

No. 12-5585

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

REPLY ON CERTIORARI

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

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Counsel was Appointed by the
United States District Court for
the District of Arizona under the
Criminal Justice Act*

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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ARGUMENT

The State's response does not dispute Petitioner's explanation of what standard the Ninth Circuit applied to decide whether a "substantial" claim is presented for purposes of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). It does not dispute that the Ninth Circuit overlooked entirely the discussion in *Martinez* about the standard for the issuance of certificates of appealability as a gauge of what constitutes a substantial claim. It does not disagree with Petitioner's explanation of why the standard for determining substantiality is of particular importance to this case. It does not contest the fact that deciding substantiality by certiorari review of this case would establish guidance and clarity about what constitutes "substantiality," which would have universal application to all subsequent *Martinez* cases. And it does not dispute Petitioner's position that for this Court to decide that issue now would be in the interests of justice by streamlining and expediting the correct and final resolution of *Martinez* cases.

In fact, the State does not deal in any respect with any of the substance of the Petition for certiorari – either factual or legal. This reply therefore needs but to correct two procedural points about which the Response is ambiguous and incorrect.

1. Although a post-conviction hearing occurred about trial counsel ineffectiveness, the hearing did not involve, to the slightest degree, a claim of ineffectiveness for a mitigation case.

In its response the State observes, pp. 2, 3, that the state post-conviction proceeding “raise[d] a claim that counsel was ineffective prior to Cook’s decision to represent himself. The state trial court conducted an evidentiary hearing in 1994, after which it denied Cook’s claim as meritless.” If that statement was intended to imply that an evidentiary hearing covered the appointed lawyer’s failure to properly investigate and prepare a mitigation case, it is wrong.

The *only* step taken by post-conviction counsel that related to a mitigation case was counsel’s inclusion in the petition for post-conviction relief of a statement that trial counsel was ineffective in “not preparing a mitigation plan.” IR 179. Counsel thereafter utterly failed to undertake any action remotely approaching an effective performance on this issue. His failings included, but were not limited to:

- Failure to plead in any useful detail appointed counsel’s acts and omissions comprising ineffectiveness for a mitigation case;
- Failure to undertake any investigation of the mitigation case that had been available, in order to prove the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and failure to present any such evidence;
- Failure to adduce any evidence, even from the ineffective appointed counsel, who testified at the hearing about other issues, on the topic of developing a mitigation case;
- Failure to adduce any evidence from Petitioner, who also testified at the hearing about other issues, on the topic of a mitigation case;

- Failure also to adduce any evidence from Petitioner about why he made the two cryptic statements which the State now contends conclusively establish that Petitioner voluntarily and intentionally waived any mitigation case;
- Failure to present any evidence about Petitioner's mental health status and state of mind after the verdict and up to the sentencing hearing, which would have been quite relevant to whether Petitioner voluntarily and intentionally waived the presentation of a mitigation case; and whether in fact he had readily in mind and appreciated the significance for mitigation purposes of his life, social and mental health history.

The Ninth Circuit did not rest its holding upon the fact that the post-conviction court held a hearing upon other issues. It did not rest its holding upon the ineffective performance of post-conviction counsel. Its conclusion arises from its view of the underlying ineffectiveness of trial-counsel claim.

2. The Ninth Circuit did not discuss or base its holding upon whether Petitioner had shown "extraordinary circumstances" permitting the use of Rule 60(b)(6) to determine whether he had a "substantial" claim.

In its Response, the State mis-describes what the Ninth Circuit did and did not hold. It asserts that the Ninth Circuit concluded that Petitioner could not establish "extraordinary circumstances" under *Gonzalez v. Crosby*, 545 U.S. 535 (2005), to allow the use of Fed. R. Civ. P. 60(b)(6) in order to present a *Martinez* claim. Response at 4. That is incorrect. The Ninth Circuit instead correctly observed that it could pass the issue of "extraordinary circumstances" and decide the merits of a motion. App. A at 21. It did so, holding that "Martinez affords [Petitioner] no relief." *Id.*

Thus, this case clearly presents the issue of what is a “substantial” claim under *Martinez*. It therefore is a case in which this Court’s decision of that issue will be universally applicable to any *Martinez* case. For that reason, it is substantial and deserving of certiorari review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.



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