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

REPLY BRIEF

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The State's Answering Brief provides little response to the three issues raised in Cook's Opening Brief. Instead, the State summarizes the District Court's opinion and urges—without support—this Court to affirm. More significantly, the Answering Brief is entirely silent on the very important issue of whether the District Court erred by ignoring the directive of *Martinez v. Lopez*, 132 S. Ct. 1309 (2012), that in deciding whether its rule of "cause and prejudice" applies to a claim, the claim needs only meet the test of the issuance of a Certificate of Appealability in order to qualify for plenary consideration on the merits. Cook stands by his arguments presented in the Opening Brief and responds only to the three points made by the State.

1. The State waived *Phelps* analysis, choosing to rely only on an argument that Cook's claim was not "substantial" under *Martinez*. The principal of "affirming for a different reason than the trial court relied upon" has no application here.

In its response to Cook's Rule 60(b) motion, the State said: "In the present case. . . 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." (Dist. Ct. Doc. No. 119 at 8, ll.1-3.)

To this Court, the State says, "Respondent offered several alternative reasons for denying Cook's motion, including the primary reason relied on by the district court – that Cook failed to establish the existence of extraordinary circumstances justifying relief under Rule 60(b)(6) . . . ." (Answering Br. at 6.) Of course, as is demonstrated above, the State *did* waive the issue by failing to argue that Cook had not met the standard under Rule 60(b)(6).

The State chooses to ignore the applicable precedent prohibiting the district court from *sua sponte* considering the issue. *See* Opening Br. at 48-49 (*citing Wood v. Milyard*, 132 S. Ct. 1836 (2012), and *Day v. McDonough*, 547 U.S. 198, 202 (2006)). These and numerous other cases on the same point control this waiver issue.

The State argues that the principle established by these cases is somehow replaced by the rule of affirmance allowing the court of appeals to affirm even if the district reached the correct result, for the wrong reason. The State cites *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010), a case which was vacated and therefore not citable. *Gonzales v. Arizona*, 649 F.3d 953 (9th Cir. 2011) (ordering *en banc* rehearing). But more to the point, the general rule relied upon by the State does not replace the specific rule established in *Wood*, *supra*, *et. al*. To do so would vacate the rule of *Welton*,

and allow the courts of appeal to reach for any aspect of a claim or defense that it wished to, irrespective of a clear waiver by one party, upon which the other relies.

2. The footnote from *Faretta*, which the State cites to argue that Cook has not presented a "substantial" claim because he represented himself at trial, actually supports the contrary conclusion.

The State cites here, as it did below, footnote 46 of *Farreta v. California*, 422 U.S. 806 (1975), to support its argument that because Cook represented himself at trial, he cannot argue that trial counsel was ineffective before trial.(Answering Br. at 6.) What the footnote says, of course, is that Cook could not "complain about the quality of *his own defense*." *Id.* That is not the claim he asked the District Court to review. As was explained by Cook at length in his Rule 60 motion, ER 50-52, there *can* be a claim of ineffectiveness of trial counsel, even though a prisoner takes over his own representation, if it meets both the performance and prejudice prongs of *Strickland v. Washington*,, 466 U.S. 668 (1984). The State fails to rebut Cook's argument nor does it point out why this Court should not apply the cases cited by Cook.

3. Cook's ineffectiveness claim is not moot because he did not expressly waive the presentation of mitigation evidence. *Schriro v. Landrigan*, does not apply here.

The State conflates two completely different circumstances when it argues that this Court can ground an affirmance upon *Schriro v. Landrigan*, 550 U.S. 465 (2007).[2] (Answering Br. at 7.) In *Landrigan* there had been a record made of Landrigan's clearly expressed instruction to his counsel *not* to present a mitigation case. *Id.* at 476. That record also revealed that Landrigan's counsel had conducted mitigation investigation and was prepared to present witnesses at Landrigan's sentencing hearing, i*d.* at 468, and that counsel carefully explained the importance of mitigating evidence to Landrigan, *id.* at 479. As a result, applying 28 U.S.C. § 2254(d), the Supreme Court found that the state court's decision was not unreasonable; Landrigan failed to demonstrate prejudice because regardless of what his counsel did, he would not have allowed mitigating evidence to be presented. *Id.* at 478.

In this case, no mitigation case had been started before trial. The trial court refused Cook, who was of course incarcerated and could not do his

[2] The State also cites *Leavitt v. Arave*, 682 F.3d 1138 (9th Cir. 2012), *Sexton v. Cozner*, 679 F.3d 1150 (9th Cir. 2012), and *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2008) for its argument that summary rejection of Cook's motion is proper. (Answering Br. at 7.) As discussed in Cook's Opening Brief at 39-40, those cases provide no such support. The State did not deign to answer that discussion, and its argument based upon them, containing no detail or logic, must be rejected.

own mitigation investigation, any expert assistance. And Cook, in asking for the assistance, told the Court that he had a mental illness and that the jury verdict had "screwed up [his] mind considerably." Then, when asked by the court at sentencing whether he had any mitigation evidence to present he said "not at this time." He did not say that he did not want to present any nor does the record indicate that he would not have presented any. The record in this case, unlike *Landrigan*, demonstrates that Cook wanted help presenting mitigation evidence, as he asked for an expert days before sentencing.

To deny Cook adjudication of his claim on the basis of waiver, without a hearing on whether in fact that is what Cook wished, cannot be justified under *Landrigan*, *supra*, or any other precedent.

CONCLUSION

The judgment should be reversed.

RESPECTFULLY SUBMITTED this 23d day of July, 2012.

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s/ Michael J. Meehan

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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:

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