No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2012

DANIEL WAYNE COOK,

Petitioner,

v.

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE
EXECUTION SCHEDULED AUGUST 8, 2012 AT 10AM P.S.T.

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QUESTIONS PRESENTED

(CAPITAL CASE)

1. Whether the Ninth Circuit erred in determining that Petitioner's habeas corpus claim was not "substantial" as described in *Martinez v. Schriro*, 132 S. Ct. 1309 (2012), by imposing a higher burden upon petitioner than would be necessary for the issuance of a certificate of appealability.

2. If this Court did not intend to use the standard for issuing certificates of appealability to identify "substantial" claims, what is the proper standard for such determination; and did the Ninth Circuit err in its conclusion that Petitioner's claim was not substantial, under that standard.

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I THE MARTINEZ LIMITATION TO "SUBSTANTIAL" CLAIMS IS AN IMPORTANT THRESHOLD FILTER DESIGNED TO SELECT CLAIMS FOR HABEAS CONSIDERATION. THE OPINION BELOW CONFLICTS WITH THIS THRESHOLD STANDARD, AND APPLLIES MARTINEZ IN A WAY WHICH WILL FRUSTRATE THE PURPOSE OF ITS "SUBSTANTIALITY" REQUIREMENT. 28

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PETITION FOR A WRIT OF CERTIORARI

Daniel Wayne Cook, an Arizona prisoner under sentence of death, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit rejecting his claim for habeas corpus relief.

OPINIONS BELOW

The opinion of the Ninth Circuit denying relief is reported at 2012 U.S. App. LEXIS 15552 (9th Cir. 2012), and is Appendix A hereto. The order of the United States District Court for the District of Arizona denying a motion under Fed. R. Civ. P. 60(B)(6) for relief from judgment is published at 2012 U.S. Dist. LEXIS 94363 (D. Ariz. 2012,) and is Appendix B hereto. The opinion of the Arizona Superior Court summarily dismissing Petitioner's third post-conviction proceeding is unreported, and is Appendix C hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on July 27, 2012. A timely Petition for Rehearing En Banc was filed on July 30, 2012, and has been denied. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions are set forth in Appendix D.

STATEMENT OF THE CASE

A. Introductory Statement.

Petitioner Daniel Cook was convicted of two murders and sentenced to death in 1988. He has a substantial claim that his appointed lawyer – who was an alcoholic and un-medicated for his bipolar disorder – was ineffective in failing to investigate and prepare a mitigation case. That claim was prejudiced by the fact that his post-conviction attorney was himself ineffective in failing to plead, prepare, present and preserve the underlying claim of ineffective trial counsel. Thus, this case involves an "initial review collateral proceeding," as described in *Martinez v. Ryan*. 132 S. Ct. 1309 (2012). It presents the question of what constitutes a "substantial" claim of ineffective counsel, which *Martinez* held to constitute "cause and prejudice," excusing the failure of post-conviction counsel to effectively prosecute it. Petitioner contends that *Martinez* did not intend for lower courts to summarily dismiss a claim without discovery or a hearing, under the guise of making the threshold determine of whether a claim shows "some merit," under *Martinez*.

In Petitioner's habeas proceedings prior to 2012, the District Court and Ninth Circuit had applied the rule of preclusion of *Coleman v. Thompson*, 501 U.S. 722 (1991), which *Martinez* changed for "initial review collateral proceeding" claims. Therefore there has been no adjudication or consideration of Petitioner's claim until the issue of whether the claim is "substantial" arose in the proceedings below.

Petitioner asserted his claim of ineffective trial counsel, in failing to prepare a mitigation case, in his petition for writ of habeas corpus in 1997, and in every proceeding thereafter. At every appropriate stage Petitioner has applied unsuccessfully to courts for expert, investigative and funding assistance to allow him to develop the mitigation case, so that he could satisfy the prejudice prong of a claim under *Strickland v. Washington*, 446 U.S. 668 (1984). Finally, in 2009, when the Arizona Federal Public Defender Capital Habeas Unit was appointed as co-counsel to Petitioner for, among other purposes, presentation of a clemency case, substantial investigative work and expert analyses yielded a truly compelling mitigation case. That case has never seen the inside of a courtroom.

The Ninth Circuit made three key conclusions in deciding that Petitioner could not prove that he had been denied effective assistance of counsel for his mitigation case, nor that he had been prejudiced by any such ineffectiveness. First, it held that Petitioner's appointed lawyer had done ample work for Petitioner's defense, and therefore was not ineffective. Second, it held that because Petitioner – having lost confidence in his lawyer – undertook his own defense at the guilt trial and sentencing hearing, and did not present mitigating evidence, he could not have been prejudiced. Third, it held that another reason Petitioner coult not show prejudice was because in 2011 the state trial court, in the course of summarily dismissing a state court claim that did not involve an ineffective assistance of counsel

claim, had expressed an opinion that the newly discovered evidence as presented on paper through expert declarations "would not have changed" his sentencing decision.

These are the facts pertinent to this case and the Ninth Circuit decision:

B. Cook's Infancy and Childhood.

Wanda Meadows, at age seventeen, married a drug addict and alcoholic named Gordon Cook. They had a daughter named Debrah. Eleven months later, Wanda gave birth to Daniel Cook. Cook's abuse from his parents began *in utero*. Gordon beat Wanda while she was pregnant with Cook, going so far as to physically attack his unborn child—he punched Wanda in the belly and pushed her down, causing her to land on her stomach. While she was pregnant Cook's mother smoked cigarettes, drank beer, and was too poor to eat properly or see a doctor. As a result of this improper prenatal care, Cook was born three months prematurely in a Chicago hospital on July 23, 1961.[1]

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.[2] Cook's mother was a "predator and sex abuser," mentally ill, and a "prescription pill junkie."[3]

After a period of homelessness, Wanda left and divorced Gordon. She

[1] Excerpt of Record on Appeal to the Ninth Circuit 114-115 (hereinafter "ER"), ¶¶ 4, 6, 8, 9. 8.
[2] *Id*, ¶ 9.
[3] *Id.*, ¶ 17; ER 126, ¶¶ 4, ¶ 5.

gave Cook and Debrah to their grandmother Mae and step-grandfather Jim Hodges when the children were only five and six years old. Their step-grandfather Jim repeatedly sexually abused Cook and Debrah, and also forced them to have sex with each other at very young ages.[4] 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.[5]

Cook and his sister also suffered physical abuse and neglect by their grandparents. As punishment, Cook and his sister would be tied to chairs.[6] 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. After he was sick, his grandparents forced him to eat his own vomit off the ground.[7]

While Cook and Debrah were living with their grandparents, Wanda would occasionally visit them. When she did, she would sometimes beat her young son and then fondle him to "make him feel better."[8] Eventually, Wanda remarried a controlling and abusive man.[9] Wanda moved to

[4] ER 66, ¶ 18; ER 119, ¶ 8; ER 115, ¶ 10.
[5] ER 66, ¶ 18.
[6] ER 115, ¶ 10; ER 66, ¶ 19.
[7] ER 118, ¶ 7.
[8] ER 67, ¶ 21.
[9] ER 126, ¶ 6.

California with her new husband and new family, but left Cook and his sister behind in Chicago with their abusive grandparents until Cook was nine.[10]

Escaping his grandparents did little to improve life for Cook or Debrah. Their stepfather believed "they had bad genes or were from bad seed."[11] They were treated as outcasts.[12] Cook's stepfather was vicious with a belt, beat Cook, and yelled at him regularly.[13] He also beat the children with what he called "The Board of Education." He would make the children drop their trousers and bend over, and then he whipped them with the board.[14] 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.[15]

Sexual abuse pervaded Cook's newly-blended home, too. Cook and his younger half-brother were sexually abused by an older stepbrother.[16] Wanda sexually abused one of her stepsons.[17] Cook's sister and stepsister were sexually abused by their stepbrothers.[18] Cook's stepfather asked his own daughter, Cook's stepsister, to have sex with him.[19]

Wanda suffered from bipolar disorder.[20] While Cook was growing up,

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[10] ER 115, ¶ 13; ER 67, ¶ 22.
[11] ER 163.
[12] ER 119, ¶ 10; ER 115, ¶ 13.
[13] ER 119-120, ¶¶ 10, 13; ER 115, ¶ 13.
[14] ER 126, ¶ 6.
[15] ER 120, ¶ 13.
[16] ER 67, ¶ 27.
[17] ER 126, ¶ 5.
[18] ER 120, ¶ 17.
[19] ER 164.
[20] ER 118, ¶ 5; ER 116, ¶ 17.

she attempted suicide on numerous occasions.[21] 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.[22]

When he was fourteen, Cook's mother gave custody of him to the State of California.[23] He spent the remainder of his teenage years bouncing from one foster home to another. From ages fourteen to nineteen he lived in a variety of youth homes, detention centers, and seven different foster homes.[24]

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.[25] While there, Cook was sexually abused by Howard Bennett, Jr., a house parent. Bennett reports: "I invited Cook into my room for a cigarette and began to touch him."[26] Bennett admits to masturbating Cook and having him perform oral sex.[27] At McKinley, there was a "peek-a-boo room" which was used for "time outs."[28] Cook was forced to spend time in the "peek-a-boo room," naked and handcuffed to the bed, while Bennett would sexually abuse him.[29] Cook

[21] ER 67, ¶ 28; ER 119, ¶ 11.
[22] ER 62, ¶ 28; ER 119, ¶ 11.
[23] ER 116, ¶ 14; ER 228-229.
[24] ER 187.
[25] ER 229.
[26] *Id.*, ¶ 6.
[27] *Id.*, ¶ 6.
[28] Declaration of David Overholt, ER 142,¶ 4..
[29] ER 68, ¶ 30.

was even circumcised at age fifteen,[30] at the instruction of Bennett.[31]

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.[32] Cook ran away from McKinley on several occasions.[33] While on the streets, Cook resorted to prostitution to survive, and during that time, Cook was raped and threatened at gunpoint.[34]

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.[35]

In 1979, just before turning eighteen, Cook left California for Lake Havasu in yet another attempt to be reunited with his mother. Unsurprisingly, Wanda did not want him and sent her son away.[36]

C. Cook's Life as an Adult.

Cook enlisted in the Army Reserves, but only served from December

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[30] ER 229.
[31] Unsurprisingly, Bennett is now a registered sex offender in California. *California v. Bennett*, State of California Department of Justice, *Megan's Law Homepage*, Photograph of Howard Bennett, ER 153. He is currently serving a 214-year prison sentence for raping, molesting, and sexually exploiting five young boys. "Convicted Child Molester and Rapist Gets 214 Years - Judge Says the Case 'Cries Out for an Exceptional Sentence,'" *The News Tribune*, Feb. 20, 1998 (NewsBank), ER 149.
[32] ER 68, ¶ 31.
[33] ER 230.
[34] ER 68, ¶ 31.
[35] ER 230.
[36] ER 69, ¶ 37; ER 136, ¶¶ 12-13.

1979, until March 1980. During his brief time in the Reserves, he struggled with his alcohol addiction and attempted suicide. As a result, the Army honorably discharged Cook, reporting that he lacked the ability "to adjust to the stress of military life, as evidenced by [his] . . . self-inflicted injury."[37]

Cook continued to battle alcoholism and drug addiction. He was suicidal and was hospitalized several times for attempting to end his life.[38] Cook's friend once talked Cook out of "jumping out of the car" he was driving, and then took Cook to the county hospital.[39] Within a year, Cook again attempted suicide.[40] He was treated at the State Hospital for depression and alcoholism. After being discharged, he returned to Idaho.

Less than a year later, Cook tried suicide again and was admitted to the Idaho State Hospital. During his hospitalization, Cook had "many ups and downs." At times, he would be "very impulsive, act[ing] without thinking." Cook "relied very heavily on friends and [their] approval." Cook eventually left the hospital against professional advice and, on a quest to be loved, became involved with a hospital staff member. Unable to cope, he voluntarily reentered the state hospital only a few days later, after yet another attempted suicide by overdosing on pills. At the end of March 1983, after having been in the hospital for only one week, Cook left.[41]

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[37] Army Records, 1979-80, ER 210.
[38] Wyoming State Hospital Records, ER 186; Idaho State Hospital Records, 1981-82, ER 167-68.
[39] ER 137, ¶ 17.
[40] ER 187.
[41] *Id*.

Cook, now twenty-one, returned to Lake Havasu, Arizona. Again, he was rejected by Wanda, and she would not allow Cook into her home.[42] Cook lived a transient lifestyle in Mohave County. One of Cook's friends said he was a "big time alcoholic," and when he drank, he simply "melted into the scenery."[43] Between 1983 and 1987, Cook was regularly seen by mental health professionals for various reasons, including depression, acute psychosis, and alcoholism.[44]

Because of his mental health issues, Cook had a hard time keeping a job.[45] He lived under a bridge, filthy and hungry.[46] He was "a beaten, broken individual—it was as if you took the spirit out of a dog."[47]

In 1986, Cook met and developed a relationship with a woman named Barbara and her two children. His relationship with Barbara lasted more than a year—longer than with any other woman before her. Unfortunately for Cook, the relationship with Barbara did not last. It came to an end in March 1987.[48] Cook learned that Barbara was not going to move from Kingman as they had planned, and instead was living with another man.[49] Cook numbed his pain in the only way he knew how—with drugs and alcohol. The weekend of the crime, Cook quit his job in a moment of anger and despair because his boss told him "not to bring his personal problems to

[42] ER 139, ¶ 4.
[43] *Id.*, ¶ 5.
[44] ER 222-23; ER 212.
[45] ER 139, ¶ 6.
[46] *Id.*, ¶ 7.
[47] *Id.*, ¶ 2.
[48] ER 73, ¶ 59
[49] *Id.*

work."[50]

After quitting his job, Cook went home to the apartment he shared with his co-defendant and one of the victims. Cook began to drink himself into numbness and to smoke away the pain.[51] A normal, well-adjusted person could cope with no longer having a job or a significant other; but Cook snapped. What started as a plan to steal a few dollars from his roommate turned into a tragedy for Carlos Froylan Cruz-Ramos and Kevin Swaney.

D. The Crime.

Intoxicated on drugs and alcohol, and aided by his codefendant and roommate John Matzke, Cook was responsible for the deaths of Cruz-Ramos and Swaney. There is no denying the tragic reality of the brutal crime. Cook had blacked out and does not have any specific recollection of the crime for which he is sentenced to death.[52] Matzke, however, provided a detailed statement to police about the crime.[53]

During the evening of July 19, 1987, into the early morning of July 20, 1987, Cook disassociated from reality. He suffered from amphetamine delusional disorder at the time of the crime, caused by his use of crystal methamphetamine.[54] According to Matzke, Cook appeared "crazy," with a

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[50] ER 221 at 3.
[51] ER 310.
[52] ER 222.
[53] Cook was in a phase where he would blackout from his heavy alcohol and drug use, and has only a handful of flash, momentary memories over a three day period. ER 308-09; ER 222.
[54] ER 80, ¶ 92.

"crooked smile," and he was "drooling."[55] Matkze also said that Cook accused Carlos of being a spy, and made references to the CIA and Oliver North. Cook kept asking Carlos to take him to his leader. These persecutory statements were not reality based; they were a symptom of Cook's psychotic state.[56]

E. Petitioner's pretrial representation by appointed counsel.

Petitioner was tried and sentenced in rural Mohave County, Arizona. Lawyer Claude Keller was appointed to represent him. Keller was an alcoholic who suffered from untreated bipolar disorder, and was without the experience or professional capability to handle a felony case, let alone a complex capital case such as Petitioner's.[57]

Keller had been appointed to represent Petitioner before July 30, 1987.[58] He remained counsel for Petitioner until April 21, 1988. The Ninth Circuit concluded that Petitioner would not be able to show that Keller was ineffective under *Strickland* during that period. App. A at 26. It based that

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[55] Interview of John Matzke, December 17, 1987, Ex. X to Petition for Clemency, July 27, 2012. The Arizona Board of Executive Clemency is an agency of the State of Arizona, established under Ariz. Rev. Stat. Ann. § 31-401. Its records are publicly available.
[56] ER 80, ¶ 92.
[57] Affidavit of Prosecutor Eric Larsen, ER 92 at ¶ 4; *see also State v. Cook*, Transcript of Post-Conviction Hearing 12/02/94, Testimony of attorney Michael Burke, (Keller was "absolutely not competent to handle capital cases."); Testimony of attorney Ronald Wood, ER 242,at transcript pages 62-67 ("I can recall having a conversation with Judge Conn wherein he indicated that he didn't think Claude was doing a very good job. . . .[H]e didn't think Claude was one of these lawyers who was going to be able to handle complex things."); Testimony of attorney Mary Ruth O'Neill, Tr. 12/02/94 at 21-23 ("[W]hile Claude may have been competent to do some things like misdemeanors, . . . he was not competent to represent a defendant in a complex criminal case.").
[58] Index of Record in the Arizona Superior Court, No. 3 (Hereinafter "IR").

conclusion on its observation that Keller had a) hired an investigator who interviewed several witnesses (probably only *two* – Petitioner's mother and step father);[59] b) obtained two mental health evaluations (which were directed at competency – whether Petitioner was able to comprehend the proceedings and participate in his own trial defense – and not mitigation); and c) "obtained extensive records and background information about his client" (which actually consisted of obtaining hospital records for the doctors' competency examination,[60] and nothing more).

The Ninth Circuit relied upon Keller's activities related to Petitioner's competency to stand trial, not mitigation, in concluding Keller performed effectively for mitigation. Further the Ninth Circuit conclusion that Keller had performed effectively for a mitigation case was also subject to dispute. Petitioner can show that, during his representation, Keller did virtually nothing for his defense other than that which was related to the competency determination. Other than for the competency determination, he did no investigation, and developed no theory of defense or plan for mitigation.[61] There is nothing in any of his motions for investigator compensation,[62] disclosure of defenses,[63] or disclosures of witnesses[64] to indicate that Keller sought any witnesses, documents or information for a mitigation case

[59] ER 246; ER 223.
[60] IR 23.
[61] IR 183, Affidavit of Daniel Cook, September 3, 1993, record *State v. Cook*. Petitioner noted that Keller was still talking about an insanity defense for him, even after the doctors had pronounced him competent, *id*.
[62] IR 11, 34, 57.
[63] IR 14, 49. The defenses disclosed included "diminished capacity," which is not permitted in Arizona.
[64] *Id*; IR 32.

The competency reports, containing the information relied upon by the Ninth Circuit, were received on November 3, 1987 and December 14, 1987.[65] Although Keller must have at least read them, since he recognized that they recommended a neurological follow-up which Keller started but did not complete,[66] there is no indication in the record that Keller used the doctors' reports as a starting point to prepare a mitigation case. Indeed, although information about Keller's ineffectiveness is sketchy because of the ineffectiveness of Petitioner's post-conviction counsel, several important witnesses interviewed in the 2010 mitigation investigation show that neither Keller nor his investigator contacted them.[67]

F. Petitioner's self-representation for guilt and penalty trials.

After Keller had represented Petitioner for nine months, Petitioner, concerned that nothing was being done to prepare a defense, moved for and was granted leave to represent himself on, April 21, 1988.[68] The trial court confirmed the trial date for May 2, 1988, eleven days later

The Ninth Circuit held that Petitioner's self-representation prevented him from claiming that he was prejudiced by his pre-trial counsel's

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[65] ER 216, 304.

[66] ER 211, Report of B. Anthony Dvorak, M.D. F.A.C.S., February 13, 1988. Dr. Dvorak recommended diagnostic tests for Petitioner, including an MRI. Keller started to follow through, but apparently abandoned his attempt, as no test results or information are in the record.

[67] ER 121, ¶ 24 (Debrah Howard, Petitioner's sister and both a witness to and victim of extended sexual abuse of Petitioner and herself, "no one from [the defense team] ever contacted me."); ER 130, ¶ 9 (Cynthia Kline, Petitioner's social worker in a group home in the late 1970's, same); ER 133, ¶ 14 (Thomas Maas, group home parent for Petitioner in the late 1970's, same); ER 140, ¶ 9 (Patricia Rose, close friend of Petitioner's in Lake Havasu City, where crime occurred, same).

[68] IR 56; Minute Entry Order 32, *State v. Cook*, April 21, 1988 (Hereinafter "M").

ineffective performance on the mitigation case. App. A at 22. It cited a statement in *Faretta v. California*, 422 U.S. 806 (1975), that "a defendant who represents himself cannot thereafter complain that the quality of *his own defense* amounted to a denial of 'effective assistance of counsel.' " *Id.* at 834 n. 46 (emphasis added). Of course this statement is inapposite if a prisoner was prejudiced by what appointed counsel did during his representation.[69]

The Ninth Circuit, analogizing this case to *Schriro v. Landrigan*, 550 U.S. 465 (2007), found that even if pretrial counsel had developed the mitigating evidence it would not have mattered because Petitioner "already knew the information but affirmatively chose not to present it." App. A at 29. The only way in which the panel could reach this conclusion was to disregard the state-court record. Before his sentencing, Petitioner asked for an expert to assist him in preparing for sentencing. He explained that every aspect of his life and his illnesses should be reviewed by the court through expert testimony before he was sentenced.[70] The state court rejected Petitioner's request, despite the overwhelming Supreme Court precedent that supported his request.[71]

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[69] *E.g. United States v. Fessel,* 531 F.2d 1275 (5th Cir. 1976) (claim that the ineffective assistance of counsel before selfrepresentation prevented the preparation and presentation of an adequate defense); *State v. Dunster,* 278 Neb. 268, 276, 769 N.W.2d 401, 408 (2009) ("defendant may maintain a claim for ineffective assistance of counsel for any acts or omissions that occurred before the defendant elected to proceed pro se); *Hance v. Kemp,* 258 Ga. 649, 373 S.E.2d 186 (1988) (because claim "relates primarily to the performance of his attorney before Hance sought to act as co-counsel").

[70] ER 297, at transcript pages 2, 3.

[71] *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982);

The Ninth Circuit concluded that Petitioner "purposely" withheld information regarding his abusive childhood from his counsel and the court. App. A at 28.[72] There was no testimony or other evidence that Petitioner engaged in such "purposeful" withholding. Further, the Ninth Circuit ignored the declaration of a psychiatrist submitted in support of Petitioner's claim. In that declaration, the psychiatrist explained that "[i]t is common for people who have been sexually abused as children to have an inability to recall important aspects of trauma. . . . Many [] victims of sexual abuse are ashamed or fear consequences for disclosing abuse, such as a disruption of familial relationships or potential harm to loved ones."[73]

Petitioner did not affirmatively *choose* not to present mitigating evidence. No mitigation case had been started before trial. The trial court refused Petitioner, who was of course incarcerated and could not do his own mitigation investigation, any expert assistance. And Petitioner, in asking for the assistance, told the Court that he was manic-depressive and that the jury verdict had "screwed up [his] mind considerably."[74] Later, when he was asked at sentencing whether he had evidence to present, he replied, "Not at

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Ake v. Oklahoma, 470 U.S. 68, 87, 105 (1985).

[72] The Ninth Circuit reached this conclusion based solely on *part* of an ambiguous statement by the psychologist who evaluated Cook's competency. The report concluded that "Daniel Cook appeared competent to assist his attorney in preparation of and presentation of a defense. He had adequate intellectual assets, understood what was required of him and could provide considerable data if he so chose." ER 312. It is clear in context that the reference is to Cook's ability to assist his counsel in his defense, and says nothing about matters that would be appropriate for mitigation.

[73] ER 76.

[74] ER 297, at transcript pages 3, 4.

this time."[75] He did not say that he did not want to present any evidence nor does the record indicate that he would not have done so. The record in this case, unlike *Landrigan*, demonstrates that Petitioner wanted help presenting mitigation evidence.

The Ninth Circuit also found important a one-sentence comment by Petitioner at his sentencing that the only sentence he would accept was death. App. A at 28. But Petitioner had a history of suicide attempts,[76] he was mentally ill leading up to and at sentencing,[77] and he had been denied any assistance in gathering mitigation information. Indeed, in a letter Petitioner wrote to the probation officer on the day he was denied an expert to assist him with sentencing, he indicated that he was attempting to use the system to carry out his desire to commit suicide.[78].

G. Compelling mitigation about Petitioner's mental illness could have been obtained with effective representation.

The Ninth Circuit not only did not consider the fulsome and harrowing evidence of Cook's childhood and background which now are available, to contrast against what was in the competency reports,[79] it also did not deal

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[75] Transcript, *State v. Cook*, 8/8/88 at 2.
[76] ER 069-072, ER 212-213.
[77] ER 77, ¶¶ 80, 81; ER 297 at transcript page 3.
[78] IR 126 ("my mother once told me that I was too weak to commit suicide, and that I was using the system to carry out my wish to die. She isn't as dumb as I thought.")
[79] As just *one* example, the Ninth Circuit noted that one of the two evaluations described Petitioner's "sexual abuse." App. A at 26. In fact, that report mentioned only two incidents – sexual abuse by a group home parent, and at a bus station. ER 305. The full story is that Cook was subjected to extensive, pervasive sexual abuse throughout his childhood. In fact, Cook was: (i) sexually abused by his *own mother*, who would beat him, then fondle him to make him feel better, ER 67, ¶ 21; (ii) sexually molested by his step-grandfather, who also

with the substantially more extensive mental diagnoses now available, upon which to gauge whether Petitioner had a claim presenting "some merit." *Martinez v. Ryan*, 132 S. Ct. 1309, 1328 (2012).

While the Court was aware of some mental illness issues and suicide attempts in the doctors' competency reports, App. A at 26, the mental illnesses that he suffered as a result of his horrific childhood were completely undeveloped.

At the time of the crime, Cook suffered from post-traumatic stress disorder (PTSD) and organic brain dysfunction (diagnosed as organic mental syndrome, not otherwise specified).[80] Had this information about his mental illnesses, his childhood abuse and neglect, been presented to him before trial, the attorney who prosecuted Cook has said he would not have sought the death penalty.[81]

A psychiatrist with a background in evaluating and treating people with sexual abuse, conducted an extensive review of Cook's history, evaluated him several times in 2010, met with his mother, and consulted with a neuropsychologist.[82] She reported that Cook had a childhood replete with sexual and physical abuse.[83] This continual traumatic abuse caused Cook to

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forced Cook and his sister to have sex when they were only five and six, ER 66, ¶ 18; 115; 119; (iii) sexually abused by an older stepbrother, ER 67, ¶ 27; (iv) exposed to sexual abuse among parents, children and siblings in various pairings, ER 67; 120, ¶ 17, ¶ 17; 126, ¶ 5; 164; and (v) gang raped by boys at the group home, ER 68, ¶ 68.

[80] ER 95.

[81] ER 92, Declaration of Eric Larsen.

[82] ER 63-64, ¶¶ 6, 8, 10, 12.

[83] ER 66-68, ¶¶ 18, 19, 21, 26, 27, 30, 31.

develop PTSD.[84] Cook exhibits typical symptoms of PTSD sufferers including hyper vigilance and impulsivity.[85] Cook's multiple substance addictions are a common complication of PTSD.[86]

Cook also had a significant history of impairments in cognitive functioning.[87] Causes for his cognitive impairments include being exposed to alcohol *in utero*, being born three months prematurely, being physically abused as an infant, and sustaining head injuries.[88] Cook has been diagnosed with organic mental syndrome, not otherwise specified.[89] In layman's terms, Cook is brain damaged. Cook suffers from clinical symptoms associated with brain dysfunction such as migraines and memory loss, and is medicated for seizures.[90] Cook's frontal lobe dysfunction was present at the time of the crime. Frontal lobe dysfunction, combined with the use of drugs and alcohol, would have very likely rendered him more susceptible to poor judgment and impulsivity, and contributed to the circumstances of his crime.[91]

The facts about these serious mental conditions are integral to understanding the nature and circumstances of the offense. As awful as these crimes were, they emulate much of the abuse that Cook suffered as a child. "PTSD affects the way you see, think about, and respond to people and

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[84] ER 77-79, ¶¶ 81-86.
[85] *Id*, ¶ 85.
[86] ER 76, ¶ 78.
[87] *Id.*, ¶¶ 75, 77, 95.
[88] ER 62, ¶¶ 15, 16, 37-40, 46, 47, 49, 57, 58, 62, 73.
[89] *Id.*, ¶¶ 87-89; ER 95 at 3-4.
[90] *Id.*, ¶ 89.
[91] ER 94, at 4.

situations."[92] Cook's illness affects his understanding of reality, his perception of surroundings, and his reactions to otherwise normal events – his understanding of the world and the events that transpire are different from ours *every day*.[93] Coupled with his brain damage and excessive abuse of drugs and alcohol, the trauma of Cook's life played out in this offense: the horrors that Cook suffered, Cruz-Ramos and Swaney suffered. Cook's serious mental illness, caused by a life of unimaginable abuse, does not excuse Cook's conduct or the tremendous loss his actions caused to both men's families, but does offer a context to understand them.

This information, never developed before Cook's sentencing, is critical to the fair outcome of his case. The trial prosecutor, has said: "Had I been informed of this mitigating information regarding Cook's severely abusive and traumatic childhood and his mental illnesses, I would have not sought the death penalty in this case."[94] Larsen has also said that had he known about Cook's background, "it certainly would have explained his behavior. In fact, the childhood abuse he suffered mirrored the circumstances surrounding the crime. I would have, therefore, not been in favor of seeking a death sentence in his case."[95]

H. Petitioner's first post-conviction proceeding.

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[92] Veterans Benefits Information, Criminal Behavior and PTSD, Dec. 13, 2011, available at http://www.veteransbenefitsinformation.com/ptsd/3526-criminal-behavior-and-ptsd.html (last visited July 27, 2012).
[93] *See* Davidson, Michael J., *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 Wm. & Mary L. Rev. 415, 422 (1988).
[94] ER 93, ¶ 9.
[95] *Id.*, ¶ 10.

Petitioner's first post-conviction counsel included in his pleading allegations that trial counsel was ineffective. However, he only alleged that counsel was ineffective for sentencing purposes in not preparing a "mitigation plan."[96] He did not allege trial counsel's failure to promptly, thoroughly investigate and prepare a mitigation case. Nor did he allege that Petitioner had been prejudiced by such trial counsel ineffectiveness. He did not allege any facts about the mitigation case which could have been presented at sentencing.[97]

There is no evidence in the record and no indication that either counsel or any investigator took any action at all to investigate the mitigation case which could have been presented at trial. Counsel presented no such evidence at the evidentiary hearing conducted for the post-conviction proceedings; even though subsequent investigation has revealed an extensive, compelling mitigation case.[98] Thus, while he represented Cook, counsel did no preparation to present a case of "prejudice" under *Strickland v. Washington,* 466 U.S. 668 (1984).

At the evidentiary hearing, post-conviction counsel presented testimony from several witnesses about appointed Counsel Keller's

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[96] IR 179.

[97] Petitioner's counsel even failed to properly plead the ineffectiveness after being notified of his deficiency and being given a second chance to remedy it. 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. IR 187 at 17. Notwithstanding that opportunity, when counsel counsel filed his upplement 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.

[98] ER 240, Decl. of Michael Terribile, March 30, 2009, ¶ 2.

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.[99] Unfortunately, although post-conviction counsel presented evidence of Keller's general incompetency, he did not adduce evidence about Keller's failure to investigate or prepare a mitigation case.

Claude Keller testified at the evidentiary hearing. He acknowledged that he had not previously handled a capital case.[100] 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,"[101] 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. In fact, post-conviction counsel did not ask any questions about whether Keller had conducted any mitigation investigation.

As with Keller, the first defense investigator, Evan Williams (who was himself replaced for inaction on Cook's case), who also testified at the post-conviction hearing did not testify explicitly that he had done nothing to investigate or prepare a mitigation case, but the fact that he had not was

[99] ER 242 at transcript pages 20, 21; 30-34; 38, 39; 43-45; 62-66; 75, 76.
[100] ER 242 at transcript page 53.
[101] *Id*. at 52.

implicit from his testimony related to guilt-phase investigations. Post-conviction counsel also failed to ask Williams if he had conducted any mitigation investigation.

The Court denied the petition for post-conviction relief, in a written order which did not make any findings of fact or conclusions of law. ME 109. The court did make a statement from the bench elaborating on his dismissal.[102] His reasons included that there had been no showing about the second prong of the *Strickland* rule on effectiveness of counsel; that there had been no indication of defenses that could have been raised or witnesses who could have been called.[103]

After relief was denied, post-conviction counsel failed to present the issue of ineffective trial counsel in a motion for rehearing to the trial court. Under Arizona law in effect at the time, in order to obtain a final judgment on a claim in post-conviction proceedings, which could then be taken up on appellate review, the trial judge must be asked to reconsider the specific claim.[104]

I. Habeas Corpus proceedings.

Cook filed a petition for writ of *habeas corpus*. The District Court held the mitigation-ineffectiveness claim defaulted. The Ninth Circuit affirmed. *Cook v. Schriro,* 538 F.3d 1000 (9th Cir. 2008). This Court denied certiorari of

[102] Transcript, February 3, 1995.
[103] *Id*. at 26.
[104] *State v. Bortz,* 169 Ariz. 575, 578, 821 P.2d 236, 239 (App. 1991); Ariz. R. Crim. P. 32.9 (former version.)

a petition raising the issue of ineffectiveness of post-conviction counsel as cause excusing failure to exhaust his claims. *Cook v. Schriro,* No. 08-7229 (Jan. 21, 2009).

J. Proceedings in the Arizona courts after denial of habeas corpus.

Upon remand of Petitioner's federal habeas corpus case in 2009, lawyers from the Capital Habeas Unit of the Federal Public Defender in Arizona were appointed as additional counsel for petitioner. They promptly enlisted necessary mitigation investigators, and ultimately, medical and psychiatric experts, to prepare for clemency proceedings. When the full dimension of Petitioner's life history, abuse, and mental illnesses became apparent, Petitioner recognized that the mitigation case which had never been developed was now apparent. Petitioner filed a third post-conviction petition in state court, seeking a re-determination of the issue of Keller's ineffectiveness for a mitigation case.[105]

The bases for the petition were Ariz. R. Crim. P. 32.1(e), that "newly discovered facts probably exist and such facts probably would have changed the verdict or sentence," and Ariz. R. Crim. P. 32.1(h), that Petitioner could demonstrate by "clear and convincing evidence" facts "sufficient to establish

[105] Petitioner had also pursued a second post-conviction proceeding, principally addressed to the mode of lethal injection Arizona proposed to use, but which also re-urged Petitioner's argument that his claim for ineffective assistance of trial counsel for the mitigation case should be considered, because Arizona's preclusion law, which was based upon the federal rule of *Coleman v. Thompson*, 501 U.S. 722 (1991), should have an exception for what *Martinez* now has identified as "initial review collateral proceedings." The state courts rejected that attempt, and this Court denied certiorari. *Cook v. Arizona*, No. 10-7210 (Jan. 18, 2011).

that the court would not . . . have imposed the death penalty."[106]

The state court summarily dismissed the petition, writing an order which the Ninth Circuit has placed great reliance upon for its conclusion that Petitioner has no "substantial" claim. App. C. As explained, *infra*, the Ninth Circuit's reliance on that order was misplaced; and its having done so demonstrates that the Ninth Circuit misapplied the "substantiality" test of *Martinez*, *supra.*

K. Proceedings in this Court in 2011, 2012.

In his third post-conviction proceeding, Petitioner had again sought to raise the issue of a federal constitutional right to effective post-conviction counsel in what now is identified as "initial review collateral proceedings," to excuse previous failure to effectively adjudicate a claim of ineffectiveness of trial counsel.[107] When it was rejected, Petitioner sought certiorari from this Court. Petitioner was under a warrant of execution to be carried out on April 5, 2011. On April 4, 2011, this Court stayed the execution, pending resolution of the certiorari petition, which raised the same issue that this Court ultimately granted review in *Martinez* to decide. *Cook v. Arizona,* No. 10-9742 (Apr. 4, 2011). Cook's case was held for *Martinez.*

Both *Cook* and *Martinez* had presented the issue as based on a Sixth

[106] These criteria for relief are more demanding than either the standard for a Certificate of Appealability, which *Martinez v. Ryan,* 130 S. Ct. 1309, 1318, (2012) established to determine whether an "initial review collateral proceeding" claim should be entertained in habeas, or the standard for relief under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing of a reasonable probability of prejudice sufficient to undermine confidence in the outcome of the original proceeding, not that it *would, probably* change the outcome.

[107] The federal rule was the basis for state court application of the same rule of preclusion.

Amendment right to counsel. *Martinez* chose not to decide the constitutional issue. Instead, *Martinez* is based upon the federal procedural law of "cause and prejudice." This Court then denied certiorari to Petitioner in No. 10-9742, on March 26, 2012, and denied a petition for rehearing which sought to have the constitutional issue decided, on May 14, 2012.

Because *Martinez* applied to federal habeas cases, Petitioner filed a motion for leave to file an out-of-time petition for rehearing in his own habeas case, No. 08-9742, in order to receive the benefit of *Martinez*. This Court denied that motion on May 29, 2012.

L. Proceedings in the District Court and the Ninth Circuit, 2012.

On June 5, 2012, a week after this Court's last action in Petitioner's case, he filed a motion in his previous habeas case, for relief under Fed. R. Civ. P. 60(b)(6) from the judgment of dismissal. He alleged that "extraordinary circumstances" existed to justify such action, because of *Martinez*. *See Gonzalez v. Crosby*, 545 U.S. 535 (2005), and that his "initial review collateral proceeding" claim fit within the *Martinez* definition of a "substantial claim," thus warranting plenary habeas consideration of his claim that attorney Keller had been ineffective. Doc. 116.

On June 12, 2012, the Arizona Supreme Court issued a warrant for Petitioner's execution, for August 8, 2012. The warrant remains in effect; the District Court and the Ninth Circuit have denied Petitioner's applications for

a stay.

The State of Arizona's response to Petitioner's Rule 60(b)(6) motion disputed whether Petitioner's claim was substantial under *Martinez*. Doc. 119. It did not dispute that Petitioner had shown "extraordinary circumstances" under *Gonzalez*, *supra*.[108] The District Court nonetheless reached the issue of "extraordinary circumstances" *sua sponte,* ruling against Petitioner. App. B at 8-13. This violated the rule of "party presentation."[109] The State also contended that Petitioner's motion under Rule 60(b)(6) was barred as a "second or successive application" for habeas relief, in violation of 28 U.S.C. § 2244(b). App. A at. 6. The District Court rejected the contention. *Id*. at 8. The District Court denied Petitioner's motion, finding that his claim was not "substantial."

The Ninth Circuit agreed with the District Court that Petitioner's motion was not a "second or successive application," App. A. at 20. It did not take up the issue of whether Petitioner had shown "extraordinary circumstances" warranting relief. App. A at 21. Its affirmance was based solely on its conclusion that Petitioner's claim was not "substantial." Thus, this case clearly presents the issue of what *Martinez* meant by "substantial."

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[108] "[S]uch 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." Doc. 119 at 8.

[109] *Wood v. Milyard*, 132 S. Ct. 1836 (2012); *Greenlaw* v. *United States*, 554 U. S. 237 (2008).

REASONS FOR GRANTING THE WRIT

I. THE MARTINEZ LIMITATION TO "SUBSTANTIAL" CLAIMS IS AN IMPORTANT THRESHOLD FILTER DESIGNED TO SELECT CLAIMS FOR HABEAS CONSIDERATION. THE OPINION BELOW CONFLICTS WITH THIS THRESHOLD STANDARD, AND APPLLIES MARTINEZ IN A WAY WHICH WILL FRUSTRATE THE PURPOSE OF ITS "SUBSTANTIALITY" REQUIREMENT.

This case merits review because the decision of the Ninth Circuit conflicts with *Martinez v. Ryan*, 130 S.Ct. 1309 (2102). Rule 10(b). It presents an important issue of federal law about what showing is required for a habeas claim to be deemed substantial under *Martinez*.

1. The Ninth Circuit has either misperceived or misapplied the *Martinez* rule requiring claims to be "substantial" to qualify for its application. The "substantiality" requirement serves only to narrow the category of cases covered by *Martinez*. It was not intended to sanction or require habeas courts to decide all potential *Martinez* claims on the merits at this threshold stage without the discovery and hearing process to which any petitioner having a claim with "some merit" is entitled.

This case presents the issue of the meaning of "substantial" particularly clearly. There has never been an actual hearing on the relevant issues. The issue of ineffectiveness, cause and prejudice, involve factual development outside the trial record. And the determination of prejudice

involves the balancing of aggravating and mitigating factors, a fact-intensive function. The case therefore demonstrates how important discovery and a hearing can be to full and fair habeas adjudication. Petitioner's case was dismissed before these fundamental processes occurred.

2. *Martinez* struck a balance between two competing and substantial concerns. One is the need to afford a remedy to prisoners entitled to effective representation by counsel in trial proceedings. The competing interest is concern for undue intrusion into or burden upon the states' conduct of their criminal post-conviction proceedings.

Thus *Martinez* did not rest upon a Sixth Amendment right to effective counsel. Recognizing such a constitutional right, said *Martinez*, would unduly interfere with state systems:

> A constitutional ruling would provide defendants a free standing constitutional claim to raise; it would *require* the appointment of counsel in initial-review collateral proceedings; it would impose the same system of appointing counsel in every State; and it would require a reversal in all state collateral cases on direct review from state courts if the States' system of appointing counsel did not conform to the constitutional rule.

132 S. Ct. at 1319.

Yet, this Court recognized that the status quo for "initial review collateral proceedings" in which counsel performed ineffectively, posed unacceptable risks to the right of defendants to a fair trial. *Martinez* focused upon a particularly crucial concern – the right to effective counsel at trial – observing that "[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 [which] is a bedrock principle in our justice system." *Id*. at 1317. *Martinez* perceived a significant risk to the guarantee of effective representation of defendants at trial under the status quo in initial-review collateral proceedings:

> When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim. This Court on direct review of the state proceeding could not consider or adjudicate the claim. And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, *no court* will review the prisoner's claim.

Id. at 1316 (internal citations omitted; emphasis supplied).

Therefore, *Martinez* recognized a rule of "limited nature." *Id*. at 1320. But this limited rule had implications for the federal habeas system. Claims of ineffective assistance of counsel are common. *Martinez* did not intend a rule which would open every such claim to adjudication. It therefore held that to be entitled to the "cause and prejudice" remedy *Martinez* permits, that in addition to showing that post-conviction counsel was ineffective (or not afforded at all):

> [A] prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing the standards for certificates of appealability to issue.)

Id. at 1318.

The requirement of "substantiality," that a claim "has some merit," *id*., or that a prisoner show he has a "potentially legitimate claim," *id*. at 1317, is

thus an important fulcrum of the *Martinez* rule. What this Court intended to constitute a "substantial" claim is an important issue.

3. The most apparent benchmark for a "substantial" claim arises from the citation in *Martinez* to *Miller-El* v. *Cockrell*, *supra*, and its pointed reference to the standards for issuance of certificates of appealability. The Ninth Circuit, in rejecting Petitioner's claim, also rejected this "substantiality" test. It said nothing about the certificate of appealability standard, and it did not apply that standard.

In order for a COA to issue, "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, (2000) (emphasis added). "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. 880, 893 n.4 (1983) (internal quotations omitted)[110]. "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 v. Cockrell*, 537 U.S. 322, 337 (2003). The standard for issuing a COA intends only to screen out the clearly frivolous claim. And, "[a]lthough not dispositive," a death sentence "is a proper consideration" in deciding whether to issue a COA. *Barefoot*, *supra,* 463 U.S. at 893. In other words, a COA must issue if the claim has any arguable merit

[110] Superseded on other grounds by statute, 28 U.S.C.A. § 2253(c)(2).

"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").

But the Ninth Circuit imposed the kind of burden upon petitioner that the above-cited cases say is inappropriate.[111] The Ninth Circuit, stating its ultimate conclusion, said Petitioner's claim "lacks merit." App. A at 3. Speaking to the issue of prejudice as affected by Petitioner's self-representation, it said that Petitioner "cannot claim" that he was denied effective counsel. This conclusion, and others, was improperly grounded on the Ninth Circuit's selecting which available evidence to accept on the issue of whether Petitioner indeed would have been able to fix trial counsel's failings, and develop and present a mitigation case from his jail cell after having been denied expert assistance, and with limited available time. The Ninth Circuit held that to have merit under *Martinez* a petitioner must show that counsel "*was* ineffective," *id*. at 25 (emphasis supplied), that Petitioner "cannot show that he suffered any prejudice," *id*. at 28. It concluded that "we cannot say that counsel performed deficiently," *id*. at 27, and, basing a conclusion on selected portions of conflicting evidence in the record, any deficient performance *would not* have made a difference." *Id*. at 28. *Compare Barefoot, supra* ("need not show that he should prevail on the merits").

[111] While the Ninth Circuit begrudgingly acknowledged citation to *Miller-El v. Cockrell* by referring to it as "not as direct but as generally analogous support," App. A at 25 n. 13, it said nothing about the certificate of appeal standard and it did not apply that standard.

Martinez was intended to include a threshold filter to identify potentially meritorious claims for plenary habeas adjudication. It was not intended to have the *Martinez* threshold determination replace normal habeas litigation, and decide the merits of habeas petitions on the preliminary papers.

4. The Ninth Circuit also failed to apply *Martinez*'s "threshold" standard when it not only required that Petitioner show entitlement to actual relief, but overstated that requirement.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), counsel's performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" of prejudice exists "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome"; indeed, a "reasonable probability" need only be "a probability sufficient to undermine confidence in the outcome." *Id.* The Ninth Circuit required considerably more certitude from Petitioner, about his claim, than that. It did not really factor into its resolution an accurate *Strickland* standard.

5. Finally, the Ninth Circuit's very extensive reliance upon the opinions expressed by the state court in its 2011 minute order decision summarily dismissing Petitioner's state law, "newly discovered evidence" claim, App. C, represented an even greater departure from *Martinez*.

The clearest indication that the Ninth Circuit should not have relied upon the state court order is that the standards applicable to the state law claim are much more rigorous than either *Martinez* or *Strickland* require. The bases for Petitioner's third post-conviction claim were that "newly discovered facts probably exist and such facts probably would have changed the verdict or sentence,"[112] or that Petitioner demonstrate by "clear and convincing evidence" facts "sufficient to establish that the court would not . . . have imposed the death penalty."[113] And these are the standards that the state court in fact imposed upon Petitioner in his post-conviction proceeding. They are not the standards that the Ninth Circuit should have applied to Petitioner's *Martinez* claim. But it did.

In addition, the Ninth Circuit should not have borrowed the conclusions of the state court, because that court was *not* deciding the issue presented before this Court. It was hearing a petition based upon "newly discovered evidence." Therefore, its order has no relevance here. Finally, even if the state court discussion of the case had been relevant, that proceeding was defective in the same way this one has turned out to be. The state court judge was supposed to have decided *whether* a hearing should be conducted, under Ariz. R. Crim. P. 32.6(c), but it did not do that. It summarily dismissed the proceeding. Indeed, the comments of the state

[112] Ariz. R. Crim. P. 32.1(e).
[113] Ariz. R. Crim. P. 32.1(h).

court judge show that he knew he was improperly making credibility judgments and fact findings without a hearing.[114]

Clearly, the Ninth Circuit did not in fact apply the appropriate *Martinez* standard.

II THIS CASE IS APPROPRIATE FOR REVIEW BECAUSE IT PRESENTS THE "SUBSTANTIALITY" ISSUE CLEARLY, AND ITS DECISION WOULD PROVIDE GUIDANCE FOR ALL FUTURE MARTINEZ CASES IN THE LOWER COURTS.

The issue presented in this case is important because of the likely large number of *Martinez* cases that will proceed through the federal courts. It is presented on a record, and arises from a decision below, which makes it an appropriate case to clearly provide guidance on the substantiality prong of *Martinez.*

1. This case should be reviewed because here it matters that the claim be properly measured for substantiality. The point of the exercise is to identify claims which should be given full habeas treatment, including discovery and a hearing. There are numerous cases in which the nature of the claim, or the extent of the record already in existence, are such that the claim can be dismissed as insubstantial, without undue concern about whether the case is dismissed because it is not "substantial," or on the merits.

Those cases for which the issue of "substantiality" is not so critical are different from this case in significant ways. They relate to discrete or

[114] The state court said "The Court . . . recognizes that a determination of credibility based solely upon affidavits is improper . . . " App. C at 4. But the state court proceeded to make credibility decisions and find facts, anyway.

focused acts of ineffectiveness, such as advice on a change of plea, *e.g. Sexton v. Cozner*, 679 F.3d 1150 (9th Cir. 2012), or issues of jury instruction or objecting to a prosecutor's argument, *e.g. Leavitt v. Arave*, 682 F.3d 1138 (9th Cir. 2012). And those cases came with an already-developed record about ineffectiveness and prejudice. *E.g. Schriro v. Landrigan*, 550 U.S. 465 (2007); *Sexton*, *supra*; *Leavitt*, *supra*; *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2008).

Cook's Claim involves pervasive ineffectiveness over time, unlike the focused issues involved in *Sexton* and *Cozner*. And it occurred off-record. Thus, a segment of exising transcript cannot determine the issue of effectiveness; a hearing is needed. Furthermore, the issue of prejudice in Petitioner's Claim requires a fact finder to weigh and balance essentially the entire case – all evidence presented – against that not presented. *See Wiggins*, 539 U.S. at 536 (noting that the court must "evaluate the totality of the evidence—'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*'") (citation omitted; alterations and emphasis in original).

For a claim possessing potential merit – one passing the *proper* test of *Martinez* substantiality – evidentiary hearings are essential for proper application of the writ. Here, the Ninth Circuit cherry picked evidence which convinced it that Petitioner could not succeed. But there was

conflicting evidence, which should be resolved through an evidentiary hearing. For example:

- It is an issue of fact, about which there already is conflicting evidence, about whether Keller performed effectively in gathering information and seeking witnesses for a mitigation case. It is unacceptable to hold the claim not to be "substantial" based upon inferences from the competency reports, without considering the remainder (including Petitioner's testimony and other extraneous evidence).

- It is necessary to present the witnesses and the evidence of Petitioner's life history which was assembled in the past three years, to decide as a factual matter whether it was substantially more significant than what was briefly set forth in the pre-sentence report and the competency reports.

- It is necessary to present the witnesses and the evidence about Cook's mental health diagnoses in 2010, to decide as a factual matter whether it was measurably different than what the competency doctors reported, and whether it is substantial.

- It is necessary to develop a record and determine whether Petitioner voluntarily intended to waive any possible weighing of mitigation factors, despite having been denied his request for expert assistance the week prior to sentencing, when he said "the only sentence I will accept is death," or whether it was explainable as a manifestation of suicidal ideation, or mental defect or impairment.

- It is necessary to develop a record and determine whether Petitioner intentionally withheld from trial counsel or from the Court at sentencing information about his life history and background, or whether Petitioner's mental state after the verdict had "screwed up [his] head considerably," and the common phenomenon that victims of sexual abuse are often not forthcoming with the information, out of shame or fear of family reactions, affect him affected him.

- Most significantly, the only reasonable method of adjudicating the prejudice issue of a claim relating to mitigation is a hearing at which the weighing of aggravating and mitigating factors is done.

For a claim like Petitioner's, presenting substantial fact issues and evidence-weighing, a habeas petitioner is "entitled to careful consideration

and plenary processing of [his claim], including full opportunity for presentation of the relevant facts." *Blacklidge v. Allison*, 431 U.S. 63, 82-83 (1977). For Petitioner to have simply stood up and told the court he'd had a dreadful childhood, or that he was manic depressive, is not an acceptable substitute for witnesses to describe the facts of his family history, and experts to explain what those facts mean to Petitioner's conduct, what mental illnesses he had, and what that meant in relation to his criminal acts.

What the Ninth Circuit did was to prematurely decide the merits, instead of deciding whether the claim had sufficient potential to merit plenary consideration. This Court has made plain that this is incorrect. *Wellons v. Hall*, 130 S. Ct. 727, 730 (2010) (lower court statement that petitioner not entitled to habeas relief "appears to address only whether petitioner was entitled to ultimate relief . . . not whether petitioner's alleged allegations, together with the facts he has learned, entitled him to the discovery and evidentiary hearing he sought").

As this Court said in *Wingo v. Wedding*, 418 U.S. 461, 474 (1974), "to experienced lawyers it is commonplace that the outcome [of a habeas case] . . . depends more on how the fact finder appraises the facts than on a disputed construction of a statue or interpretation of a line of precedents."

2. This is an important case because there appears likely to be an immediate and heavy flow of cases invoking *Martinez*. Providing guidance

now, will in the long run make proper resolution of those cases more efficient and expeditious.

At the very least, the Ninth Circuit in this case has created significant confusion about whether *Martinez* intended the standard for a certificate of appealability to determine substantiality, or indeed whether it differs in any material respect from the test for granting relief. Surely this Court intended for there to be a difference, and it seems plain that *Martinez* selected the standard for a certificate of appealability as that difference. The Court should review this case to correct the Ninth Circuit's disposition of "substantial," confirming the COA standard, or clarifying what determines a "substantial" claim.

3. If lower courts use the wrong standard for "substantial," they will unacceptably alter the balance that *Martinez* has carefully drawn between permitting cause and prejudice for some habeas claims, but not automatically allowing it for all. *Martinez* sought to provide a cause and prejudice window wide enough to admit cases that, even though not now shown to deserve relief, deserve mature habeas consideration; but not so wide as to impose on the District Courts obligation to entertain *Martinez* cause and prejudice exercise for a flood of ineffectiveness claims. The Ninth Circuit unacceptably narrows – even closes – that window.

4. The Ninth Circuit opinion in this case presents an unfettered vehicle for this Court to clarify the "substantiality" standard. Although the

appeal arose from a motion under Fed. R. Civ. P. 60(b)(6), the Ninth Circuit did not rule on its applicability. It is assumed so. Furthermore, the Ninth Circuit has already concluded (properly, Petitioner asserts) that Petitioner's motion was not a "second or successive" application. The Ninth Circuit's holding is based solely on its reading of the substantiality standard of *Martinez*. Therefore, a decision by this Court clarifying that standard will be fully applicable to any and every *Martinez* case in the federal courts.

5. It is anomalous that the Ninth Circuit rejected Petitioner's claim as not substantial. This Court seems to have already concluded otherwise.

Before this Court took up the certiorari petition in *Martinez*, it had before it Cook's petition for certiorari raising the same issue. The Court stayed Cook's execution, *Cook v. Arizona*, No. 10-9742 (Apr. 4,2011). In order to do so this Court necessarily concluded that there was a reasonable probability that four members of the Court would consider Petitioner's Claim sufficiently meritorious to grant certiorari and that, upon granting certiorari and resolving the issue presented, five Justices were likely to conclude that the case was erroneously decided below.[115] This was a considerably more rigorous standard than the low threshold for certificates of appeal, the test for a substantial claim established by *Martinez*.[116]

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[115] *Multimedia Holdings v. Circuit Court of Fla.,* 544 U.S. 1301 (2005)(Kennedy, J.); *Barefoot v. Estelle,* 463 U.S. 880 (1983).

[116] Ultimately, of course, this Court chose to decide *Martinez* and not to reach the constitutional issue raised by *Cook*. But that does not detract from the fact that, looking at virtually the same record that is now before this Court, the Supreme Court concluded that Cook had met the more stringent standard. One can certainly conclude that the Supreme Court would find Cook's Claim to be "substantial," as should this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

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August 2, 2012

APPENDIX A

FILED

JUL 27 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL WAYNE COOK, Petitioner - Appellant, v. CHARLES L. RYAN, Respondent - Appellee.	No. 12-16562 D.C. No. 2:97-cv-00146-RCB **ORDER AND OPINION**

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, Senior District Judge, Presiding

Argued and Submitted July 26, 2012
San Francisco, California

Filed July 27, 2012

Before: O'SCANNLAIN, GRABER, and CALLAHAN, Circuit Judges.

Opinion by Judge CALLAHAN, Circuit Judge:

This is the second time Daniel Wayne Cook seeks habeas review in this court. *See Cook v. Schriro*, 538 F.3d 1000, 1007 (9th Cir. 2008). Three things have happened since we issued our decision in 2008. First, the Supreme Court issued its decision in *Martinez v. Ryan*, -- U.S. -- , 132 S. Ct. 1309 (2012).

Martinez "changed the landscape with respect to whether ineffectiveness of postconviction counsel may establish cause for procedural default." *Lopez v. Ryan*, 678 F.3d 1131, 1133 (9th Cir. 2012). Second, the State of Arizona issued a death warrant and set August 8, 2012, as Cook's execution date. Third, the district court denied Cook's Federal Rule of Civil Procedure 60(b)(6) motion for relief from judgment under *Martinez*. *Cook v. Ryan*, No. 97-cv-00146-RCB, 2012 WL 2798789 (D. Ariz. July 9, 2012) (unpublished).[1]

Cook asserts that his pretrial counsel was ineffective and that his postconviction relief ("PCR") counsel was ineffective in Cook's presentation of that claim. In Cook's view, *Martinez* requires us to excuse his procedural default because of ineffective assistance of counsel ("IAC") in his state PCR proceedings. Cook also asks us to stay his execution so that he may further pursue his underlying pretrial IAC claim.

We affirm the district court's decision to deny Cook's Rule 60(b) motion and deny Cook's motion for a stay of execution. *Martinez* does not apply to this case given Cook's decision to represent himself during his trial and at sentencing.

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[1] Cook filed a second habeas petition raising the same IAC claims that form the basis of his Rule 60(b) motion. The district court dismissed the petition as a second or successive petition barred by 28 U.S.C. § 2244(b). Cook has not appealed from that ruling, and we do not discuss it further.

Even if *Martinez* does apply, that decision affords Cook no relief because his pretrial IAC claim lacks merit.

A unique feature of this case, and one that informs much of our analysis, is that Cook's pretrial counsel ceased to represent Cook after seven months, at which point Cook decided to represent himself. The propriety of Cook's waiver of counsel has been fully litigated and is not at issue in this appeal. During his limited period of representation, Cook's pretrial counsel acted competently by, among other things, procuring two mental evaluations and a hearing on Cook's competence to stand trial. Indeed, in Cook's waiver of counsel hearing, Cook stated that his lawyer "has worked hard for my defense; [he] cares about the outcome of my trial."

Cook's pretrial counsel cannot be faulted for failing to develop a mitigation case based on information that Cook knew but decided not to disclose, either before or during sentencing. Even if such fault could be assigned to Cook's pretrial counsel, Cook cannot show prejudice because Cook affirmatively chose not to present *any* mitigation information. Moreover, the same judge who sentenced Cook in 1988 recently reviewed most of the "new" mitigation information Cook has since developed and concluded that it would not have

changed his decision. Thus, even assuming *Martinez* applies to this case, Cook has not raised a "substantial" claim that his pretrial counsel was ineffective.

BACKGROUND

A. Factual background

The facts are set forth in our opinion affirming the denial of Cook's first federal habeas petition, as well as in the Arizona Supreme Court's opinion denying Cook's direct appeal. *See Cook v. Schriro*, 538 F.3d 1000, 1008-09 (9th Cir. 2008); *State v. Cook*, 821 P.2d 731, 736-37 (Ariz. 1991). To summarize, at about 6 p.m. on July 19, 1987, Cook suggested to his roommate, John Eugene Matzke, that the two men steal money from Carlos Cruz-Ramos, a co-worker at a local restaurant who recently had moved in with Cook and Matzke. After Cruz-Ramos realized his money was gone, Cook and Matzke tied Cruz-Ramos to a chair and tortured him for six hours. Among other things, Cook and Matzke beat Cruz-Ramos with a metal pipe; burned his chest, stomach, and genitals with cigarettes; and cut his chest with a knife. Cook also raped Cruz-Ramos and stapled Cruz-Ramos's foreskin to a chair. Matzke finally strangled Cruz-Ramos to death with a metal pipe, and the two men put his body in a closet.

At around 2:30 or 3 a.m., Kevin Swaney arrived at Cook and Matzke's apartment. Swaney was a 16-year-old dishwasher at the restaurant where Cook

and Matzke worked. Cook originally told Swaney to go away, but then invited him in. Cook barricaded the door after telling Swaney that he and Matzke had drugs they wanted to get rid of. Cook took Swaney upstairs and showed him Cruz-Ramos's body. When they returned downstairs, Swaney was crying. Cook and Matzke forced Swaney to undress and then gagged him and tied him to a chair. Matzke told Cook he wanted no part of any torture, and went to the living room and fell asleep. At around 4:30 or 5 a.m., Cook woke Matzke. Swaney remained tied and gagged and was crying. Cook told Matzke they had to kill Swaney because he (Cook) had raped him. Cook then strangled Swaney, and the two men put his body in the closet. Cook and Matzke went to sleep.

Matzke went to work that afternoon but returned home a few hours later. He and Cook went to a bar and then hung out with Byron Watkins and other friends by the pool of their apartment complex, as well as in their apartment. The following morning, Matzke showed Watkins the bodies. Watkins convinced Matzke to go to the police. The two men went to the police department, whereupon Matzke gave a videotaped statement.

The police went to Cook and Matzke's apartment and arrested Cook. After receiving *Miranda* warnings, Cook said, "we got to partying; things got out of hand; now two people are dead." Cook then said, "my roommate killed one and I

killed the other." He specifically admitted choking Swaney to death. After making these statements, Cook refused to say anything further.

B. Procedural background

1. Proceedings before and during trial

The long procedural history of this matter is set forth in *Cook*, 538 F.3d at 1009-14. As relevant here, Cook and Matzke were charged with two counts of first-degree murder, including a death penalty allegation under Arizona Revised Statute § 13-703. The trial court appointed attorney Claude Keller (hereinafter "pretrial counsel") to represent Cook. A grand jury returned an indictment on two counts of first-degree murder against both defendants.

Cook was given two pretrial psychological evaluations. After a hearing, the trial court concluded that Cook was competent to stand trial. Cook was then given an additional neurological examination, the results of which were filed with the trial court. A couple of months later, Cook filed a *pro se* motion to waive counsel and have his counsel appointed as advisory counsel. During the ensuing hearing, Cook asked that the trial court "not appoint Mr. Keller as my legal advisor." Cook explained, "Mr. Keller has worked hard for my defense; cares about the outcome of my trial. My personal belief[] is that he cannot advise me according to my defense." Cook asked for a specific attorney, but the trial court said only someone

else was available, whom Cook rejected. The trial court explained at length the perils of self-representation, but Cook still wanted to proceed *pro se*. The court then conducted extensive questioning pursuant to *Faretta v. California*, 422 U.S. 806, 835 (1975), and found that Cook knowingly, intelligently, and voluntarily relinquished his right to counsel. The court granted Cook's motion and appointed Keller as Cook's advisory counsel. This was two weeks before trial.

Matzke entered into a stipulated guilty plea and was sentenced to 20 years in prison. Matzke testified against Cook at Cook's trial. At the end of the trial, the jury deliberated for 77 minutes before returning a guilty verdict against Cook on both first-degree murder counts.

Following his conviction, Cook continued to represent himself and presented no mitigating evidence at the sentencing hearing, stating 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." The court reviewed the presentence report, the mental health evaluations, the State's sentencing memorandum, a letter from Cook, the trial evidence, and matters from hearings in the case. The court found three aggravating factors (the murders were multiple, were committed for pecuniary gain, and were committed in an especially heinous, cruel, or depraved manner). The court found

no mitigating factors to offset these aggravating factors and sentenced Cook to death.

2. State PCR and federal habeas proceedings

Cook, with the help of a lawyer (hereinafter "appellate counsel"), filed a direct appeal in which he raised 16 issues. Cook argued, among other things, that the trial court had erred in allowing him to waive his appointed trial counsel. The Arizona Supreme Court rejected this claim, explaining that "[w]hile 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." *Cook*, 821 P.2d at 739.

While his appeal was pending, Cook filed a motion to relieve his appellate counsel for allegedly failing to communicate with him and explain the issues to him. Cook also filed, pursuant to Arizona Rule of Criminal Procedure 32, a PCR petition asserting IAC by his pretrial counsel. Cook's appellate counsel moved to withdraw or, in the alternative, to have the Arizona Supreme Court clarify his status. The Arizona Supreme Court denied the motion to withdraw and issued an order finding Cook's PCR petition premature, appointing new counsel for PCR proceedings, and granting additional time to file an amended PCR petition, if necessary. About nine months later, the Arizona Supreme Court affirmed Cook's

conviction and sentence. *Cook*, 821 P.2d at 756. The United States Supreme Court denied Cook's petition for certiorari. *Cook v. Arizona*, 506 U.S. 846 (1992).

In September 1993, Cook filed, through counsel John Williams (hereinafter "first PCR counsel"), a "Supplement to Petition for Post-Conviction Relief" in Arizona Superior Court. The supplemental petition raised nine claims, two of which were that Cook's pretrial counsel was ineffective in failing to investigate and prepare for trial and sentencing, and that this ineffectiveness forced Cook to choose between ineffective counsel and self-representation. In May 1994, Cook's first PCR counsel moved to withdraw due to a conflict and the court appointed a new attorney, Michael Terribile (hereinafter "second PCR counsel"). In various rulings issued in late 1994 and early 1995, the trial court—which was the same court that presided over Cook's trial and sentencing—rejected some of Cook's supplemental PCR issues as precluded or not colorable and denied the others on their merits after holding evidentiary hearings to receive any newly discovered evidence.[2]

In denying Cook's pretrial IAC and "forced" self-representation claims, the court explained that Cook failed to show prejudice or deficient performance.

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[2] During one of the evidentiary hearings, Cook's second PCR counsel elicited testimony about pretrial counsel's actions in preparing Cook's case, alleged inexperience with capital cases and applicable law, and personal problems.

Specifically: (1) there was "no evidence of witnesses who could have been called that would have testified in a way that was beneficial" to Cook; (2) the court could only speculate as to what might have happened at trial had Cook not represented himself or had Cook's pretrial counsel "done a better job"; (3) Cook did not show any specific deficiency, and no case required the judge to inquire into the effectiveness of appointed counsel in determining whether a waiver of counsel is knowing, intelligent, and voluntary.

Cook, through his second PCR counsel, filed a motion for rehearing regarding several of the claims asserted in his supplemental PCR petition, as well as one new claim. Cook sought rehearing of his self-representation/waiver claim, but not of his pretrial IAC claim. The court denied the motion for rehearing. Cook then filed a petition for review that simply stated, "Daniel Wayne Cook, through counsel and pursuant to Rule 32.9 of the Arizona Rules of Criminal Procedure, petitions the Arizona Supreme Court for review." The Arizona Supreme Court denied the petition and the United States Supreme Court denied Cook's petition for certiorari. *Cook v. Arizona*, 519 U.S. 1013 (1996).

In January 1997, Cook filed a federal habeas petition in Arizona district court. The court appointed habeas counsel and granted Cook's motion to proceed

in forma pauperis.[3] Cook asserted 21 claims for relief, among them the claim that his decision to waive counsel was not knowing, intelligent, and voluntary, as well as the claim that his pretrial counsel was ineffective by failing to investigate mitigating evidence. The district court denied Cook's waiver claim on its merits, holding that no clearly established federal law required the state trial court to inquire into Cook's dissatisfaction with pretrial counsel's performance before allowing him to waive representation. *Cook v. Schriro*, No. 97-cv-00146-RCB, 2006 WL 842276, at *6-10 (D. Ariz. Mar. 28, 2006) (unpublished). As for Cook's independent pretrial IAC claim, the court held that this claim was procedurally barred because Cook had failed to preserve it in his motion for rehearing. Under the version of Arizona Rule of Criminal Procedure 32.9 that applied to Cook,

> [a]ny party aggrieved by a final decision of the trial court in these proceedings may, within ten days after the ruling of the court, move the court for a rehearing setting forth in detail the grounds for believing the court erred.

Ariz. R. Crim. P. 32.9(a). Moreover, "[o]n denial of a motion for rehearing any party aggrieved may petition the appropriate appellate court for review of the actions of the trial court." *Id.* R. 32.9(c). Thus, a petitioner could (but was not

[3] The court originally appointed an attorney from the federal public defender's office, but he was replaced by a Criminal Justice Act ("CJA") attorney. That CJA attorney continues to represent Cook, including in this appeal.

required to) seek rehearing, but doing so was a prerequisite to further review. Moreover, failure to file a *detailed* motion for rehearing waived further review.[4] *See State v. Gause*, 541 P. 2d 396, 397 (Ariz. 1975); *State v. Bortz*, 821 P. 2d 236, 239 (Ariz. Ct. App. 1991).

On appeal in 2008, we affirmed the district court's rulings. As relevant here, we concluded that "the state trial court's determination that Cook's waiver of his right to counsel was voluntary . . . was not objectively unreasonable." *Cook*, 538 F.3d at 1015. We also affirmed the district court's ruling that Cook's claim that his pretrial counsel was ineffective was procedurally barred. Specifically, we held that "preclusion for failure to preserve the issue on motion for rehearing was proper" under Arizona Rules of Criminal Procedure 32.2(a)(3) and 32.9(c), and thus that "Cook must demonstrate cause and prejudice in order to excuse his procedural default." *Id.* at 1027 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Cook argued that he had cause because his second PCR counsel was ineffective in failing to preserve his pretrial IAC claim in the motion for rehearing and the

[4] The Arizona Supreme Court changed Rule 32.9 in June 1992 to eliminate the requirement for a detailed motion for rehearing. However, the court made that change applicable only to defendants sentenced after December 1, 1992, well after Cook's sentencing. Cook's first PCR counsel "realized that the former Rule 32.9 governed the case and filed an unopposed motion for rehearing to conform to the old rule." *Cook*, 538 F.3d at 1026-27.

petition for review. We rejected this argument, citing a long line of Supreme Court and Ninth Circuit cases for the proposition that IAC in post-conviction proceedings does not establish cause. *Id.* at 1027-28; *see, e.g.*, *Coleman*, 501 U.S. at 752-53; *see also Sexton v. Cozner*, 679 F.3d 1150, 1158 (9th Cir. 2012) (discussing these cases); *Towery v. Ryan*, 673 F.3d 933, 941 (9th Cir.) (per curiam), *cert. denied*, 132 S. Ct. 1738 (2012) (same). We also cited the fact that Cook had no right to counsel at the motion for rehearing stage. *Cook*, 538 F.3d at 1027 (citing *State v. Smith*, 910 P.2d 1, 4 (Ariz. 1996) ("After counsel or the pro per defendant submits the post-conviction petition to the court and the trial court makes its required review and disposition, counsel's obligations are at an end.")). Because Cook was unable to show cause, we did not consider whether he suffered prejudice. *Id.* at 1028 n.13. We affirmed the district court's denial of Cook's habeas petition, and the Supreme Court denied Cook's petition for certiorari. *Id.* at 1031; *Cook v. Schriro*, 555 U.S. 1141 (2009).

3. Additional post-trial proceedings

In January 2009, after the Supreme Court denied certiorari, the State of Arizona sought a warrant of execution.[5] The Arizona Supreme Court declined to issue a warrant because litigation regarding the constitutionality of Arizona's lethal-injection protocol was then underway. Cook filed a second PCR petition challenging the lethal-injection protocol, but also asserting that his pretrial counsel was ineffective in failing to investigate mitigating evidence. In December 2009, the trial court denied Cook's second PCR petition after concluding, among other things, that Cook's pretrial IAC claim had been previously litigated and therefore was barred. In September 2010, the Arizona Supreme Court denied Cook's petition for review, and the State once again sought a warrant of execution.

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[5] In February 2009, Cook sought, and we granted, re-appointment of an attorney from the federal defender's office to represent Cook, along with his CJA attorney, in potential further proceedings. *See infra*. Specifically, Cook sought re-appointment of the federal defender's office on the grounds that his CJA attorney had "never litigated a death penalty case through execution," and that the federal defender's office would help his CJA attorney: (1) mount a challenge to Arizona's lethal injection protocol; (2) assert unexhausted claims "based on changes in recent state and federal law"; (3) provide funding for a mental health expert to explore "issues related to competency"; (4) file a second or successive habeas petition based on new constitutional rules of law or a showing of actual innocence; and (5) pursue any due process violations that might occur during clemency proceedings. Cook did not argue that he needed the federal defender's expertise or resources to conduct an investigation into mitigating circumstances.

In November 2010, while the State's warrant request was pending, Cook filed a third PCR petition seeking relief on the ground that newly discovered information likely would have led the original state trial court to impose a sentence other than death. *See* Ariz. R. Crim. P. 32.1(e), (h) (allowing PCR relief on grounds of newly discovered evidence). Specifically, based on an investigation conducted by his federal defender, Cook presented the declarations of Cook's mother, sister, and a former group home parent, all of whom knew Cook as a child or adolescent. These declarations documented a long history of physical and sexual abuse by family members, sexual abuse by the group home parent, a gang rape by Cook's peers in the group home when Cook was fifteen years old, and Cook's own drug and alcohol abuse. Several of the declarants indicated that no one had contacted them previously.[6]

In addition, Cook presented the declaration of a psychiatrist who reviewed information from Cook's trial and the declarations and records described above. The psychiatrist opined that, at the time Cook committed the murders, Cook suffered from post-traumatic stress disorder ("PTSD"), "organic mental syndrome, not otherwise specified," and alcohol and amphetamine intoxication. A letter and a

[6] As part of his Rule 60(b)(6) motion, Cook submitted additional declarations containing similar statements.

declaration from a clinical psychologist highlighted what the psychologist believed were deficiencies in Cook's pretrial competency evaluations.

Finally, Cook presented the declaration of Eric Larsen, the lead prosecutor at Cook's trial in 1988. Larsen declared that Cook's pretrial counsel was at the "low end of the competency scale" and "did not speak with me about mitigating circumstances." Larsen also declared that: he reviewed the declarations of Cook's relatives; "[e]vidence of [Cook's] brain damage and post-traumatic stress disorder was present at the time that Mr. Cook was arrested and tried for murder"; and "[h]ad I been informed of this mitigating information regarding Mr. Cook's severely abusive and traumatic childhood and his mental illnesses, I would not have sought the death penalty in this case."[7]

[7] Cook asserted in his Rule 60(b)(6) motion that all of this newly discovered mitigation information

> could not have been presented in Cook's 1997 petition for habeas corpus, because it was not until the Federal Public Defender for the District of Arizona was appointed co-counsel for Cook in 2009, with its financial and personnel resources to carry out the necessary investigative and professional investigations and evaluations, that a proper mitigation investigation could be accomplished. It was in the process of preparing for clemency . . . that facts were uncovered to support an application such as is made here.

In January 2011, the trial court denied Cook's third PCR petition. *State v. Cook*, No. CR-9358 (Maricopa Co. Sup. Ct. Jan. 27, 2011).[8] The judge—who again was the same judge who presided over Cook's trial and sentencing—considered Cook's additional information and explained that it either reflected information the court already knew in 1988 or was irrelevant post-hoc speculation. Thus, the judge still would have imposed the death penalty. The judge also concluded that Cook had not been diligent in securing his PTSD diagnosis.

The Arizona Supreme Court then issued a warrant of execution for April 5, 2011. Cook filed a petition for review to that court of the trial court's denial of his third PCR petition. Among other things, he argued that his lack of diligence in developing the PTSD diagnosis was the result of his first PCR counsel's ineffectiveness. The Arizona Supreme Court summarily denied review. Cook filed a petition for certiorari to the United States Supreme Court and sought a stay of execution pending the Court's resolution of the petition in *Martinez*. The Court granted a stay pending the resolution of Cook's certiorari petition. *Cook v. Arizona*, 131 S. Ct. 1847 (2011).

[8] We take judicial notice of this decision. *See Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002) (taking judicial notice of state judicial opinion).

4. *Martinez*

In March 2012, the Supreme Court decided *Martinez*. The Court established an equitable, rather than constitutional, "narrow exception" to the rule previously announced in *Coleman*:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez, 132 S. Ct. at 1320. Thus, under *Martinez*, a petitioner may establish cause for procedural default of a trial IAC claim, where the state (like Arizona) required the petitioner to raise that claim in collateral proceedings, by demonstrating two things: (1) "counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984)," and (2) "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S. Ct. at 1318.

Immediately after deciding *Martinez*, the Supreme Court denied Cook's certiorari petition, *Cook v. Arizona*, 132 S. Ct. 1790 (2012), and the State sought a new warrant of execution. Cook filed a motion before the Supreme Court for leave

to file an untimely petition for rehearing from the Court's 2009 denial of his petition for certiorari in the federal habeas proceedings, urging a remand to allow the Ninth Circuit to apply *Martinez* to Cook's pretrial and PCR IAC claims. On May 29, 2012, the Court denied Cook's motion. *Cook v. Schriro*, 132 S. Ct. 2709 (2012).

5. Current proceedings

On June 5, 2012, Cook filed in Arizona district court the Rule 60(b) motion that underlies this appeal. On June 12, 2012, the Arizona Supreme Court issued a warrant of execution for August 8, 2012. Cook filed a motion for stay of execution pending the district court's disposition of his Rule 60(b)(6) motion.

On July 9, 2012, the district court denied Cook's motions. Applying the six-factor test from *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009); *see also Lopez*, 678 F.3d at 1135-37, the court concluded that *Martinez* does not constitute an "extraordinary circumstance" justifying relief under Rule 60(b). Although certain factors favored granting relief, others—namely finality, comity, and the degree of connection between Cook's claims and *Martinez*—did not. Furthermore, the court held, Cook failed to show that his underlying pretrial IAC claim was substantial, and therefore he could not establish cause under *Martinez* for his procedural default.

Cook timely appeals the district court's order denying his Rule 60(b)(6) motion. Cook also seeks a stay of his execution from this court.

DISCUSSION

A. Cook's Rule 60(b)(6) motion is not a second or successive petition under 28 U.S.C. § 2244(b).

A Rule 60(b)(6) motion constitutes a second or successive habeas petition under 28 U.S.C. § 2244(b) when it "seeks to add a new ground" for relief or "it attacks the federal court's previous resolution of a claim *on the merits* . . . ." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (emphasis in original). "On the merits" means "a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at 532 n.4. A habeas petitioner does not seek merits review "when he merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.*

We agree with the district court that Cook's Rule 60(b)(6) motion is not a barred second or successive habeas petition. In his motion, Cook seeks relief not from the district court's ruling on the merits of his claim that his waiver of counsel was not knowing, intelligent, and voluntary because his pretrial counsel was ineffective, but from the district court's ruling that his separate claim that his

counsel was ineffective for failing to investigate and prepare a mitigation plan was procedurally barred.[9] The district court correctly interpreted the statement in *Cook*—that "the trial court's rulings on Cook's ineffective assistance of counsel claims were not contrary to or unreasonable applications of *Strickland*," *Cook*, 538 F.3d at 1016—as being limited to the waiver issue. Section 2244(b) therefore did not bar the district court from considering Cook's Rule 60(b)(6) motion.

B. Cook is not entitled to relief under Rule 60(b)(6).

We review the district court's denial of a Rule 60(b) motion for abuse of discretion. *Delay v. Gordon*, 475 F.3d 1039, 1043 (9th Cir. 2007). "'However, as the Supreme Court held in *Gonzalez*, 545 U.S. at 536-38, appellate courts may, in their discretion, decide the merits of a Rule 60(b) motion in the first instance on appeal.'" *Lopez*, 678 F.3d at 1135 (quoting *Phelps*, 569 F.3d at 1134-35). Whether we conduct our review independently or through the lens of the district court's discretion, Cook's claim to Rule 60(b)(6) relief fails. Even if Cook otherwise could "show 'extraordinary circumstances' justifying the reopening of a final judgment," *Gonzalez*, 545 U.S. at 535 (citations omitted), the ground for his motion—*Martinez*—affords him no relief.

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[9] Although the two claims are interrelated, as we discuss *infra*, they are sufficiently separate to evade § 2244(b)'s bar.

1. *Martinez* does not apply to Cook's claims.

In *Faretta v. California*, 422 U.S. 806, 835 (1975), the Supreme Court explained that, "[w]hen an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." The Court also explained that, "whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *Id.* at 834 n.46.

In this case, Cook was represented by pretrial counsel from August 1987 through April 1988. Cook then made a knowing, intelligent, and voluntary waiver of his right to counsel,[10] and represented himself at his trial and sentencing hearing. Even if Cook's pretrial counsel performed deficiently during the seven months he represented Cook (a contention we reject below), Cook could have corrected those

[10] As discussed *supra*, we previously rejected Cook's claim that his waiver was not voluntary. *See Cook*, 538 F.3d at 1015.

errors once he decided to represent himself.[11] *Faretta* therefore precludes Cook from complaining about the "quality of his own defense." It follows that the reason given by the Supreme Court for creating an exception to the *Coleman* rule in *Martinez*—"[t]o protect prisoners with a potentially legitimate claim of ineffective assistance of trial *counsel*"—does not apply to Cook. *Martinez*, 132 S. Ct. at 1315 (emphasis added).[12]

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[11] This is particularly true because Cook already knew much, if not all, of the information he now faults his counsel for failing to develop. Indeed, Cook admits that much of his "new" mitigation information was "available" before and during his trial in 1988. Cook *has* to admit this: even if he was not completely aware of the mental impairments he now alleges he had at the time he committed the murders, he plainly was aware of his own troubled childhood and adolescence. Yet Cook apparently never told his pretrial or PCR counsel about that mitigation information, never presented the information during the penalty phase of his trial (instead saying that he would accept only the death penalty, and that he had "nothing further"), and never presented the information in his federal habeas proceedings, even though he has been represented by the same counsel since his habeas proceedings commenced in 1997.

Cook points to the district court's decision to deny his request for funding in 2000. However, while Cook said he needed funds for a "documents investigator/mitigation specialist" and a mental health examination, his pretrial IAC claim was not among the claims for which he said he needed those things. Cook also suggests that it was not until he had the additional resources of the federal defender's office in 2009 "that a proper mitigation investigation could be accomplished." But Cook did not seek that assistance to develop a mitigation case. *See supra*. Finally, even if these explanations had merit, they fail to explain Cook's inaction before 2000.

[12] We do not hold that a *Martinez* claim can never be available to a defendant who represents himself. Here, however, the conduct of the trial and sentencing phases, and Cook's strategy, were his own.

In short, Cook's trial counsel was, at his own request, Cook. Accordingly, he cannot claim he was denied effective assistance of counsel. Nor can Cook be prejudiced by PCR counsel's alleged failures to assert IAC by trial counsel where, again, Cook chose to forego trial counsel. Nonetheless, even if *Martinez* applied to Cook notwithstanding *Faretta*, he is not entitled to relief because his pretrial IAC claim is not substantial.

2. Cook's underlying pretrial IAC claim is not substantial.

To succeed under *Martinez*, a petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S. Ct. at 1318. "Thus, *Martinez* requires that a petitioner's claim of cause for a procedural default be rooted in 'a potentially legitimate claim of ineffective assistance of trial counsel.'" *Lopez*, 678 F.3d at 1137-38 (quoting *Martinez*, 132 S. Ct. at 1315); *see also Martinez*, 132 S. Ct. at 1319 ("When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, i.e., it does not have any merit or that it is wholly without factual support . . . .").

As an initial matter, Cook argues that the district court applied too exacting a standard to his pretrial IAC claim. In Cook's view, the court evaluated whether

Cook would *succeed* on his IAC claim, rather than whether his claim was "substantial," i.e., "has some merit."[13] *Martinez*, 132 S. Ct. at 1318. We disagree. Here, while the district court explained that Cook "cannot establish" deficient performance or prejudice, the court was clear that it was applying the "*Martinez* test of substantiality." *Lopez*, 678 F.3d at 1138.

Cook's pretrial IAC claim—that his pretrial counsel was ineffective in failing to investigate and to prepare a mitigation case for sentencing—does not meet *Martinez*'s test. An IAC claim has merit where counsel's "performance was unreasonable under prevailing professional standards," and (2) "there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different." *Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001) (citing *Strickland*, 466 U.S. at 687-91, 694).

First, Cook cannot show that his pretrial counsel performed deficiently. Cook's lawyer represented Cook for just seven months. During that time, the

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[13] In explaining that an underlying trial IAC claim must have "some merit," *Martinez* referenced, not as direct but as generally analogous support, *Miller-El v. Cockrell*, 537 U.S. 322 (2003), which sets forth the standards for issuing certificates of appealability under 28 U.S.C. § 2253. Under *Miller-El*, a certificate of appealability should issue where the "resolution [of a habeas petitioner's claim] [is] debatable amongst jurists of reason." *Id.* at 336. A court should conduct a "general assessment of the[] merits," but should not decline to issue a certificate "merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 336-37.

lawyer obtained two mental health evaluations, hired an investigator who interviewed several witnesses, filed a host of motions, and caused the trial court to hold a competency hearing. In particular, Cook's two mental health evaluations provided detailed information about Cook's background, mental state at the time of the murders, and competency to stand trial. The first evaluation, conducted by Dr. Daniel Wynkoop, a psychologist, described Cook's unstable home life, juvenile delinquency, continuing drug and alcohol use, sexual abuse, emotional instability, and repeated hospitalizations for depression. The second evaluation, conducted by Dr. Eugene Almer, a psychiatrist, recapped much of the first evaluation but also detailed the unstable life of Cook's parents and siblings, Cook's medical history, and other topics. Dr. Almer reviewed Dr. Wynkoop's evaluation, "extensive" medical records, and a taped interview of Cook's mother and stepfather that was conducted after the murders. Although both doctors explained that Cook likely had been using drugs and alcohol when he committed the murders, they also explained that he did not have significant cognitive deficits or organic brain problems. Finally, both doctors concluded that Cook was competent to assist his pretrial counsel in his defense, with Dr. Wynkoop adding that Cook "could provide considerable data if he so chose."

As the district court explained, it is apparent from these evaluations that Cook's pretrial counsel obtained extensive records and background information about his client during the limited period during which he represented Cook. It is also apparent that the state trial court, which reviewed these evaluations, the presentence report, the State's sentencing memorandum, a letter from Cook, the trial evidence, and the testimony from evidentiary hearings, was aware of that information when it imposed the death penalty. Given these facts, we cannot say that Cook's pretrial counsel performed deficiently.[14]

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[14] Thus, this is not a case where a lawyer knew his client had or might have mitigating circumstances but did nothing to investigate them. *Cf. James v. Ryan*, 679 F.3d 780, 807-10 (9th Cir. 2012), *petition for cert. filed*, -- U.S.L.W. -- (U.S. June 28, 2012) (No. 12-11) (finding deficient performance where counsel "failed to conduct even the most basic investigation of James's social history" despite "obvious indications" of a troubled childhood and mental health problems).

Nor is this a case in which counsel discovered initial mitigating information and then did nothing further despite continuing to represent his client through sentencing. *Cf. Wiggins v. Smith*, 539 U.S. 510, 523-28 (2003) (holding that counsel performed deficiently where they considered only basic social history documents, conducted no further investigation after learning of possible leads, and presented no mitigating information at the sentencing hearing); *Williams v. Taylor*, 529 U.S. 362, 370, 396 (2000) (counsel performed deficiently where he failed to, among other things, present known mitigating information during sentencing); *James*, 679 F.3d at 807-10 (finding deficient performance where counsel learned of substantial mitigating information following guilty verdict but failed to present it during the sentencing hearing).

As discussed above, Cook's pretrial counsel took actions that were reasonable "under prevailing professional norms," *Strickland*, 466 U.S. at 688, especially in light of the short period during which Cook allowed his counsel to represent him.

Our conclusion is bolstered by the unique procedural history of this case, and in particular Cook's own role in it. First, Cook's pretrial counsel represented him for at most seven months, before Cook successfully moved to represent himself. In doing so, Cook accepted responsibility for preparing for his trial and sentencing hearing. Second, the information Cook's pretrial counsel allegedly failed to discover or to develop during this short period was peculiarly within Cook's knowledge, but he withheld that information from his counsel and the court. Indeed, Dr. Wynkoop noted that Cook could provide considerable data if he chose to. Instead, Cook declined to provide any information, going so far as to say at sentencing 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."[15]

Even if Cook's pretrial counsel could be faulted for not developing information that Cook withheld, Cook cannot show that he suffered any prejudice

[15] Even though Cook never told his counsel about his own background, Cook argues that the need for a more "thorough" investigation nonetheless was made apparent by his pretrial motion for a competency hearing, in which he revealed that he had been a patient at two mental hospitals and received treatment at a mental health clinic, and that a car had run over his head. However, that information was more fully developed during, and as a result of, the dual competency evaluations. As for the alleged car accident, Dr. Almer discussed it in his report, even though the neurology expert who examined Cook's hospital records found no record of a head injury. When confronted with this fact, Cook claimed his records had been "transferred." The expert also conducted a neurological exam of Cook and concluded that it was "[c]ompletely normal."

as a result of that alleged error. First, whether Cook's pretrial counsel had developed further mitigation information would have made no difference given that Cook already knew the information but affirmatively chose not to present it. *See Schriro v. Landrigan*, 550 U.S. 465, 477 (2007) ("The District Court was entitled to conclude that regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence.").

Second, the same trial judge who sentenced Cook to death in 1988 has stated that Cook's additional information would not have made any difference. *See id.* at 476 ("And it is worth noting, again, that the judge presiding on postconviction review was ideally situated to make this assessment because she is the same judge who sentenced Landrigan and discussed these issues with him."). In ruling on Cook's third PCR petition, the judge considered much of Cook's "new" mitigation information, particularly his PTSD diagnosis. The judge explained that Cook's "subsequent diagnosis of post-traumatic stress disorder simply gave a name to significant mental health issues that were already known to the Court at the time of sentencing." Thus, the judge, writing as the court, determined "unequivocally that if it had known in 1988 that the Defendant had been diagnosed with post-traumatic

stress disorder at the time of the murders it still would have imposed the death penalty."

The trial judge also explained that the declaration of Eric Larsen, the prosecutor-turned-criminal-defense-attorney who said he would not have sought the death penalty had he known about Cook's mitigating circumstances, represented "the ultimate in speculation." Given the prosecutor's background and practices in 1987 and 1988, as well as the "fairly regular basis" on which the prosecutor's office sought the death penalty during that period, it was "unfathomable" that the death penalty would not have been sought in a case "involving the torture, mutilation, and eventual killing of 2 completely innocent victims." That was true "even for a defendant who was known to have been diagnosed" with PTSD. We think these observations, made by the same judge who sentenced Cook nearly 25 years ago, are persuasive.

In sum, Cook fails to set forth a substantial claim that his pretrial counsel performed deficiently or that, even if he did, Cook suffered prejudice. This conclusion supports the district court's denial of Rule 60(b)(6) relief.

C. Cook has not established that he is entitled to a stay of execution.

"[L]ike other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a

stay, including a showing of a significant possibility of success on the merits." *Hill v. McDonald*, 547 U.S. 573, 584 (2006). As discussed *supra*, we reject Cook's *Martinez* claim on the grounds that *Martinez* does not apply, and that, even if it does, Cook's pretrial IAC claim is not substantial. Because Cook therefore fails to show "a significant possibility of success on the merits," we must deny his request for a stay.

We also conclude that Cook fails to meet two of the three remaining requirements for a stay: "that the balance of equities tips in his favor[] and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As discussed *supra*, Cook has delayed for 25 years disclosing much of the information on which he now premises his pretrial IAC claim. *Cf. Hill*, 547 U.S. at 584 (explaining that where a prisoner has delayed bringing his claim, the equities cut sharply against him); *Gomez v. U.S. Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay). In addition, the citizens of the State of Arizona—especially the families of Carlos Cruz-Ramos and Kevin Swaney—have a compelling interest in seeing that Arizona's lawful judgments against Cook are enforced.

CONCLUSION

The district court properly denied Cook's Rule 60(b)(6) motion for relief from judgment. *Martinez* does not apply to Cook given Cook's decision to represent himself. Even if *Martinez* does apply, Cook has not established that his pretrial counsel IAC claim is substantial. Cook also fails to meet the requirements for a stay of execution. The district court's judgment is **AFFIRMED**, and Cook's motion for a stay of execution is **DENIED**.

COUNSEL

Michael J. Meehan (argued), Law Office of Michael Meehan, Tucson, Arizona, and Dale A. Baich and Robin C. Konrad, Federal Public Defender, Capital Habeas Unit, Phoenix, Arizona (on the briefs), for Petitioner-Appellant Daniel Wayne Cook.

Kent E. Cattani (argued) and Thomas C. Horne (on the briefs), Office of the Attorney General, Phoenix, Arizona, for Respondent-Appellee Charles L. Ryan.

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Daniel Wayne Cook, Petitioner, v. Charles L. Ryan, et al., Respondents.	No. CV-97-00146-PHX-RCB DEATH PENALTY CASE **ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT**

Before the Court is Petitioner's motion for relief from judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. (Doc. 118.) The motion is based on the Supreme Court's recent decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that ineffectiveness of post-conviction counsel may serve to excuse the procedural default of claims alleging trial counsel ineffectiveness. Petitioner argues that *Martinez* provides a proper ground for this Court to reopen his federal habeas proceeding and to find cause for the procedural default of a claim alleging a Sixth Amendment violation based on counsel's failure to undertake a timely mitigation investigation. Respondents oppose the motion. (Doc. 119.) As explained herein, the Court concludes that Petitioner has failed to establish extraordinary circumstances to justify reopening this case. Even if the Court reconsidered its procedural bar determination, Petitioner has not demonstrated cause under *Martinez* to excuse the default.

BACKGROUND

In 1988, a jury convicted Petitioner of two counts of first-degree murder for the brutal killing of two acquaintances in Lake Havasu City. Details of the crimes are set forth in the Arizona Supreme Court's opinion upholding Petitioner's convictions and sentences. *See State v. Cook*, 170 Ariz. 40, 45-46, 821 P.2d 731, 736-37 (1991) ("*Cook I*").

Prior to trial, Petitioner chose to waive his right to counsel. After strongly advising Petitioner against self-representation, the trial court accepted Petitioner's waiver as knowing, intelligent, and voluntary. Following conviction, Petitioner continued to represent himself and presented no mitigating evidence at the sentencing hearing, stating 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 Cir. 2008) ("*Cook II*"). After reviewing the presentence report, pre-trial mental health evaluations, the State's sentencing memorandum, a letter from Cook, the trial evidence, and matters from hearings in the case, the trial court found several aggravating factors and no mitigating factors sufficient to outweigh the aggravation, and sentenced Petitioner to death.

On appeal, Petitioner argued that the trial court erred by allowing him to waive appointed counsel. In rejecting this claim, the Arizona Supreme Court observed that "[w]hile 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." *Cook I*, 170 Ariz. at 48, 821 P.2d at 739.

Petitioner also sought post-conviction relief ("PCR") under Rule 32 of the Arizona Rules of Criminal Procedure. Among other claims in the PCR petition, Petitioner asserted that pre-trial counsel had been ineffective in failing to investigate and to prepare for trial and sentencing and that this deficient representation impermissibly forced Petitioner to choose self-representation. Following an evidentiary hearing, the trial court denied PCR relief. The court first found no prejudice from any alleged deficiencies by pre-trial counsel because the court could only speculate as to what could have happened had counsel represented Petitioner at trial. The court also found that Petitioner had failed to identify any specific

action that was ineffective and that no caselaw required a judge to inquire about the effectiveness of appointed counsel in determining whether a waiver of counsel is knowing, intelligent, and voluntary. Petitioner sought rehearing of the waiver issue but not the separate claim alleging ineffectiveness by pre-trial counsel. Following denial of rehearing, the Arizona Supreme Court summarily denied a petition for review.

In January 1997, Petitioner initiated federal habeas corpus proceedings. Among other claims, Petitioner asserted in his habeas petition that his decision to waive counsel was not knowing, voluntary, and informed because he was forced to choose between ineffective counsel and self-representation. He also asserted as a stand-alone claim that pre-trial counsel's representation was constitutionally deficient. In September 1999, this Court determined that the ineffectiveness claim was procedurally defaulted because Petitioner had failed to include it in his motion for rehearing from the denial of state PCR relief and had not established cause to excuse the default. (Doc. 39 at 14-15.) In March 2006, the Court denied relief on the remainder of Petitioner's claims. With regard to the waiver issue, the Court determined that no clearly established federal law required the trial court to inquire into Petitioner's potential dissatisfaction with counsel prior to allowing him to waive counsel. (Doc. 90 at 12-15.)

On appeal, the Ninth Circuit affirmed. In a section titled "Ineffective assistance of pre-trial counsel," the court concluded that the state court's factual determinations concerning pre-trial counsel's representation were supported by the record and that its rulings on Petitioner's ineffectiveness claims were not objectively unreasonable. *Cook II*, 538 F.3d at 1016. The court also determined that the Supreme Court "has never held that a defendant who does not inform the court that he wants to represent himself because he believes that his counsel is ineffective was coerced into representing himself." *Id.* Regarding Petitioner's allegation that pre-trial counsel was ineffective for failing to investigate mitigating evidence, the court agreed with this Court that the claim was procedurally barred because under the version of Arizona Rule of Criminal Procedure 32.9 applicable to Petitioner's case the failure to detail each ground of relief in a motion for rehearing waived further review of that issue.

Id. at 1026-27. Furthermore, the court found that counsel ineffectiveness did not constitute cause for the procedural default because Petitioner had no right to counsel in state court at the motion for rehearing stage. *Id.* at 1027, *citing State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996) ("After counsel or the pro per defendant submits the post-conviction petition to the court and the trial court makes its required review and disposition, counsel's obligations are at an end.").

In January 2009, the Supreme Court denied a petition for certiorari, effectively ending these federal habeas corpus proceedings, and the Arizona Attorney General sought a warrant of execution. At the time, litigation concerning the constitutionality of Arizona's lethal-injection protocol was pending in both state and federal courts, and the Arizona Supreme Court declined to issue a warrant. Instead, the court directed Petitioner to initiate a new state PCR proceeding to litigate the constitutionality of Arizona's lethal-injection protocol, and Petitioner promptly filed a second PCR petition. The petition challenged the execution protocol but also asserted among other claims that pre-trial counsel had been ineffective for failing to conduct a mitigation investigation. The trial court denied relief in December 2009, finding in part that Petitioner's ineffectiveness claims had been previously litigated and therefore were precluded. The Arizona Supreme Court denied a petition for review in September 2010, and the State again sought a warrant of execution.

In November 2010, while the warrant request was pending, Petitioner filed a third PCR petition seeking relief on the grounds of newly-discovered material facts that probably would have changed his sentence and the existence of facts establishing that the trial court would not have imposed the death penalty. *See* Ariz. R. Crim. 32.1(e) and (h) (providing exceptions to preclusion for successive petitions raising claims based on newly-discovered evidence and actual innocence). Specifically, Petitioner asserted that he only recently was diagnosed as suffering from post-traumatic stress disorder ("PTSD") and organic brain dysfunction and that this mitigation probably would have resulted in a non-death sentence. On January 27, 2011, the trial court denied relief, stating "unequivocally that if it had known in 1988 that the Defendant had been diagnosed with post-traumatic stress disorder at the time

of the murders it still would have imposed the death penalty." The court further noted that the subsequent PTSD diagnosis "simply gave a name to significant mental health issues that were already known to the Court at the time of sentencing. Knowing that name and knowing the symptomology of that condition would not have changed the sentencing decision made by the Court." Finally, the court observed that Petitioner had failed to diligently develop his PTSD evidence.

On February 8, 2011, the Arizona Supreme Court issued a warrant of execution for April 5, 2011. On March 8, 2011, Petitioner sought review in the state supreme court of the trial court's denial of the third PCR petition. He argued *inter alia* that his alleged lack of diligence in developing the PTSD diagnosis was due to the ineffective assistance of counsel during his first PCR proceeding and asserted that he had the right to effective post-conviction counsel under the Sixth Amendment. The Arizona Supreme Court summarily denied review on March 22, 2011.

Petitioner then filed a petition for certiorari and asked the Supreme Court to stay his execution pending resolution of certiorari in *Martinez v. Ryan*, a case that presented the question of whether the Sixth Amendment requires the effective assistance of post-conviction counsel when a post-conviction proceeding is the first opportunity to raise trial ineffectiveness claims. On April 4, 2011, the Supreme Court granted the motion for stay pending disposition of Petitioner's certiorari petition. *See Cook v. Arizona*, 131 S. Ct. 1847 (2011).

On March 20, 2012, the Court in *Martinez v. Ryan* declined to reach the constitutional question on which certiorari had been granted. 132 S. Ct. at 1315. Instead, the Court adopted an equitable rule, finding that in order 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*, 501 U.S. 722 (1991),] that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Id.* 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 counsel in an initial-review collateral proceeding to raise a substantial trial ineffectiveness claim may provide cause to excuse the procedural default of such a claim. *Id.*

Less than a week after issuing the *Martinez* opinion, the Court denied Petitioner's certiorari petition, *Cook v. Arizona*, 132 S. Ct. 1790 (2012), and the State sought issuance of a new warrant of execution. Petitioner then requested leave to file an untimely petition for rehearing from the denial of certiorari in these federal habeas proceedings. The motion urged rehearing in light of *Martinez* and requested that Petitioner's federal habeas case be remanded back to the Ninth Circuit for a determination of whether ineffectiveness by post-conviction counsel constitutes cause for the procedural default of his trial ineffectiveness claims. The Court denied the request on May 29, 2012. *Cook v. Schriro*, No. 08-7229, 2012 WL 1912258 (U.S. May 29, 2012).

On June 5, 2012, Petitioner filed the instant motion, arguing that extraordinary circumstances based on *Martinez* justify reopening this Court's prior judgment and that post-conviction counsel's ineffectiveness constitutes cause to excuse the default of his claim alleging pre-trial counsel ineffectiveness. On the same day, Petitioner filed a second petition for writ of habeas corpus raising anew a claim of ineffective assistance of pre-trial counsel.[1]

On June 12, 2012, the Arizona Supreme Court issued a warrant of execution for August 8, 2012. Subsequently, Petitioner filed a motion for stay of execution pending disposition of his Rule 60(b) motion and/or new habeas petition.

DISCUSSION

Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from judgment on several grounds, including the catch-all category "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). A motion under subsection (b)(6) must be brought "within a reasonable time," Fed. R. Civ. P. 60(c)(1), and

[1] The Court addresses Petitioner's newly-filed petition in a separate order, concluding that it constitutes a prohibited second or successive petition under the dictates of 28 U.S.C. § 2244(b) and therefore must be dismissed.

requires a showing of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

I. Second or Successive Petition

For habeas petitioners, Rule 60(b) may not be used to avoid the prohibition set forth in 28 U.S.C. § 2244(b) against second or successive petitions. In *Gonzalez*, the Court explained that 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. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at n.4. The Court further explained that a Rule 60(b) motion does *not* constitute a second or successive petition when the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.*

Respondents argue that the instant motion constitutes a prohibited second or successive habeas petition because Petitioner's claims of trial ineffectiveness were rejected on the merits "in the context of" Petitioner's claim that counsel ineffectiveness led to Petitioner's decision to represent himself. (Doc. 119 at 6.) In response, Petitioner asserts that Respondents misapprehend his argument and that the already-resolved claim of ineffectiveness-induced waiver of trial counsel is separate from the claim that counsel was ineffective for failing to investigate and develop a mitigation plan. (Doc. 120 at 2.)

In its order analyzing Petitioner's waiver-of-counsel claim, this Court did not address the merits of Petitioner's allegations of ineffectiveness by trial counsel, having previously found them to be procedurally barred. However, on appeal, prior to addressing the waiver issue, the Ninth Circuit found that "the trial court's rulings on Cook's ineffective assistance of counsel claims were not contrary to or unreasonable applications of *Strickland*." *Cook II*, 538 F.3d at 1016. Although it appears the appellate court may have reached the merits of Petitioner's ineffectiveness claims, a closer reading of the opinion persuades this Court that Petitioner's Rule 60(b) motion does not constitute an unauthorized successive petition.

First, the Ninth Circuit addressed ineffectiveness only with respect to several trial-related issues, finding no merit to Petitioner's claimed prejudice from the lost opportunity to have a stronger presentation on reasonable doubt, to impeach the co-defendant, and to challenge the co-defendant's plea agreement. *Id.* Further, in the context of analyzing Petitioner's waiver claim, the appellate court did not discuss counsel's alleged failure to investigate mitigating evidence. Rather, the court expressly affirmed this Court's finding of procedural default as to the mitigation-related ineffectiveness claim. *Id.* at 1024-26. Because neither the Ninth Circuit nor this Court expressly addressed the merits of Petitioner's sentencing ineffectiveness claim, and both courts clearly found the claim procedurally barred, this Court has jurisdiction under *Gonzalez* to consider Petitioner's Rule 60(b) motion, free of the constraints imposed by 28 U.S.C. § 2244(b) upon successive petitions.[2] *See Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. 2007) (finding § 2244(b) inapplicable where Rule 60(b) motion sought to reopen judgment on procedurally barred claim).

II. Extraordinary Circumstances

The Court turns now to the issue raised in the instant motion—whether in this case *Martinez* constitutes extraordinary circumstances justifying relief under Rule 60(b)(6) to reconsider the Court's procedural bar ruling. When a petitioner seeks post-judgment relief based on an intervening change in the law, the Ninth Circuit has directed district courts to balance numerous factors on a case-by-case basis. *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009); *see also Lopez v. Ryan*, 678 F.3d 1131, 1135-37 (9th Cir. 2012). These include but are not limited to: (1) whether "the intervening change in the law . . . overruled an otherwise settled legal precedent;" (2) whether the petitioner was diligent in pursuing the

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[2] Although not raised by Respondents in their opposition, the Court observes that Petitioner's motion possibly could be construed as an impermissible second or successive petition because the sentencing ineffectiveness claim Petitioner ultimately seeks to litigate if the Court were to find cause under *Martinez* is fundamentally different from the defaulted sentencing ineffectiveness claim raised in the amended federal habeas petition. Because Respondents have not made this assertion and the motion fails on other grounds, the Court does not address the issue here.

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. After consideration of these factors, the Court determines that the balance weighs against granting post-judgment relief.

Change in the Law

The first factor considers the nature of the intervening change in the law. In *Lopez*, another capital case from Arizona in which the petitioner sought relief under Rule 60(b) based on *Martinez*, the court found that the Supreme Court's creation of a narrow exception to otherwise settled law in *Coleman* "weigh[ed] slightly in favor of reopening" the petitioner's habeas case. 678 F.3d at 1136. "Unlike the 'hardly extraordinary' development of the Supreme Court resolving an existing circuit split, *Gonzalez*, 545 U.S. at 536, the Supreme Court's development in *Martinez* constitutes a remarkable—if 'limited,' *Martinez*, 132 S. Ct. at 1319—development in the Court's equitable jurisprudence." *Id.* Thus, based on *Lopez*, this factor weighs slightly in Petitioner's favor. *But see Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012) (finding that *Martinez* is "simply a change in decisional law" and does not constitute an extraordinary circumstance justifying postconviction relief).

Diligence

The second factor, whether Petitioner was diligent in pursuing the issue, also weighs in Petitioner's favor. This is not a case, such as *Lopez*, where the petitioner not only failed to advance post-conviction counsel's ineffectiveness as cause for the default of his sentencing ineffectiveness claim, but argued that such counsel had in fact been diligent in developing the claim. 678 F.3d at 1137. Here, Petitioner argued to the Ninth Circuit that ineffective assistance of post-conviction counsel constituted cause because the post-conviction proceeding was the first opportunity he had to raise trial ineffectiveness claims

and thus he was not subject to the preclusive rule of *Coleman*. Appellant's Supplemental Reply Brief, *Cook v. Schriro*, No. 06-99005, 2007 WL 4733563, at *18 (9th Cir. Nov. 27, 2007). In rejecting the claim, the Ninth Circuit observed that the default occurred during post-conviction proceedings and that ineffective assistance of post-conviction counsel could not serve as cause because Petitioner had no constitutional right to such counsel. *Cook II*, 538 F.3d at 1027. Petitioner clearly acted with diligence.

Reliance

The third factor is whether granting relief under Rule 60(b) would "'undo the past, executed effects of the judgment,' thereby disturbing the parties' reliance interest in the finality of the case." *Phelps*, 569 F.3d at 1137 (quoting *Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987)). Post-judgment relief "is less warranted when the final judgment being challenged has caused one or more of the parties to change his legal position in reliance on that judgment." *Id.* at 1138.

In *Lopez*, the court found that the State's and the victim's interest in finality, especially after a warrant of execution has been obtained and an execution date set, weigh against granting post-judgment relief. 678 F.3d at 1136; *see also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (discussing finality in a capital case). Accordingly, this factor weighs against reopening Petitioner's habeas case.

Delay

The fourth factor looks at whether a petitioner seeking to have a new legal rule applied to an otherwise final case has petitioned the court for reconsideration "with a degree of promptness that respects the strong public interest in timeliness and finality." *Phelps*, 569 F.3d at 1138 (internal quotation omitted). Here, the motion was filed only days after the Supreme Court denied Petitioner's motion to file an untimely request for rehearing of the order denying certiorari of the Ninth Circuit's decision affirming the denial of habeas relief. And that motion was itself filed just two weeks following the Supreme Court's denial of Petitioner's certiorari petition from the Arizona Supreme Court's denial of his successive state post-conviction petition, in which Petitioner asserted a Sixth Amendment right to

effective post-conviction counsel. Petitioner did not delay seeking relief based on *Martinez*, and this factor weighs in his favor.

Close Connection

The fifth factor "is designed to recognize that the law is regularly evolving." *Phelps*, 569 F.3d at 1139. The mere fact that tradition, legal rules, and principles inevitably shift and evolve over time "cannot upset all final judgments that have predated any specific change in the law." *Id.* Accordingly, the nature of the change is important and courts should examine whether there is a "close connection" between the original and intervening decision at issue in a Rule 60(b)(6) motion. *Id.*

In *Phelps*, the intervening change in the law directly overruled the decision for which reconsideration was sought, and this factor supported reconsideration. The same cannot be said here because Petitioner's procedural default occurred during appeal of his post-conviction petition, not its initial filing.

In *Martinez*, the petitioner's post-conviction counsel failed to raise any trial ineffectiveness claims in the initial state post-conviction petition. When Martinez later sought to raise trial ineffectiveness claims in a successive state post-conviction petition, the claims were found precluded under state law and then found procedurally defaulted in federal habeas proceedings. In carving out a narrow exception to the rule that ineffectiveness of post-conviction counsel cannot constitute cause for a procedural default, the Court in *Martinez* emphasized that the

> rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, *including appeals from initial-review collateral proceedings*, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. It does not extend to attorney errors in any proceeding *beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial*, even though that initial-review collateral proceeding may be deficient for other reasons.

Martinez, 132 S. Ct. at 1320 (citations omitted; emphasis added).

In this case, Petitioner's post-conviction counsel raised his pre-trial ineffectiveness claims in the initial post-conviction petition (the "first occasion" to raise such claims), and

they were denied on the merits by the state court following an evidentiary hearing. However, post-conviction counsel failed to include the ineffectiveness claims in a motion for rehearing from the denial of post-conviction relief or in a discretionary petition for review to the Arizona Supreme Court, both of which were necessary steps at that time to properly exhaust the claims in state court and, consequently, for federal habeas review. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (requiring state prisoners to complete one round of state's established appellate review process to exhaust claims for federal review); *Cook II*, 538 F.3d at 1026 ("Prior to the amendments to Rule 32.9, the failure of the petitioner to file a motion for rehearing setting forth in detail the grounds for rehearing waived further review.").

Under the plain language of *Martinez*, post-conviction counsel's failure to appeal the state court's denial of the ineffectiveness claims cannot constitute cause for the procedural default because the *Martinez* exception does not extend to attorney errors "beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial." 132 S. Ct. at 1320; *see also Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012) ("Arnold's multiple ineffective assistance claims were litigated in his initial-review collateral proceeding, but not preserved on appeal. Thus, unlike Martinez, Arnold has already had his day in court; deprivation of a second day does not constitute cause."). Indeed, as recognized by the Ninth Circuit in this case, under Arizona law a defendant is entitled to counsel only through the disposition of a first post-conviction petition. *Cook II*, 538 F.3d at 1027; *see also Smith*, 184 Ariz. at 459, 910 P.2d at 4 ("Our constitution does not require, and the rules do not extend, the right to appointed counsel for indigent defendants in Rule 32 proceedings beyond the trial court's mandatory consideration and disposition of the PCR.") "Because Cook had no constitutional right to counsel *at the motion for rehearing stage*, any errors by his counsel could not constitute cause to excuse the default." *Cook II*, 538 F.3d at 1027 (emphasis added) (citing *Coleman* and *Harris v. Vasquez*, 949 F.2d 1497 (9th Cir. 1990)). The lack of connection between Petitioner's case and *Martinez* weighs heavily against reconsideration.

Comity

The last factor concerns the need for comity between independently sovereign state and federal judiciaries. *Phelps*, 569 F.3d at 1139. The Ninth Circuit has determined that 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." *Id.* at 1140. For example, in *Phelps*, the district court dismissed the petition as untimely, thus precluding any federal habeas review of the petitioner's claims. The court found that this favored the grant of post-judgment relief because dismissal of a first habeas petition "denies the petitioner the protections of the Great Writ entirely." *Id.*

Here, the Court's judgment did not preclude review of all of Petitioner's federal constitutional claims. A number of the claims, including the trial court's failure to inquire about the ineffectiveness of counsel before permitting Petitioner's waiver of counsel, were addressed on the merits in both the district and appellate courts. More critically, the state court held an evidentiary hearing and considered the merits of Petitioner's pre-trial ineffectiveness claims. Additionally, the state court recently considered the merits of Petitioner's expanded sentencing ineffectiveness claim during the third PCR proceeding. In light of these circumstances, the comity factor does not favor Petitioner.

Conclusion

The Court has evaluated each of the factors set forth in *Phelps* in light of the particular facts of this case. Some weigh in Petitioner's favor. However, the Court finds that the lack of connection between Petitioner's case and the *Martinez* decision is a substantial factor that, when weighed with the reliance and comity factors, tips the balance against granting post-judgment relief. Accordingly, the Court concludes that Petitioner's motion to reopen judgment fails to demonstrate the extraordinary circumstances necessary to grant relief under Rule 60(b)(6).

III. Cause for Procedural Default

Even if the Court granted the motion under Rule 60(b) to reconsider whether Petitioner can establish cause for his procedural default, Petitioner would not be entitled to

the relief he seeks for two reasons. First and foremost, as already discussed, the Supreme Court's holding in *Martinez* does not apply to alleged ineffectiveness by post-conviction *appellate* counsel, and the procedural default at issue here occurred when Petitioner's post-conviction counsel failed to preserve the pre-trial ineffectiveness claims for appeal. Second, Petitioner has not demonstrated that the defaulted ineffectiveness claim is substantial. Therefore, even if the narrow *Martinez* exception applied, it does not provide cause to excuse the procedural default here.

In *Martinez*, the Court held that a prisoner must demonstrate that the underlying ineffectiveness claim is a substantial one to overcome any procedural default of that claim. 132 S. Ct. at 1318. "Thus, *Martinez* requires that a petitioner's claim of cause for a procedural default be rooted in 'a potentially legitimate claim of ineffective assistance of trial counsel.'" *Lopez*, 678 F.3d at 1137-38 (citing *Martinez*, 132 S. Ct. at 1318); *see also Leavitt v. Arave*, No. 12-35427, 2012 WL 2086358, at *1 (9th Cir. June 8, 2012). Under *Strickland v. Washington*, 466 U.S. 668, 687 (1994), an ineffective assistance claim requires a showing that counsel's performance was both "deficient" and "prejudicial" to the petitioner's case.

Petitioner argues that pre-trial counsel was ineffective for failing to conduct a prompt investigation into mitigation early in the case. (Doc. 118 at 24-25.) Although neither his initial state post-conviction petition nor amended federal habeas petition detail what counsel should have done or what potentially mitigating evidence would have been uncovered, Petitioner asserts in his Rule 60(b) motion that a thorough investigation of Petitioner's childhood would have revealed a history of physical and sexual abuse by family members, as well as repeated sexual abuse by a house parent and a gang rape by peers when Petitioner was 15 and living at a group home for boys. He further asserts that a proper investigation would have revealed that he has a history of alcohol and drug abuse resulting from his traumatic upbringing, attempted suicide on numerous occasions, and suffers from post-traumatic stress disorder and impaired cognitive functioning.

Prior to trial and his waiver of counsel, Petitioner was evaluated by two mental health experts to determine competency at the time of the offense and competency to stand trial.

Dr. Daniel Wynkoop, a psychologist, detailed Petitioner's background and history, including his unstable early homelife, juvenile delinquency, early onset of drug and alcohol use, sexual abuse by a house parent at a boys' home, sexual molestation at a bus station, repeated hospitalizations for depression and suicidal tendencies, and difficulty maintaining employment and relationships. Psychological testing revealed adequate intellectual resources but some deficits in understanding cause and effect relationships, lack of social judgment, and some failure to understand the implications of behavior. Dr. Wynkoop diagnosed Petitioner as having a borderline personality disorder, with alcohol, amphetamine, and marijuana addictions. He observed nothing to suggest organic brain damage or a thought disorder. In Dr. Wynkoop's view, Petitioner's alcohol and drug use at the time of the crime likely impaired his ability to exercise judgment.

Dr. Eugene Almer, a psychiatrist, also described some of Petitioner's social history. He observed that Petitioner's mother was an alcoholic with a manic depressive illness, who was frequently hospitalized, and that Petitioner lived in various foster and group homes. Petitioner relayed that he began drinking at 14, smoking marijuana at 15, taking barbiturates and hallucinogenics at 16 and 17 respectively, and using amphetamines at 25. Dr. Almer reviewed "a great number of medical records" from hospitals in Wyoming and Arizona, including voluminous records from the Kingman Regional Hospital that are "replete with psychological reports, psychiatric evaluations and numerous treatment records" describing "various types of alcohol and drug abuse and personality disorder problems in addition to the diagnosis of depression or dysthymic disorder." Dr. Almer also reviewed a September 1987 investigative report that included a taped interview of Petitioner's mother and stepfather, who described Petitioner's life history, psychiatric problems, acting-out behavior, and various stays at institutions as a teenager. In addition, Dr. Almer noted that a CT scan from 1982 was normal. With regard to Petitioner's mental state at the time of the offense, Dr. Almer concluded that Petitioner probably was under the heavy influence of alcohol and drugs, which seriously impaired his judgment and produced more impulsive behavior.

From these evaluations, it is evident that pre-trial counsel obtained a substantial

number of records and background information concerning Petitioner. He also enlisted an investigator to interview, at minimum, Petitioner's mother and stepfather. Whether counsel would have pursued additional mitigating evidence had he remained on the case cannot be known. Consequently, the Court concludes that Petitioner cannot establish deficient performance. However, even assuming pre-trial counsel acted deficiently, Petitioner "fails to meet the *Martinez* test of substantiality as to prejudice." *Lopez*, 678 F.3d at 1138; *see also Leavitt*, 2012 WL 2086358, at *1 (finding no substantial ineffectiveness claims where record demonstrated no prejudice from alleged ineffectiveness).

Petitioner's first prejudice argument relies on a declaration from the prosecutor stating that he would not have sought the death penalty if he had known of Petitioner's abusive childhood and mental problems. However, in addressing this "newly discovered" evidence during the third PCR proceeding, the state court expressly rejected the argument as the "ultimate in speculation . . . based on the assertion of a prosecutor 23 years after the fact that he would have made a different charging decision." *State v. Cook*, No. CR-9358, at 3 (Maricopa Co. Sup. Ct. Jan. 11, 2011). The court further explained:

> To the extent that Mr. Larsen's opinion is relevant, the question is not what the Eric Larsen of today, having practiced criminal defense for at least the last 15 years, would do in a case involving identical facts if he were somehow to be appointed as a special prosecutor in a potential capital case. The question is what the prosecutor Eric Larsen would have done back in 1987 and 1988 without the benefit of the experience of criminal defense work, including defense of capital cases, to broaden his horizons and perspectives.
>
> The Court would like to avoid getting into a discussion of personalities in this Order and recognizes that a determination of credibility based solely upon affidavits is improper, unless perhaps an affidavit is inherently incredible on its face. The Court recalls, however, that Mr. Larsen was an aggressive prosecutor and that there were times when he and the Court clashed as to how the Court handled this case. The Court also recalls an unrelated case prosecuted around this same time by Mr. Larsen in which a defendant claimed that his sentence should be mitigated by a diagnosis of post-traumatic stress disorder. The Court recalls that Mr. Larsen, who had served in the military, indicated that many military personnel, presumably including himself, did not necessarily believe in the viability of post-traumatic stress disorder as a psychiatric diagnosis and that it should not be treated as a relevant consideration in sentencing.
>
> The Court acknowledges that it is 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. The Court is engaging in this analysis mainly to point out the problems inherent in trying to determine how a prosecutor would have exercised his discretion 23 years ago with the added knowledge of a diagnosis of post-traumatic stress disorder but without the added experience and perspective he undoubtedly gained in the ensuing years.
>
> The Court is also aware that in 1987 and 1988, long before the *Ring* decision changed the landscape of capital sentencing, the Mohave County Attorney's Office sought the death penalty on a fairly regular basis. This was a case involving the torture, mutilation and eventually killing of 2 completely innocent victims who had the misfortune of working with and knowing the Defendant and the co-defendant in this case. It is unfathomable to the Court that the Mohave County Attorney's Office during the time that this case was pending would not have sought the death penalty even for a defendant who was known to have been diagnosed with post-traumatic stress disorder.
>
> The Court finds that the affidavit from the former prosecutor of this case is speculation and conjecture.

Id. at 4-5.

This Court concurs in the conclusion of the state court that Petitioner cannot establish prejudice from pre-trial counsel's alleged failure to conduct a timely mitigation investigation by claiming more than 20 years after trial that the prosecutor would not have sought the death penalty. The prosecutor was aware prior to trial of Petitioner's mental difficulties, alcohol and substance abuse problems, and history of attempted suicides. He was also well versed in the facts of these gruesome murders. As noted by the state court, it is pure speculation to say what probably would have occurred had the prosecutor been provided additional information about Petitioner's difficult childhood and newly-diagnosed post-traumatic stress disorder.

Petitioner also argues that development of a mitigation case would have ensured that such information was available to and considered by the sentencing judge. Even though Petitioner chose not to argue for leniency or present mitigation during the sentencing hearing, in his view there is a reasonable probability the mental health experts who evaluated him before trial would have determined that he suffered from post-traumatic stress disorder if they had known more about his background and, consequently, the trial court would not have sentenced him to death. This argument is also unpersuasive because, like the prosecutor's decision to seek the death penalty, it rests on speculation about the experts and assumes any

additional evidence developed by pre-trial counsel would have been available to the sentencing judge despite Petitioner's decision not to make a mitigation presentation. *See, e.g.*, *Schriro v. Landrigan*, 550 U.S. 465, 476 (2007) (finding no prejudice under *Strickland* where the defendant would have refused to allow counsel to present mitigation regardless of what information counsel might have uncovered during a more thorough investigation).

Moreover, the trial judge who actually sentenced Petitioner has considered the newly-developed mitigation evidence and concluded there is no reasonable probability the sentencing outcome would have been different:

> This is not a case where the Court has to speculate about whether new evidence might have caused a jury to reach a not guilty verdict had they known of such evidence. This is not a case where the Court has to speculate about whether new evidence might have caused a jury to not recommend a death sentence had they known of such evidence. Only the Court knows for sure what it would have done, and the only speculation involved is in the process of remembering the judicial officer that it was 22 years ago.
>
> The Court certainly recognizes the problems inherent in this analysis. Counsel may have a legitimate concern that the Court can say whatever it wants in an order, without testifying under oath, being cross-examined or subjected to impeachment. The fact remains that this Court has had to make similar decisions in countless Rule 32 proceedings in which claims were made that different circumstances, usually involving more effective representation, would have resulted in different sentences being imposed. The fact that this is a death penalty case does not change the process, it just heightens the significance of the process. The Court determines unequivocally that if it had known in 1988 that the Defendant had been diagnosed with post-traumatic stress disorder at the time of the murders it still would have imposed the death penalty.
>
> . . . .
>
> The Court concludes for all the above reasons that the subsequent diagnosis of post-traumatic stress disorder simply gave a name to significant mental health issues that were already known to the Court at the time of sentencing. Knowing that name and knowing the symptomology of that condition would not have changed the sentencing decision by the Court. The recent diagnosis is not material under Rule 32.1(e) because it would not have probably resulted in a different sentence being imposed by this Court.

State v. Cook, No. CR-9358, at 6-7 (Maricopa Co. Sup. Ct. Jan. 11, 2011).

Petitioner cites caselaw demonstrating that an ineffectiveness claim may be established even where a defendant takes over his own representation. However, the claimed deficiency still must satisfy both the performance and prejudice prongs of *Strickland*. As just

discussed, Petitioner cannot make that showing here. Accordingly, even if the *Martinez* exception applied, Petitioner has not demonstrated that post-conviction counsel was ineffective for failing to raise a substantial sentencing ineffectiveness claim.

CERTIFICATE OF APPEALABILITY

To the extent a certificate of appealability is needed for an appeal from this Order, *see United States v. Washington*, 653 F.3d 1057, 1065 n.8 (9th Cir. 2011) (noting open question whether COA required to appeal denial of legitimate Rule 60(b) motion), *cert. denied*, 132 S. Ct. 1609 (2012), the Court finds that reasonable jurists could debate its denial of Petitioner's Rule 60(b)(6) motion. *See* 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, the Court grants a certificate of appealability on this issue.

Based on the foregoing,

IT IS ORDERED that Petitioner's Motion for Relief from Judgment Pursuant to Rule 60(b)(6) (Doc. 118) is **DENIED**.

IT IS FURTHER ORDERED that Petitioner's Motion for Stay of Execution (Doc. 121) is **DENIED**.

DATED this 6th day of July, 2012.

Robert C. Broomfield
Senior United States District Judge

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE STEVEN F. CONN
DIVISION 3
DATE: JAN. 27, 2011

SC*
VIRLYNN TINNELL, CLERK

COURT NOTICE/ORDER/RULING

STATE OF ARIZONA,
Plaintiff,

vs.

DANIEL WAYNE COOK,
Defendant.

No. CR-9358

The Court has reviewed the Defendant's Third Petition for Post-Conviction Relief filed on November 23, 2010, the State's Response and the Defendant's Reply. The Court has reviewed the exhibits attached to the Defendant's Petition. The Defendant asserts that he is entitled to post-conviction relief because of newly discovered evidence which probably would have resulted in him not receiving the death penalty. The Defendant is not challenging his underlying conviction. That newly discovered evidence is his recent diagnosis with post-traumatic stress disorder which existed at the time of the crimes for which he was sentenced to death in this case. The Court assumes the validity of that diagnosis for purposes of this Order. The Defendant asserts that this evidence would have changed the sentence in 2 different respects. First, that the State would not have sought the death penalty. Second, that the Court would not have imposed the death penalty.

The State argues that the Defendant is precluded from the relief being sought and that the Petition should be summarily denied. Rule 32.1(e) provides that a defendant may seek post-conviction relief if newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Rule 32.2(a) provides that a defendant shall be precluded from

relief based upon any ground finally adjudicated on the merits on appeal or in any previous collateral proceeding or that has been waived at trial, on appeal or in any collateral proceeding. The grounds for preclusion are relevant because the Defendant in this case, following his jury trial and sentencing, has had a direct appeal and filed 2 previous petitions for post-conviction relief, in the latest of which he was represented by the same attorney representing him on the current proceeding. However, Rule 32.2(b) provides that Rule 32.2(a) does not apply to a claim for relief based on Rule 32.1(e), as is the claim in this case.

This does not mean that a claim for post-conviction relief based on newly discovered evidence can be made at any time without limitation. Rule 32.2(b) goes on to provide that when a claim of newly discovered evidence is to be raised in a successive or untimely post-conviction relief proceedings, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed. This case involves a petition, not a notice, which clearly sets forth the specific exception. The Court would still have the authority to summarily deny relief upon a determination that there are not meritorious reasons shown why the claim was not stated previously.

There are other procedural components to a claim of newly discovered evidence that invoke preclusion consideration. In order to show that newly discovered facts exist, a defendant must show that he exercised due diligence in securing the newly discovered facts. This means that there must be not only due diligence in discovering the facts that existed at, in this case, the time of sentencing but were unknown to the defendant but also due diligence in bringing them to the attention of the court. Unlike preclusion, which may require a simple review of the procedural history of the case, the issue of due diligence is more fact intensive. This case, of course, involves a claim of newly

discovered evidence that is being made more than 22 years after the relevant time in question, although the Court is aware of no bright line rule suggesting that there is some time frame beyond which one is presumed to no longer be acting with due diligence.

To justify relief under Rule 32.1(e) the facts must not be merely newly discovered but they must be material, meaning that they probably would have changed the sentence. The Defendant first asserts that his newly discovered diagnosis of post-traumatic stress disorder, if known to the State back in 1987, would have caused them to not seek the death penalty. This assertion is supported by an affidavit from the prosecutor in this case, Eric Larsen, indicating that he would not have sought the death penalty for the Defendant had he known the information contained in the exhibits attached to the most recent Petition.

The Court queries initially whether the exercise of prosecutorial discretion in deciding what charges to file and sentence to seek is a proper subject for inquiry under Rule 32.1(e). It seems that this form of relief is intended to address the discovery of facts relating to a case or a defendant's background which, if presented to the trier of fact or the sentencing entity, would have resulted in a different verdict or sentence. The Court acknowledges that it can identify no language in Rule 32.1(e) that would preclude this sort of claim, but it seems to the Court that this is not the scenario contemplated as a basis for relief under the rule. It strikes the Court as the ultimate in speculation to suggest that a defendant should get post-conviction relief for newly discovered evidence based on the assertion of a prosecutor 23 years after the fact that he would have made a different charging decision.

This is more apparent upon considering the specific circumstances involved in this case. The Court should preface its comments by noting that it had a great deal of respect for Mr. Larsen when he was a prosecutor for the Mohave County Attorney's Office and that that respect was not diminished in any way by him becoming a criminal defense attorney, although the Court can think

of only one case in which it has dealt with him in the latter capacity. That case was, ironically, also a Rule 32 case in which he testified as an expert witness for the defense in support of a claim of ineffective assistance of counsel.

The Court makes this observation not to suggest that Mr. Larsen is some hired gun whose services are available wherever a Rule 32 needs to be saved. To the extent that Mr. Larsen's opinion is relevant, the question is not what the Eric Larsen of today, having practiced criminal defense for at least the last 15 years, would do in a case involving identical facts if he were somehow to be appointed as a special prosecutor in a potential capital case. The question is what the prosecutor Eric Larsen would have done back in 1987 and 1988 without the benefit of the experience of criminal defense work, including defense of capital cases, to broaden his horizons and perspectives.

The Court would like to avoid getting into a discussion of personalities in this Order and recognizes that a determination of credibility based solely upon affidavits is improper, unless perhaps an affidavit is inherently incredible on its face. The Court recalls, however, that Mr. Larsen was an aggressive prosecutor and that there were times when he and the Court clashed as to how the Court handled this case. The Court also recalls an unrelated case prosecuted around this same time by Mr. Larsen in which a defendant claimed that his sentence should be mitigated by a diagnosis of post-traumatic stress disorder. The Court recalls that Mr. Larsen, who had served in the military, indicated that many military personnel, presumably including himself, did not necessarily believe in the viability of post-traumatic stress disorder as a psychiatric diagnosis and that it should not be treated as a relevant consideration in sentencing.

The Court acknowledges that it is 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. The Court is engaging in this analysis mainly to point out the problems inherent in trying to determine how a prosecutor would have exercised his discretion

23 years ago with the added knowledge of a diagnosis of post-traumatic stress disorder but without the added experience and perspective he undoubtedly gained in the ensuing years.

The Court is also aware that in 1987 and 1988, long before the Ring decision changed the landscape of capital sentencing, the Mohave County Attorney's Office sought the death penalty on a fairly regular basis. This was a case involving the torture, mutilation and eventually killing of 2 completely innocent victims who had the misfortune of working with and knowing the Defendant and the co-defendant in this case. It is unfathomable to the Court that the Mohave County Attorney's Office during the time that this case was pending would not have sought the death penalty even for a defendant who was known to have been diagnosed with post-traumatic stress disorder.

The Court finds that the affidavit from the former prosecutor of this case is speculation and conjecture. The Court determines that a claim that a different charging decision or sentencing request would have been made is not the difference in the verdict or sentence contemplated by Rule 32.1(e). The Court determines that the Defendant is not entitled to relief for newly discovered evidence based on the affidavit of Mr. Larsen.

The second basis for relief is that the Defendant would not have received the death penalty if his diagnosis with post-traumatic stress disorder had been known at the time of sentencing. Again, it has to be emphasized that the issue is what would have happened in 1988. The question is not what a post-Ring jury would do today at a significantly different procedure where the Defendant was presented by an attorney at a 3-part trial where all significant decisions would be made by the jury. The question is not even what this Court, whose thoughts about the application and efficacy of the death penalty have evolved considerably over the years, would do today if granted a Ring exemption and allowed to make a decision whether the Defendant should be sentenced to death. The question is whether this Court in 1988 would have made any different decision under the judicial sentencing

scheme in effect at the time had it known of the diagnosis of post-traumatic stress disorder in addition to everything else that it knew regarding the Defendant's mental health history.

This is not a case where the Court has to speculate about whether new evidence might have caused a jury to reach a not guilty verdict had they known of such evidence. This is not a case where the Court has to speculate about whether new evidence might have caused a jury to not recommend a death sentence had they known of such evidence. Only the Court knows for sure what it would have done, and the only speculation involved is in the process of remembering the judicial officer that it was 22 years ago.

The Court certainly recognizes the problems inherent in this analysis. Counsel may have a legitimate concern that the Court can say whatever it wants in an Order, without testifying under oath, being cross-examined or subjected to impeachment. The fact remains that this Court has had to make similar decisions in countless Rule 32 proceedings in which claims were made that different circumstances, usually involving more effective representation, would have resulted in different sentences being imposed. The fact that this is a death penalty case does not change the process, it just heightens the significance of the process. The Court determines unequivocally that if it had known in 1988 that the Defendant had been diagnosed with post-traumatic stress disorder at the time of the murders it still would have imposed the death penalty.

The State feels compelled to discuss the Bilke decision cited by both counsel, because it may suggest that an evidentiary hearing would have to be set under these circumstances. The Court does not believe that Bilke stands for the proposition that every post-sentencing diagnosis of post-traumatic stress disorder requires an evidentiary hearing or resentencing. As pointed out in Bilke, post-traumatic stress disorder was not even a recognized mental condition at the time the defendant in that case was sentenced. The diagnosis was not only new to that defendant but it was new to the medical profession. The diagnosis was an accepted one by the time of the sentencing in this case

and the cases cited in Bilke had been reported prior to the sentencing of the Defendant. The defendant in Bilke raised this issue in what may have been his first request for post-conviction relief 13 years after being sentenced rather than in his third such request 22 years after being sentenced, although that fact is probably of little relevance. More critical to the Court's consideration is that it cannot be ascertained from the Bilke decision whether the trial judge engaged in any analysis similar to what the Court is attempting to do in this Order. The decision lays out in specific detail the documentation that was presented to the trial court but indicates only that the trial court "denied the PCR without an evidentiary hearing." It is unknown to this Court, and cannot be determined from the appellate opinion, whether the Rule 32 judge was the same as the trial judge and, if so, whether his denial of post-conviction relief was done summarily without further discussion or whether it was based on the same judge in both phases of the proceedings having decided that the recent diagnosis would not have changed the decision that he had made years earlier. The Court determines that the Bilke decision does not by itself mandate a Rule 32 evidentiary hearing in this case.

The Court concludes for all the above reasons that the subsequent diagnosis of post-traumatic stress disorder simply gave a name to significant mental health issues that were already known to the Court at the time of sentencing. Knowing that name and knowing the symptomology of that condition would not have changed the sentencing decision made by the Court. The recent diagnosis is not material under Rule 32.1(e) because it would not have probably resulted in a different sentence being imposed by this Court.

Despite the determination that the diagnosis of post-traumatic stress disorder is not a material fact that has been newly discovered, the Court still addresses the issue of due diligence. Doing so is not meant to undermine that finding but to make as full a record as possible on the basis for the Court's ultimate ruling. Although a claim of newly discovered evidence is not subject to preclusion in the strictest sense, Rule 32.1(e)(2) requires due diligence and Rule 32.2(b) requires an explanation

for not raising a claim in a previous petition. In assessing due diligence the Defendant is held accountable for decisions made on his behalf by previous attorneys representing him and made by himself while representing himself.

The procedural history of the phases of this case at which the Defendant's mental health was discussed and assessed have been noted in the pleadings, can be determined from the record and will not be reiterated at this time. The concern the Court has with regard to the issue of due diligence is that the Defendant has had 2 previous Rule 32 proceedings in which this issue could have been raised. Certainly the first proceeding, initiated within a relatively short time after the trial proceedings and direct appeal, would have been the logical time to address this issue. Although the Defendant had obviously not yet then been diagnosed with post-traumatic stress disorder, that proceeding would have at least provided an avenue for requesting a further mental health examination of the Defendant, a request which could have been made by an attorney better able than the Defendant was during the trial proceedings to articulate the reasons for such an examination. The Court is aware that the Defendant has relatively recently suggested that he was denied effective assistance of counsel in that first Rule 32 proceeding, a claim which he did not formally make in the state proceedings for more than 10 years, but the Court has determined in ruling on his second petition that such a claim would not be one he could raise.

To a lesser extent the Court is also concerned that this issue was not developed in the second Rule 32 proceeding in which the Defendant was represented by the same attorney who represents him now. The Court concedes that this is a far less compelling argument as it relates to the issue of due diligence. The issue of the Defendant's mental health was raised in the second Rule 32 proceeding, so perhaps an attempt could have been made at that time to obtain further information regarding his mental health. The Court concedes that this observation may seem disingenuous since it actually ruled that this claim, that the Court improperly allowed the Defendant to represent himself

at trial and sentencing while he was mentally ill, was precluded. It is unlikely that the Court would have granted funds for an examination of the Defendant under those circumstances even if it had been requested.

The Court's main concern is that the diagnosis of post-traumatic stress disorder has been raised for the first time 23 years after the crimes for which he was sentenced and on the eve of the Arizona Supreme Court being asked to issue an execution warrant. Although the Court finds that the Defendant's present counsel has shown due diligence in raising this issue once the diagnosis was made, the Court determines that the Defendant and his attorneys at various stages of the proceedings in this case have not shown due diligence in securing that diagnosis. Even if the Court were to find that the Defendant's diagnosis of post-traumatic stress disorder were a material fact which probably would have changed the sentence imposed, which it has not, the Court would find that the Defendant did not exercise due diligence in securing that information and would not be entitled to relief on a claim of newly discovered evidence.

The Court's focus in this Order thusfar has been the claim of newly discovered evidence. This is consistent with the pleadings that have been filed. Although little attention is devoted to any other issue, the Defendant has also claimed that he is entitled to relief under Rule 32.1(h). This would require the Defendant to show by clear and convincing evidence that the recent diagnosis of post-traumatic stress disorder would be sufficient to establish that the court would not have imposed the death penalty. Although under the circumstances of this case it is hard to separate this claim from the claim of newly discovered evidence, the claim of "actual innocence" is different in that it lacks the component of due diligence. However, the Court's determination that it still would have imposed the death penalty had it known that the Defendant had post-traumatic stress disorder in effect constitutes a ruling on the claim under Rule 32.1(h).

IT IS ORDERED denying the Defendant's Third Petition for Post-Conviction Relief.

cc:

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APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment provides: "[N]or shall any state deprive any peson of life, liberty, or property, without due process of Law."