was not stated previously." *Id.* at

2 (Emphasis supplied.); *See also id.* at 3 (holding that Defendant needed to present facts "that probably would have changed the sentence.")

However, in dealing with a motion to summarily dismiss a petition, the petitioner is *not* required to convince the Court as to the merit of the alleged facts. Rather, the Court's function is to determine whether a *hearing* should be conducted, at which the merits of the Petition can be adjudicated. *See* Ariz. R. Crim. P. 32.8(a).

In deciding whether there are material issues of fact such that a Rule 32.6(c) hearing must be conducted, the Superior Court cannot weigh the significance of the petition and its supporting documentation, and make a decision on the merits:

> A defendant is entitled to an evidentiary hearing on a colorable claim – one that, 'if defendant's allegations are true, *might have changed the outcome.*' *State v. Watton,* 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990)(citing *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

State v. Donald, 198 Ariz. 406, 411, ¶ 7, 10 P.3d 1193 (App. 2000) (emphasis supplied). Judge Conn applied a standard of "probably would change" the outcome. But Arizona law requires a hearing that "if defendant's allegations are true, *might have changed the outcome*." *Id.*

It is quite clear that the summary ruling contemplated by Rule 32.6(c) is not to be a "trial on the papers," and that all doubts about the sufficiency

of the petition and its supporting documentation must be resolved in favor of granting a hearing:

> "In questions of post-conviction relief, however, '[w]hen doubts exist, "a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review." ' *See Watton*, 164 Ariz. at 328, 793 P.2d at 85 (quoting *Schrock*, 149 Ariz. at 441, 719 P.2d at 1057)."

State v. Donald, *supra*, 198 Ariz. at 413, 10 P. 3d at 1200.

But the post-conviction court actually *did* engage in fact finding, in order to be able to dismiss the Petition. The court ignored much of the newly discovered evidence and made finding based on extra-record facts. Specifically, the trial judge rejected the declaration from the prosecutor in Cook's case by injecting his own opinion of what he believed the prosecutor would have done. Indeed, the trial judge even recognized that he was "skating on thin procedural ice by making these comments because it may seem to be deciding issues of credibility based on affidavits rather than sworn testimony subject to cross-examination." (*Cook*, No. CR-9358, Order, Jan. 27, 2011, at 4.)

Moreover, in reviewing Cook's claim of newly discovered evidence, the judge focused solely on the diagnosis of PTSD. (*Id.* at 5.) While the state-court judge ultimately determined that a diagnosis of PTSD would not have changed his mind in sentencing Cook to death (*id.* at 6), he ignored the

diagnosis of organic brain dysfunction and was silent as to the extensive social history that had been developed. Thus, in rejecting Cook's claims under state law, the court failed to allow a hearing to which Cook is entitled.

9. The District Court also circumvented plenary consideration of the claim, as had the state post-conviction court, without an evidentiary hearing.

Cook asked the District Court to make the determination of substantiality defined by *Martinez*, using the standard of *Miller-El v. Cockrell*, 537 U.S. 322 (2002). That is a threshold test, not intended to subject the claim to the rigors of an ultimate decision on the merits. *Miller-El*, which *Martinez* explicitly cited, makes that clear.

Cook argued to the Court that under *Martinez* and *Miller-El*, it is important "not [to] overstate the showing required, at this '*Martinez* stage', of the strength of the underlying claim," and further that "[t]his motion does not put in issue the actual claim, and it would be both premature and unfair to Cook for the Court to gauge the merits of his claim when he has never had the opportunity to present it effectively and completely." (Reply, Doc. 120 at 5.) Cook argued that *Martinez* intended for a prisoner to have the right to discovery, and a full opportunity to present evidence at an evidentiary hearing, for any "debatable" claim. *Id*. at 6. But the Court proceeded

differently.

The Order does not discuss the *Martinez* definition of a "substantial claim," nor acknowledge that *Martinez* required it to determine whether Cook's claim would qualify for a Certificate of Appealability.

The District court first determined that under *Gonzales v. Crosby*, 545 U.S. 534 (2005), Cook's motion was not a "second or successive" petition, for purposes of 28 U.S.C. § 2244(b). Because both the District Court and this Court held the claim precluded, and therefore did not resolve the merits, the District Court properly held that § 2244(b) did not apply. (ER 9.)

Then, the Court analyzed the factors of *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009) and determined that they weighed against finding the "extraordinary circumstances" necessary for Cook to receive Rule 60(b)(6) relief. (ER 10-15.) It did so even though Respondent explicitly waived any argument that the factors of *Phelps* weighed against Cook's claim. *See* Doc. 119 at 8 ("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.")

The Court then, as an alternative holding, held that Cook's claim failed because he could establish neither that trial counsel Keller and performed ineffectively in the mitigation aspect of a defense, nor that he was

prejudiced by Keller's failure to seek out the robust mitigation case which was available to be presented. (ER at 15-21.)

SUMMARY OF ARGUMENT

In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the Supreme Court decided that certain claims of ineffective assistance of trial counsel could be heard in federal habeas corpus even though a petitioner's state post-conviction counsel was ineffective and thereby prevented proper presentation of such claims to the state court. *Martinez* limited the scope of its rule to those claims having "some merit," in order not to provide carte blanche permission to every petitioner having any claim of ineffectiveness of trial counsel. However, the Court in Martinez also did not intend for its rule to result in claims being decided on the merits on a bob-tailed record, or no record at all.

The District Court overlooked the *Martinez* definition of what is a "substantial claim," by equating it to the standard for issuing a Certificate of Appealability. Instead, it denied Cook's Rule 60(b)(6) motion by holding that Cook could not show that he was entitled to relief. Instead of recognizing that Cook should be allowed to proceed if his claim had "some merit," the Court did what *Martinez* did not intend. It made what should have been a threshold determination that Cook's claim should proceed into

the ultimate decision on the merits. But it did so without providing Cook an opportunity to remedy the deficiencies of the state court proceeding, in asserting his claim of ineffective trial counsel. Cook therefore is deprived of what the Supreme Court in *Martinez* sought to insure – that petitioners like Cook be afforded a full hearing on the merits, with a developed record, someplace, at some time. The District Court should have recognized that Cook's claim has some merit (indeed, Cook observes, is strongly meritorious). The Court should have granted the motion and proceeded to normal habeas corpus consideration.

The District Court held that Cook's motion could not receive the benefit of the *Martinez* rule. The Court held that the ineffectiveness that Cook claimed as the basis for *Martinez* relief was simply post-conviction counsel's failure to include the claim of trial counsel ineffectiveness in a motion for reconsideration which was a pre-requisite to petitioning for Arizona Supreme Court review. The Court held that even though filing such a motion was done in the trial court, and by the trial counsel for Cook's post-conviction proceeding, that the act was an "appellate" function, and not covered by *Martinez.* This is plainly incorrect, when measured on a logical and functional basis. More importantly, there were many other aspects of post-conviction counsel's ineffective performance which were "trial level"

functions, and indisputably come within the scope of the *Martinez* rule. These included deficiencies in pleading, investigation, and hearing procedures. The District Court erred in holding that *Martinez* does not apply to this case.

In order for a district court to grant a Rule 60(b)(6) motion in these circumstances, the court must find that "extraordinary circumstances" warrant doing so. In *Phelps v. Alameida*, this Court specified several "factors" for a district court to consider in determining whether such extraordinary circumstances justified granting a motion. In his motion Cook set forth an explanation of why the *Phelps* factors supported a grant of his motion. In its response, the State expressly and clearly waived any defense that *Phelps* required the District Court to deny Cook's motion. The District Court, nonetheless, undertook the *Phelps* analysis, and held that three of them weighed against Cook's position. The Court therefore held that no extraordinary circumstances existed. The Court held that the interest in finality of judgments counted against Cook. But that conclusion ignores Supreme Court precedent holding that it should not. The Court also held against Cook the factor measuring whether there was a "close connection" between the new case which prompted filing of the Rule 60 motion, and the case at bench. Because of the District Court's erroneous conclusion that

there had been no ineffective performance by a post-conviction *trial* counsel, the Court counted that against Cook, too. And the Court said that the interest of comity between state and federal courts dictated denying Cook's motion. That conclusion was based upon a belief that the claim which Cook seeks to have considered, by this motion, had been resolved on the merits in state court. That is factually incorrect.

Cook asks this Court to reverse the District Court's dismissal of his Rule 60 motion, and remand for regular habeas corpus proceedings.

ARGUMENT

Standard of Review

This Court reviews a district court ruling upon a motion under Fed. R. Civ. P. 60(b)(6) for an abuse of discretion. *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012). However, a district court abuses its discretion when the court does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. *See Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011).

An error of law is an abuse of discretion. *Strauss v. Comm'r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1137 (9th Cir. 2011). Thus, the court abuses its discretion by erroneously interpreting a law, *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1289 (9th Cir. 1994), or by resting its

decision on an inaccurate view of the law, *Richard S. v. Dep't of Dev. Servs.*, 317 F.3d 1080, 1085-86 (9th Cir. 2003).

I

MARTINEZ INTENDS FOR A DISTRICT COURT TO CONSIDER WHETHER AN INEFFECTIVENESS-OF-TRIAL-COUNSEL CLAIM HAS "SOME MERIT," AND NOT TO DECIDE THE ULTIMATE MERITS OF THE CLAIM WITHOUT NORMAL HABEAS CORPUS PROCEEDINGS.

This appeal is before this Court because of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). *Martinez* was decided by the Supreme Court because, without the special equitable rule the Court adopted in that case, prisoners like Cook could be left completely bereft of a remedy to redress the ineffective performance of trial counsel. Many prisoners such as Martinez – and Cook – are represented incompetently in the only state court proceeding where ineffectiveness of trial counsel can be reviewed. Such a proceeding is what the *Martinez* Court called an "initial review" proceeding, in which the issue is trial counsel ineffectiveness. But, before *Martinez*, such ineffectiveness of "initial review proceeding counsel" had the additional consequence that persons such as Martinez or Cook could not have a district court hearing on their claims of ineffective trial counsel, because the ineffectiveness of post-conviction counsel also resulted in a failure to exhaust the claim, thus requiring preclusion under *Coleman v. Thompson*, 501 U.S. 722 (1991).

Martinez was a carefully nuanced ruling. The Supreme Court decided not to resolve whether Martinez – or Cook – had a federal constitutional right to effective post-conviction counsel. 132 S. Ct. at 1315. Instead, it adopted an "equitable rule," which reposes in the jurisprudence of "cause and prejudice" subset of the federal statutory dictates of exhaustion and preclusion. *Id*. at 1318.

It is apparent from the byplay between the majority and dissenting opinions that the Supreme Court had little or no inclination to adopt a constitutional right to effective post-conviction counsel. *Compare*, 132 S. Ct. at 1319-20, *with id*. at 1321-22. (Scalia, J., dissenting.) To do that would have imposed upon the district courts an automatic obligation to hear claims of trial counsel ineffectiveness, no matter how specious. To avoid giving every habeas petitioner an automatic pass from the requirement to preserve claims of ineffective assistance of trial counsel, the Court limited its new *Martinez* rule to claims which are "substantial." *Id*. However, the Supreme Court also did not create a rule which would have the district courts making an ultimate decision on the merits as part of its threshold determination of whether a claim is "substantial." To do that would have choked off claims as non-meritorious, before they could be fully developed. Therefore, the Court said that it would allow a finding of "cause," excusing a

failure to preserve claims, for "a *potentially* legitimate claim of ineffective assistance of trial counsel . . . ." *Id*. at 1315 (emphasis supplied).

In order to define what it deemed a "potentially legitimate" claim, the Supreme Court invoked an already-developed jurisprudence. The Court said that substantiality is measured by the same standard as is used to decide whether a Certificate of Appealability should issue. *Id*. at 1318-19. The Court cited *Miller-El v. Cockrell*, 537 U.S. 322 (2002), as "describing standards for certificates of appealability to issue," to demonstrate the test for a claim having "some merit."

By invoking the standard for granting a Certificate of Appealability to define a "substantial" claim, the Supreme Court intended for district courts to determine whether there is "cause," and to undertake normal habeas adjudication procedures, without regard to whether the claim will ultimately succeed. "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). *See also Tennard v. Dretke*, 542 U.S. 274, 284-89 (2004). "In requiring a question of some substance, or a substantial showing of the denial of [a] federal right, obviously a petitioner need not show that he should prevail on the merits." *Barefoot v. Estelle*, 463 U.S. 890, 893 n.4 (1983) (internal quotations

omitted). "The holding in *Slack* would mean very little if appellate review were denied because the prisoner could not convince a judge, or, for that matter, three judges, that he or she would prevail." *Miller-El*, 537 U.S. at 337.

The standard for issuing a Certificate of Appealability intends only to screen out the clearly frivolous claim. Any doubt as to whether the petitioner has advanced a non-frivolous claim should be resolved in the petitioner's favor. *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000). And, "[a]lthough not dispositive," a death sentence "is a proper consideration" in deciding whether to issue a Certificate of Appealabililty. *Id.* (*quoting Barefoot*, 463 U.S. at 893). In other words, a Certificate of Appealability must issue if the claim has any arguable merit "even though every jurist of reason might agree [that] . . . petitioner will not prevail." *Miller-El*, 537 U.S. at 338; *id*. at 337 (stressing that a "court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief").

The District Court in this case entirely overlooked the above-described portion of *Martinez.* Its decision is entirely phrased in terms of whether Cook could show entitlement to relief on the merits. That was an error of law and a mis-interpretation of *Martinez*. The District Court failed

to even consider whether post-conviction counsel was ineffective. It was, therefore, an abuse of discretion.

This Court has recognized that *Martinez* was intended to be applied in the manner just described. It has granted motions to remand pending appeals, in light of *Martinez*, in terms demonstrating that if a claim is recognized as having some potential, an evidentiary hearing should be conducted by the District Court. *E.g. Lopez v. Ryan*, No. 09-99028 (9th Cir. Apr. 26, 2012) (the district court should determine "how *Martinez* applies to claims of ineffective assistance of counsel who failed to develop a factual record during the initial post-conviction relief proceedings; and should afford Lopez an evidentiary hearing if the district court determines that one is warranted"); *Creech v. Hardison*, No. 10-99015 (9th Cir. June 20, 2102) (remanding to district court to determine whether petitioner's counsel's ineffectiveness excuses claims of trial counsel ineffectiveness). *Cf. Bilal v. Walsh*, 2012 U.S. Dist. LEXIS 43663 at *4 (E.D. Penn. Mar. 29, 2012) (ordering evidentiary hearing in light of *Martinez* so post-conviction counsel "could explain why he failed to pursue the defaulted claim").

From this point, it follows that Cook is entitled to the full panoply of rights afforded to habeas petitioners who seek to establish cause to overcome an alleged procedural default over their claims, including an opportunity for

discovery and an evidentiary hearing. *See, e.g.*, *House v. Bell*, 547 U.S. 518, 539 (2006) (holding that limitations on factual development found in the AEDPA do not apply to procedural claim of actual innocence); *Banks v. Dretke*, 540 U.S. 668, 684-85, 692-98 (2004) (petitioner established cause to overcome procedural default based on documents obtained in federal discovery); *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010) (remanding for evidentiary hearing pursuant to *Townsend v. Sain*, 372 U.S. 293, 313 (1963), to determine whether petitioner can show cause and prejudice to overcome alleged procedural default).[6]

It is true that this Court has also affirmed denials of Rule 60(b)(6) motions brought under the *Martinez* rule without a district court evidentiary hearing. *Lopez v. Ryan*, 678 F.3d 1311 (2012); *Leavitt v. Arave*, 2012 U.S.

[6] To be clear, and to forestall possible attempts by the State to suggest additional procedural hurdles to factual development that do not exist, Cook submits that 28 U.S.C. § 2254(e)(2) does not constrain the District Court from considering Cook's allegation of cause based upon an evidentiary record developed in the District Court. As indicated by the above-cited cases, and more fully explained in *Cristin v. Brennan*, 281 F.3d 404 (3rd Cir. 2002), "the plain meaning of [Section] 2254(e)(2)'s introductory language does not preclude federal hearings on excuses for procedural default." *Id.* at 412-417. Likewise, *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), has no application to the issues presently before this Court, because any limitations contained therein apply to situations in which a state court addressed a federal constitutional claim on the merits after an adequate opportunity for factual development. Because of the ineffectiveness of post-conviction counsel, Cook did not receive such an adequate opportunity. Put simply, because this Court is not presently conducting an analysis of a prior disposition under Section 2254(d), *Pinholster* is irrelevant.

App. LEXIS 11668 (9th Cir. 2012). But in each of these cases this Court has determined that an adequate record had already been developed.[7] Here, that is not the case. Yet the District Court ignored the Certificate of Appealability standard, and dismissed the Rule 60(b)(6) motion because Cook could not establish either "cause" or "prejudice." (ER at 18-20.)

Had the District Court applied the proper *Martinez* rule, and allowed discovery and a hearing to develop a full record, many of the "uncertainties" and points of "speculation" the District Court determined had contributed to Cook's inability to show entitlement to relief would have been dealt with. *See* ER at 18, concluding that one reason Cook could not establish deficient performance by his trial counsel is because "whether counsel would have pursued additional mitigation had he remained cannot be known." That is so because post-conviction counsel did not develop that testimony in the state court.

Similarly, some of the District Court's comments about events during

[7] This Court denied a motion to remand for an evidentiary hearing in *Sexton v. Cozner*, 2012 U.S. App. LEXIS 10112 (9th Cir. 2012). But in doing so, the opinion, while briefly acknowledging the statement in *Martinez* that a claim must have "some merit," *id*. at *16, is entirely couched in terms that indicate a requirement that petitioner there had to prove that he *would* prevail on the merits, rather than only having to meet the standard for a Certificate of Appealability. However, the *Sexton* court was resolving a case in which the record was deemed already complete, and sufficient to *decide* the claim on its merits. This case does not present such a record.

the prosecution, which imply that Cook is not entitled to relief, should be the subject of a hearing. *See* ER 4, pointedly observing that at sentencing Cook said that he had no mitigation information to present "at this time," and that he would only accept a sentence of death. The District Court said that the assertion that effective performance by trial counsel would have brought Cook's PTSD to the attention of the sentencing judge "assumes any [such evidence] would have been available despite Petitioner's decision not to make a mitigation presentation." (ER at 17 – 18.) Cook was never asked about these matters in the state post-conviction hearing. Cook is entitled to a hearing to develop what likely would have occurred if there *had been* a proper mitigation case prepared.

The Supreme Court adopted the special rule of *Martinez* because "[a] prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." 132 S. Ct. at 1317. The Court concluded that without the rule it established in *Martinez* a prisoner might not have the ineffectiveness claim adjudicated in any forum, at any time. The interpretation by the District Court in this case would frustrate the Supreme Court's purpose in deciding *Martinez*. It would decide the merits of claims instead of the standard for a

Certificate of Appealability, without undertaking the federal habeas process, and based upon an inadequate or non-existent state court record. Necessarily many or most such decisions would nip "substantial" claims in the bud, before full development and plenary consideration. That is not what the Supreme Court intended when it decided *Martinez.*

Cook's claim *is* substantial, and this Court should hold that the District Court should proceed with normal habeas corpus proceedings, to adjudicate that claim.

II

THE INEFFECTIVENESS OF POST-CONVICTION COUNSEL WHICH MERITS APPLICATION OF *MARTINEZ* TO THIS CASE WAS THEIR FAILURE TO PLEAD, PREPARE, AND PRESENT AN EFFECTIVE CLAIM; AND IT ALSO INCLUDED COUNSEL'S FAILURE TO OBTAIN A JUDGMENT IN THE TRIAL COURT FROM WHICH APPELLATE REVIEW COULD BE TAKEN. THEREFORE *MARTINEZ* APPLIES TO THIS CASE.

The District Court held that Cook did not present a claim falling under *Martinez*. (ER 14.) That conclusion resulted from two aspects of the District Court's order which were erroneous.

First, the Court focused entirely upon that part of Cook's claim of post-conviction counsel ineffectiveness involving counsel's failure to take the step necessary to obtain a trial court judgment which could be the subject of a petition for review to the Arizona Supreme Court. The Court ignored

the extensive additional allegations of ineffectiveness that occurred at the pleading stage and the evidentiary hearing stage of the trial court post-conviction proceeding. By ignoring those allegations, the District Court cited *Martinez*'s limitation to ineffectiveness of *trial* level post-conviction counsel, and concluded that *Martinez* did not apply. Therefore, the Court held, Cook was not entitled to the benefits of *Martinez*, irrespective of whether his claim was "substantial." But when the full scope of post-conviction counsel's ineffectiveness is recognized, this conclusion is no longer valid.

As is more fully described in the Statement of Facts, *supra* § 7, two successive post-conviction counsel were ineffective in numerous respects even before the trial court ruling occurred and the need for a motion for rehearing arose:

- The allegations of the petition for post-conviction relief were inadequate because they did not allege trial counsel's failure to investigate mitigation;
- The allegations were inadequate because they failed to alleged prejudice to Cook resulting from the foregoing failure;
- The allegations inadequate because there was no allegation of any mitigation facts that could have been presented;

- Post-conviction counsel did no investigation into a mitigation case, and therefore was in no position to present evidence at the hearing on the issue of prejudice to Cook;
- Post-conviction counsel did not ask trial counsel Keller any questions at the evidentiary hearing about any actions Keller may or may not have taken to investigate and prepare a mitigation case.

Obviously, all of these matters were deficiencies of *trial* level post-conviction counsel, and therefore *Martinez* is fully applicable to Cook's motion. But the District Court focused only on the failure by counsel to include this claim in his motion for reconsideration by the trial court. (ER 13 l. 27 – 14 l. 17.) Its conclusion based solely on that portion of post-conviction trial counsel's performance is inadequate to entirely remove Cook's motion from consideration under *Martinez*, because obviously all of the other, above-described phases of post-conviction counsel's performance, do clearly fall under *Martinez.*

But even if counsel's error in failing to include this claim in his motion for reconsideration can somehow be made the linchpin for deciding *Martinez* coverage of Cook's motion, the District Court erred in concluding that it was an appellate counsel, and not a post-conviction trial counsel, who was ineffective.

To begin with the obvious, the motion for reconsideration was filed in the trial court. It was filed by the trial counsel. It was a pre-requisite to appellate review, but it was *not* part of the appeal process. Just as everything filed in the trial court before a notice of appeal is part of the trial process, here the filing of a mandatory motion for reconsideration was part of the trial process. *See State v. Gause*, 541 P.2d 396, 397 (Ariz. 1975) ("Rule 32.9(a) specifically requires that the petitioner timely move the court for rehearing in order that the *trial court* have a last chance to correct any errors or omissions.") (emphasis added). The petition for review begins the appellate process. Counsel's filing of the mandatory motion for reconsideration was just as much a trial function as is obtaining a judgment that can be appealed; or filing the post-trial motions which are mandatory before certain issues may be presented on appeal.

The District Court cited a sentence from this Court's opinion in this case, as the basis for its conclusion. But that sentence is not sufficient grounds upon which to exclude Cook's motion from *Martinez* coverage.

This Court, in dealing with the *Coleman v. Thompson* issue and Cook's argument to surmount it (which ultimately became the *Martinez* rule), said that "Cook attempts to argue that ineffective assistance of appellate counsel excuses the procedural default." *Cook*, 538 F.3d at 1027.

But Cook argued precisely to the contrary, stating repeatedly in his briefs to this Court that it was the ineffectiveness of post-conviction *trial* counsel which would be the exception to the *Coleman* rule. *See* Cook's Opening Brief at 72 (Nov. 9, 2006); Supplemental Reply Brief at 20 (Nov. 27, 2007); and Appellant's Request for Court to Consider Correction to Supplemental Reply Brief at 3 (Dec. 3, 2007).

In its opinion, this Court next said that under Arizona law, "a defendant is only entitled to counsel through the disposition of his or her first post-conviction petition." *Cook*, 538 F.3d at 1027. That logically includes the motion for rehearing, akin to post-trial motions under Ariz. R. Civ. P. 50 and 59, which are counterparts of the same federal civil rules. But it also said "Cook had no constitutional right to counsel at the motion for rehearing stage." *Id.*

To support the above-quoted statements, this Court cited *State v. Smith*, 184 Ariz. 456, 910 P.2d 1 (1996). That case, and the earlier Arizona case upon which it relies, supports Cook's position on this issue. *Smith* involved the circumstance of appointed post-conviction counsel filing an Anders brief, and decided what if any duty the post-conviction trial counsel may have thereafter. The Arizona Supreme Court stated that if counsel filed an Anders brief, and notified his client of that fact, then his obligation was

concluded. *Id.* at 459. But the Court also said that "Following the trial court's disposition, counsel need only inform the defendant of the status and defendant's future options, unless counsel's review, or that of the trial court, reveals an issue appropriate for submission to the court of appeals." *Id*. This implies that even where counsel had filed an Anders brief, if the court made a disposition which counsel concludes merits further action, counsel has a further duty. The obvious action expected of counsel would be to file the motion for rehearing which is a pre-requisite for appellate review.

In its *Smith* decision, the Arizona Supreme Court cited and relied upon *State v. Shattuck*, 140 Ariz. 582, 585, 684 P.2d 154 (1984). *Shattuck* makes clear that the point at which the Arizona Supreme Court holds that a prisoner is not entitled to further counsel is in initiating a petition for review.

Finally, this Court's discussion was dictum, because the Court held, as it was then required to do, that *Coleman v. Thompson* held, broadly, that "a petitioner cannot claim constitutionally ineffective assistance of counsel in [state post-conviction] proceedings." *Cook*, 538 F.3d at 1027 (alteration in original). When the Court decided Cook's appeal in 2008, that rule applied, irrespective of what label might be given to the lawyer who filed a motion for rehearing in the trial court.

Thus, the District Court's holding that *Martinez* was simply

inapplicable to Cook's motion cannot stand.

III
THE DISTRICT COURT ERRED IN DECIDING THAT THERE WERE NO "EXTRAORDINARY CIRCUMSTANCES" JUSTIFYING RELIEF UNDER THE *PHELPS V. ALAMEIDA* FACTORS, BOTH AS A MATTER OF LAW AND BECAUSE THE STATE VOLUNTARILY WAIVED THIS ARGUMENT.

In the District Court, the State explicitly waived any argument that the factors of *Phelps* weighed against Cook's claim. In the response, the State argued: "In the present case, however, such an analysis [under *Phelps*] is unnecessary because the change in law at issue in *Martinez* implicates only a "substantial" underlying claim of ineffective assistance of trial counsel." (Doc. 119 at 8.) The State deliberately chose to limit its opposition to Cook's motion to the issue of whether Cook's claim was "substantial" under *Martinez*. The District Court nonetheless took up the *Phelps* factors, and held that they militated against granting Cook's motion. This was an abuse of discretion.

In *Wood v. Milyard*, 132 S. Ct. 1836 (2012), the Supreme Court held that where the state had deliberately waived its claim that a prisoner's habeas petition was untimely under AEDPA, the Court of Appeals erred in raising and deciding the timeliness bar *sua sponte*. *Wood* held that "a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system. . . . Only where the State

does not strategically withhold the limitations defense or choose to relinquish it and where the petitioner is accorded a fair opportunity to present his position, may a district court consider the defense on its own initiative" 132 S. Ct. at 1833, 34 (Internal quotation marks and citation deleted.) *Wood* further held that "[i]t would be an abuse of discretion . . . for a court to override a State's deliberate waiver of a limitations defense." *Id*. (citing *Day v. McDonough*, 547 U.S. 198, 202 (2006)).

The District Court erred in *sua sponte* analyzing the *Phelps* factors, and holding that they did not establish "extraordinary circumstances." The State explicitly chose not to contest Cook's position that the *Phelps* factors aligned in favor of granting him relief. Cook had no reason to think that his position was contested or would be rejected. The District Court rendered its decision without notice to Cook that it would take up the *Phelps* factors, notwithstanding the State's clear waiver of the issue. As the Supreme Court stated in *Wood*, the District Court should not have departed from the "principle of party presentation basic to our adversary system." 132 S. Ct. at 1833. This decision was a clear misapplication of the law.

Moreover, the District Court's analysis of the *Phelps* factors was also an abuse of discretion. The District Court found that three of the *Phelps* factors weighed against Cook in its decision to reopen its judgment. Those

findings were based on legal and factual errors and should not be upheld.

First, the District Court found that the factor involving finality of the case weighed against Cook. (ER 12.) In making this finding, however, the District Court overlooked Supreme Court precedent. When discussing finality in a Rule 60(b)(6) case, the Supreme Court explicitly explained: "That policy consideration, standing alone, is unpersuasive in the interpretation of a provision *whose whole purpose is to make an exception to finality*." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) (emphasis added). Only by ignoring the language set forth by the Supreme Court could the District Court reach the conclusion that the interest in finality weighed against reopening the judgment.

Second, the District Court determined that Cook could not show a "close connection" between his claim and *Martinez*. (ER 13-14.) The District Court reached this conclusion based on an erroneous finding of a material fact. Specifically, the District Court found that the *Martinez* was inapplicable because the default occurred during appeal of his post-conviction petition, not its initial filing. (ER 13.) As discussed more fully in Argument II, *supra*, that is factually incorrect, as a motion for rehearing is part of the *initial* post-conviction proceedings presented to the trial court. *See Gause*, *supra*. As explained in *Gause*, review by "the appropriate

appellate court" can only commence upon denial of rehearing by the trial court. 541 P.2d at 397. Thus, it was not in the post-conviction *appeal* stage that Cook's counsel was ineffective; it was during the initial proceedings.

And, although the court accurately states the reason that the federal courts found the claim defaulted, it nevertheless ignored the factual basis of Cook's claim of ineffective assistance of post-conviction counsel. As also discussed more fully in Argument II, *supra*, Cook did not argue that his post-conviction counsel was ineffective simply for failing to follow the proper state rules in exhausting the claim. Rather, Cook explained that his post-conviction counsel fell short of their duties by first failing to investigate and present facts to support the ineffective-assistance-of-trial-counsel claim. (ER 054-056.) By concluding that *Martinez* did not apply to Cook's case, the District Court ignored the material facts supporting cause to overcome the defaulted claim.

Finally, the District Court found that principles of comity weighed against reopening judgment in this case. (ER 15.) As the District Court recognized, "principles of comity are not upset when an erroneous legal judgment, if left uncorrected, 'would prevent the *true merits* of a petitioner's constitutional claims from ever being heard.'" (ER 15 *citing Phelps*, 569 F.3d at 1140 (emphasis added).) That said, the District Court wrongly

concluded that Cook had received review of the merits of his claim of ineffective assistance of trial counsel in both his initial and most recent post-conviction proceedings.

Cook did *not* receive "true merits" review of his trial ineffectiveness claim for the exact reason he seeks review of it in light of *Martinez*: his post-conviction counsel were ineffective and failed to present that claim. As noted by the state court in denying Cook relief on that claim, "There is no evidence of witnesses who could have been called that would have testified in a way that was beneficial to the Defendant. I am really left with nothing other than just speculation as to what could have happened had Keller done a better job." (RT 3 February 1995 at 26-27.) Thus, there was no "true merits" review of his claim in the initial post-conviction proceedings.

Nor did Cook receive "true merits" review by the post-conviction court when it reviewed his third petition for post-conviction relief. Notably, Cook's third petition did *not* raise a claim of ineffective assistance of trial counsel—even though the District Court found that "the state court recently considered the merits of Petitioner's expanded sentencing ineffectiveness claim." (ER 15.)[8] No court has reviewed the merits of Cook's ineffective

[8] Cook presented two claims for relief in his third petition: (1) Cook is entitled to relief under Rule 32.1(e) because evidence of PTSD and organic brain dysfunction would have probably changed his sentence; and (2) Cook is entitled to relief under Rule 32.1(h) because he has demonstrated by clear

assistance of trial counsel claim. Further, it was improper for the District Court to rely upon the decision of the state court in its rejection of claims based solely on state law. By finding that the merits of this claim have been reviewed and therefore weighing the comity factor against Cook, the District Court clearly erred.

CONCLUSION

The order of dismissal should be reversed, and the case should be remanded for further habeas corpus proceedings on this claim.

RESPECTFULLY SUBMITTED this 16th day of July, 2012.

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and convincing evidence that the facts underlying his claim are sufficient to establish that the court would not have imposed the death penalty. *See State v. Cook*, No. CR-9358 (Mohave Cty. Sup. Ct. Nov. 22, 2010).

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth at FRAP 28.1(e)(2)(A) and is proportionately spaced, has a typeface of 14 points or more and contains 11,793 words.

s/ Michael J. Meehan

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2012, I caused the foregoing document to be filed electronically with the Clerk of the Court through ECF and notice will be sent to the following ECF recipients:

Kent Cattani
Attorney for Charles L. Ryan, Director

s/ Michael J. Meehan