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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Edward Harold Schad,

) No. CV-97-02577-PHX-ROS

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Petitioner,

) DEATH PENALTY CASE

13

v.

) **ORDER DISMISSING MOTION FOR
RELIEF FROM JUDGMENT**

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Charles L. Ryan, et al.,

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Respondents.

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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. 145.) The motion is based on the Supreme Court’s decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that ineffective assistance of post-conviction counsel may serve as cause to excuse the procedural default of a claim alleging ineffective assistance of trial counsel. Petitioner argues that *Martinez* provides a proper ground for this Court to reopen these proceedings to consider anew the merits of his claim alleging ineffective assistance of counsel at sentencing (“Claim P’). Respondents oppose the motion. (Doc. 147.) The Court concludes that, because Petitioner’s Rule 60(b) motion is a challenge to the Court’s resolution of Claim P on the merits, it constitutes a second or successive petition that may not be considered by this Court absent authorization from the Court of Appeals for the Ninth Circuit.

BACKGROUND

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2 In 1979, a jury convicted Petitioner of first-degree murder for the 1978 strangling of
3 74-year-old Lorimer Grove, and the trial court sentenced him to death. Details of the crime
4 are set forth in the Arizona Supreme Court's first opinion upholding Petitioner's conviction
5 and sentence. *See State v. Schad*, 129 Ariz. 557, 561–62, 633 P.2d 366, 370–71 (1981).
6 Pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, Petitioner filed a petition
7 for post-conviction relief, which the trial court denied. Upon petition for review, however,
8 the Arizona Supreme Court reversed the conviction due to an error in jury instructions and
9 remanded for a new trial. *State v. Schad*, 142 Ariz. 619, 691 P.2d 710 (1984).

10 In 1985, a jury again convicted Petitioner, and the trial court again sentenced him to
11 death. On direct appeal, the Arizona Supreme Court affirmed. *State v. Schad*, 163 Ariz. 411,
12 423, 788 P.2d 1162, 1174 (1989). The United States Supreme Court granted certiorari but
13 ultimately affirmed.¹ *Schad v. Arizona*, 501 U.S. 624 (1991).

14 Petitioner sought post-conviction relief in the state trial court, which found many of
15 the claims procedurally precluded. The court denied post-conviction relief after reviewing
16 the merits of the remaining claims. The Arizona Supreme Court summarily denied a petition
17 for discretionary review.

18 Petitioner initiated these federal habeas proceedings in 1997 and filed an amended
19 petition for habeas corpus relief in 1998. The petition alleged ineffective assistance of
20 counsel at sentencing due to counsel's failure to (1) adequately investigate Petitioner's
21 criminal background and develop available mitigating evidence; (2) locate records and
22 interview persons familiar with Petitioner's background; (3) object to erroneous information
23 contained in the presentence report; and (4) present proportionality evidence at sentencing.

24
25 ¹ The Court granted certiorari to address two questions, both of which it
26 answered in the negative: “[W]hether a first-degree murder conviction under jury instructions
27 that did not require agreement on whether the defendant was guilty of premeditated murder
28 or felony murder is unconstitutional; and (2) whether the principle recognized in *Beck v.*
Alabama, 447 U.S. 625 (1980), entitles a defendant to instructions on all offenses that are
lesser than, and included within, a capital offense as charged.” *Schad*, 501 U.S. at 627.

1 (Doc. 27 at 84–85.) In their Answer, Respondents (who first labeled the sentencing
2 ineffectiveness allegations as “Claim P”) conceded that sub-parts (1)–(3) were properly
3 exhausted during the state post-conviction proceeding. (Doc. 29 at 25.) In May 2000, the
4 Court issued an order concerning the procedural status of Petitioner’s claims, finding many
5 to be procedurally barred or plainly meritless. (Doc. 59.) The Court ordered the parties to
6 brief the merits of the remaining claims, including sub-parts (1)–(3) of Claim P. (*Id.*)

7 Petitioner filed his merits brief in October 2000. Regarding Claim P, Petitioner
8 focused on counsel’s failure to investigate Petitioner’s miserable and abusive childhood,
9 arguing that counsel’s investigation was inadequate and that counsel failed to present
10 “persuasive, corroborating evidence, including records and witnesses, of the nature and
11 extent of [the abuse], as well as its longstanding effects on him.” (Doc. 82 at 81.) In support,
12 Petitioner proffered numerous materials not presented to the state court, including an
13 affidavit from his mother, an affidavit from an investigator recounting a conversation with
14 Petitioner’s sister, employment records of Petitioner’s mother, and Veterans’ Administration
15 records of Petitioner’s father and younger brother. (Doc. 84.) In opposition, Respondents
16 disputed that counsel’s performance was either deficient or prejudicial. (Doc. 91 at 63.)
17 Citing 28 U.S.C. § 2254(e)(2), Respondents further argued that Petitioner was precluded
18 from getting a federal evidentiary hearing due to his failure to exercise due diligence in state
19 court to develop the facts supporting Claim P. (*Id.* at 65.) In his reply, Petitioner appended
20 an affidavit from Leslie Lebowitz, Ph.D., which focused on the mental health of Petitioner’s
21 parents.

22 More than three years after the conclusion of merits briefing, Petitioner moved to
23 expand the record to include a 92-page affidavit from Charles Stanislaw, Ph.D. (Doc. 115.)
24 Dr. Stanislaw opined concerning the mental health of Petitioner’s parents and the effect of
25 their condition, and of other social and economic factors, on Petitioner’s psychological
26 development. The affidavit also chronicled Petitioner’s education, military service, and
27 criminal activities, and theorized about the cause of Petitioner’s erratic and self-defeating
28 behaviors. Dr. Stanislaw concluded that Petitioner “exhibited many symptoms indicative of

1 a severe and chronic illness. His history of abuse, neglect, and abandonment cannot be ruled
2 out as playing a significant factor in [his] psychiatric and behavioral functioning as an adult.”
3 (*Id.* at 90.)

4 Respondents filed an opposition to the expansion request, again arguing that
5 Petitioner’s lack of diligence and failure to meet the narrow exceptions of § 2254(e)(2)
6 precluded a federal evidentiary hearing. (Doc. 116.) Respondents also argued *inter alia* that
7 expansion of the record was unnecessary because the Court’s determination of whether the
8 state court had reasonably applied *Strickland* in denying Claim P was limited to consideration
9 of the record that was before the state court when it ruled.

10 In September 2006, the Court entered an order and memorandum of decision denying
11 habeas relief. (Doc. 121.) With regard to Claim P, the Court concluded that Petitioner had
12 failed to show that the state court’s denial of the claim was based on an unreasonable
13 application of *Strickland*. (*Id.* at 61–67.) The Court further found, with respect to
14 Petitioner’s attempt to introduce factual information that was not before the state court when
15 it ruled, that Petitioner lacked diligence in developing these facts and therefore was not
16 entitled to an evidentiary hearing or expansion of the record. (*Id.* at 84–86.) Nonetheless,
17 the Court determined that, even considering the new materials, Claim P lacked merit. (*Id.*
18 at 64–67.)

19 On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded for an
20 evidentiary hearing to determine whether Petitioner had diligently sought to develop the
21 factual record in state court. *Schad v. Ryan*, 606 F.3d 1022 (9th Cir. 2010). On petition for
22 certiorari from Respondents, the Supreme Court vacated the Ninth Circuit’s opinion and
23 remanded for further proceedings in light of *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398–99
24 (2011), in which the Court held that federal habeas review under 28 U.S.C. § 2254(d)(1) “is
25 limited to the record that was before the state court that adjudicated the claim on the merits.”
26 *Ryan v. Schad*, 131 S. Ct. 2092 (2011). On remand, the Ninth Circuit affirmed this Court’s
27 denial of habeas relief. *Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011) (per curiam). The Ninth
28 Circuit subsequently denied a motion for rehearing and rehearing en banc in February 2012.

1 On July 10, 2012, Petitioner moved the Ninth Circuit to vacate its judgment and
2 remand to this Court for additional proceedings in light of *Martinez*, which had been decided
3 in March 2012. On July 27, 2012, the Ninth Circuit denied the motion, and Petitioner filed
4 a petition for writ of certiorari. The Supreme Court denied the petition on October 9, 2012,
5 and denied a petition for rehearing on January 7, 2013.

6 On the same date as the denial of rehearing, Petitioner filed an emergency motion at
7 the Ninth Circuit requesting a continued stay of the mandate in light of an order granting en
8 banc review issued just three days earlier in another capital case from Arizona. Petitioner
9 argued that the en banc case would be addressing the interaction between *Pinholster* and
10 *Martinez*. The Ninth Circuit denied the motion on February 1, 2013. However, instead of
11 issuing the mandate affirming this Court's denial of habeas relief, the appellate court *sua*
12 *sponte* construed the emergency stay motion as a motion for reconsideration of the denial of
13 Petitioner's July 2012 motion to vacate judgment in light of *Martinez*. The Ninth Circuit
14 subsequently granted reconsideration, remanded to this Court for application of *Martinez* to
15 Petitioner's sentencing ineffectiveness claim, and stayed an execution warrant for March 6,
16 2013, which the Arizona Supreme Court had issued following the denial of certiorari. *Schad*
17 *v. Ryan*, No. 07-99005, 2013 WL 791610 (9th Cir. Feb. 26, 2013.)

18 On March 4, 2013, the Ninth Circuit denied Respondents' petition for rehearing and
19 rehearing en banc, with eight judges dissenting. *Schad v. Ryan*, 709 F.3d 855 (9th Cir.
20 2013). On that same date, Respondents moved in the Supreme Court for an order vacating
21 the stay of execution and filed a petition for certiorari. The Court declined to vacate the stay
22 of execution but on June 24, 2013, granted certiorari and reversed the Ninth Circuit with
23 instructions to issue its mandate affirming the denial of habeas relief. *Ryan v. Schad*, 133 S.
24 Ct. 2548 (2013) (per curiam). The Court concluded that the Ninth Circuit abused its
25 discretion in choosing not to issue the mandate based on an argument it had considered and
26 rejected in the July 2012 initial motion to vacate judgment. In doing so, the Court found "no
27 indication that there were any extraordinary circumstances here that called for the [Ninth
28 Circuit] to revisit an argument *sua sponte* that it had already explicitly rejected." *Id.* at 2552.

1 On June 25, 2013, Respondents moved the Arizona Supreme Court to issue a new
2 warrant of execution. On July 19, 2013, Petitioner filed a petition for rehearing with the
3 United States Supreme Court, which was denied five weeks later. *Ryan v. Schad*, No. 12-
4 1084, 2013 WL 4606329 (U.S. Aug. 30, 2013). Three days prior to that ruling, Petitioner
5 filed the instant motion to vacate judgment based on *Martinez*, and this Court set a briefing
6 schedule. (Docs. 144, 145.) On September 3 and 4 respectively, the Arizona Supreme Court
7 set Petitioner's execution for October 9, 2013, and the Ninth Circuit issued its mandate
8 affirming this Court's denial of habeas relief. Respondents filed an opposition to the instant
9 motion to vacate judgment on September 6, and Petitioner filed a reply on September 13.
10 (Docs. 147, 150.)

11 DISCUSSION

12 Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from
13 judgment on several grounds, including the catch-all category "any other reason justifying
14 relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). A motion under
15 subsection (b)(6) must be brought "within a reasonable time," Fed. R. Civ. P. 60(c)(1), and
16 requires a showing of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535
17 (2005).

18 For habeas petitioners, a Rule 60(b) motion may not be used to avoid the requirements
19 for second or successive petitions set forth in 28 U.S.C. § 2244(b). *Gonzalez*, 545 U.S. at
20 530–31. This statute has three relevant provisions: First, § 2244(b)(1) requires dismissal of
21 any claim that has already been adjudicated in a previous habeas petition. Second,
22 § 2244(b)(2) requires dismissal of any claim not previously adjudicated unless the claim
23 relies on either a new and retroactive rule of constitutional law or on new facts demonstrating
24 actual innocence of the underlying offense. Third, § 2244(b)(3) requires prior authorization
25 from the court of appeals before a district court may entertain a second or successive petition
26 under § 2244(b)(2). Absent such authorization, a district court lacks jurisdiction to consider
27 the merits of a second or successive petition. *United States v. Washington*, 653 F.3d 1057,
28 1065 (9th Cir. 2011); *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001).

1 In *Gonzalez*, the Court held that a Rule 60(b) motion constitutes a second or
2 successive habeas petition when it advances a new ground for relief or “attacks the federal
3 court’s previous resolution of a claim *on the merits*.” 545 U.S. at 532. “On the merits” refers
4 “to a determination that there exist or do not exist grounds entitling a petitioner to habeas
5 corpus relief under 28 U.S.C. §§ 2254(a) and (d).” *Id.* at 532 n.4. The Court further
6 explained that a legitimate Rule 60(b) motion “attacks, not the substance of the federal
7 court’s resolution of a claim on the merits, but some defect in the integrity of the federal
8 habeas proceedings.” *Id.* at 532; *accord United States v. Buenrostro*, 638 F.3d 720, 722 (9th
9 Cir. 2011) (observing that a defect in the integrity of a habeas proceeding requires a showing
10 that something happened during that proceeding “that rendered its outcome suspect”). For
11 example, a Rule 60(b) motion does *not* constitute a second or successive petition when the
12 petitioner “merely asserts that a previous ruling which precluded a merits determination was
13 in error—for example, a denial for such reasons as failure to exhaust, procedural default, or
14 statute-of-limitations bar”—or contends that the habeas proceeding was flawed due to fraud
15 on the court. *Id.* at 532 nn.4–5; *see, e.g., Butz v. Mendoza-Powers*, 474 F.3d 1193 (9th Cir.
16 2007) (finding a Rule 60(b) motion not to be the equivalent of a second or successive petition
17 where district court dismissed first petition for failure to pay filing fee or comply with court
18 orders and did not reach merits of claims). The Court reasoned that if “neither the motion
19 itself nor the federal judgment from which it seeks relief substantively addresses federal
20 grounds for setting aside the movant’s state conviction,” there is no basis for treating it like
21 a habeas application. *Gonzalez*, 545 U.S. at 533.

22 On the other hand, if a Rule 60(b) motion “presents a ‘claim,’ i.e., ‘an asserted federal
23 basis for relief from a . . . judgment of conviction,’ then it is, in substance, a new request for
24 relief on the merits and should be treated as a disguised” habeas application. *Washington*,
25 653 F.3d at 1063 (quoting *Gonzalez*, 545 U.S. at 530). Interpreting *Gonzalez*, the court in
26 *Washington* identified numerous examples of such “claims,” including:

27 a motion asserting that owing to “excusable neglect,” the movant’s habeas
28 petition had omitted a claim of constitutional error; a motion to present “newly
discovered evidence” in support of a claim previously denied; a contention that

1 a subsequent change in substantive law is a reason justifying relief from the
2 previous denial of a claim; a motion that seeks to add a new ground for relief;
3 a motion that attacks the federal court's previous resolution of a claim on the
4 merits; a motion that otherwise challenges the federal court's determination
that there exist or do not exist grounds entitling a petitioner to habeas corpus
relief; and finally, an attack based on the movant's own conduct, or his habeas
counsel's omissions."

5 *Id.* (internal quotations and citations omitted). If a Rule 60(b) motion includes such claims,
6 it is not a challenge "to the integrity of the proceedings, but in effect asks for a second chance
7 to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5.

8 In their briefs, the parties debate extensively the "law of the case" doctrine as it relates
9 to Petitioner's *Martinez* argument and the existence of extraordinary circumstances to justify
10 relief under Rule 60(b). However, because the requirements for second or successive
11 petitions apply to motions filed under Rule 60(b), the Court is required under *Gonzalez* to
12 first determine whether Petitioner's motion is a legitimate Rule 60(b) motion or is a
13 "disguised" second or successive habeas petition; that is, whether the motion goes to the
14 integrity of the habeas proceedings or is a new request for relief on the merits. If the motion
15 is the equivalent of a second or successive petition, the Court lacks jurisdiction to consider
16 it. *Washington*, 653 F.3d at 1065; *Cooper*, 274 F.3d at 1274. If the motion does not
17 constitute a second or successive petition, the Court must consider whether extraordinary
18 circumstances exist to grant relief from judgment. *See, e.g., Phelps v. Alameida*, 569 F.3d
19 1120, 1128 (9th Cir. 2009) (considering existence of extraordinary circumstances after
20 observing that Rule 60(b) motion challenging dismissal of petition on statute-of-limitations
21 grounds not the equivalent of a successive habeas petition).

22 Petitioner's motion does not identify a specific "defect" in the integrity of his habeas
23 proceeding or point to "something that happened during that proceeding that rendered its
24 outcome suspect." *Buenrostro*, 638 F.3d at 722. Rather, throughout his motion, Petitioner
25 repeatedly states that Claim P, alleging ineffective assistance of counsel at sentencing, is a
26 "new, unexhausted, procedurally defaulted claim" to which *Martinez* now provides cause to
27 excuse the procedural default. (Doc. 145 at 5.) Although he does not expressly contend that
28 this Court found Claim P procedurally defaulted, Petitioner nonetheless suggests that his

1 Rule 60(b) motion is legitimate because it challenges a procedural issue, not a substantive
2 ruling on the merits. (*Id.* at 29.) The record refutes this premise.

3 In their Answer, Respondents conceded that the relevant sub-parts of Claim P at issue
4 here were properly exhausted in state court and did not assert procedural default as a defense.
5 *See Trest v. Cain*, 522 U.S. 87, 89 (1997) (noting that procedural default is a defense that
6 must be raised and preserved); *see also Wood v. Milyard*, 132 S. Ct. 1826, 1833–34 (2012)
7 (observing that it would be “an abuse of discretion” for a court to override a State’s
8 deliberate waiver of a procedural defense). Consequently, the Court ordered supplemental
9 merits briefing on the claim and subsequently reviewed the claim on the merits.² At no point
10 did the Court consider whether Claim P was procedurally defaulted or whether Petitioner
11 could establish cause and prejudice to overcome such a default. *Contra Cook v. Ryan*, 688
12 F.3d 598, 608 (9th Cir.), *cert denied*, 133 S. Ct. 81 (2012) (finding no “second or successive
13 petition” bar to consideration of Rule 60(b) motion premised on *Martinez* where underlying
14 trial ineffectiveness claim was found procedurally barred by district court). Although the
15 Court determined that Petitioner’s lack of diligence precluded expansion of the record and
16 an evidentiary hearing to develop new facts in support of Claim P, this was not a procedural
17 determination that “precluded a merits determination.” *Gonzalez*, 545 U.S. at 532 n.4.

18 _____
19 ² In their opposition to Petitioner’s motion to expand the record to include the
20 declaration of Dr. Sanislow, Respondents argued that Petitioner had failed to exercise
21 diligence in developing the factual basis of Claim P in state court. (Doc. 116 at 4–9.) In the
22 concluding paragraph of this argument, Respondents also asserted that expanding the record
23 to include the new declaration “would place the claim in a significantly different evidentiary
24 posture than it was in before the state court, thereby violating the fair presentation
25 requirement.” (*Id.* at 9.) In reply, and contrary to his arguments in the instant motion,
26 Petitioner argued that the factual predicate of Claim P had been fairly presented in state court
27 and that Dr. Sanislow’s declaration did not “fundamentally alter” the claim, but only
28 supplemented it. (Doc. 119 at 5–6.) Petitioner also pointed out that Respondents elsewhere
in their opposition described Sanislow’s declaration as “cumulative” to what had been
presented in state court. (*Id.* at 6; *see* Doc. 116 at 10.) The Court ultimately denied the
motion without prejudice, noting that it would consider whether Petitioner diligently
attempted to develop the factual basis of Claim P when it considered the claim on the merits.
(Doc. 120.)

1 Rather, this finding under § 2254(e)(2) merely informed the scope of the record to be
2 reviewed in considering the state court’s adjudication of the claim’s merits under § 2254(d).
3 *But see Lopez v. Ryan*, 678 F.3d 1131, 1137 (9th Cir.), *cert. denied*, 133 S. Ct. 55 (2012)
4 (noting, for claims adjudicated in state court, tension between *Pinholster* limiting § 2254(d)
5 review to record before state court and suggested expansion of *Martinez* to excuse post-
6 conviction counsel’s failure under § 2254(e)(2) to fully develop factual basis of claim in state
7 court). Because this Court ultimately found that Claim P provided no basis for habeas relief
8 under § 2254(d), this was, in accord with *Gonzalez*, an “on the merits” ruling. Moreover, the
9 Court alternatively considered the same evidence now advanced by Petitioner in the instant
10 motion and nonetheless determined that Claim P lacked merit. (Doc. 121 at 64–66.)
11 Petitioner’s Rule 60(b) motion does not present a new claim; rather, he seeks “a second
12 chance to have the merits determined favorably.” *Gonzalez*, 545 U.S. at 532 n.5.

13 Petitioner rightly notes that the Ninth Circuit affirmed the denial of Claim P based
14 solely on the record that was before the state court, pursuant to the Supreme Court’s directive
15 in *Pinholster*, without considering the new evidence developed in these federal habeas
16 proceedings. From this, Petitioner suggests that this Court’s alternative consideration of the
17 new evidence is “dicta.” (Doc. 150 at 8.) Regardless, the Ninth Circuit’s ruling also was an
18 “on the merits” ruling. The Ninth Circuit affirmed this Court’s denial of relief under
19 § 2254(d) based on a finding that the state court’s adjudication of Claim P was not
20 objectively unreasonable. *Schad*, 671 F.3d at 721–22. This was plainly a merits
21 determination, not a procedural ruling precluding consideration of the merits.

22 The Court finds support for its conclusion in *United States v. Washington*. There, the
23 petitioner argued in a Rule 60(b) motion that the district judge mishandled his § 2255 habeas
24 application by, among other things, declining to conduct an evidentiary hearing. The Ninth
25 Circuit found that the petitioner had not alleged a defect in the integrity of the proceedings
26 but was, in essence, seeking reconsideration of the merits of his claims. 653 F.3d at 1064.
27 The same is true here. The instant Rule 60(b) motion does not allege any specific defect in
28 the integrity of the district court proceedings. Rather, it seeks to have this Court rescind its

1 original merits ruling on Claim P, *sua sponte* raise and find Claim P to be procedurally
2 defaulted, determine that post-conviction counsel's ineffectiveness provides cause and
3 prejudice to excuse that default, and then (assuming cause and prejudice is shown) reconsider
4 the merits of Claim P *de novo*, without the deference required by § 2254(d). At its core, the
5 motion attacks both this Court's and the Ninth Circuit's "determination that there exist or do
6 not exist grounds entitling a petitioner to habeas corpus relief." *Gonzalez*, 545 U.S. at 532
7 n.4. Thus, it raises a "claim" and must be treated as a second or successive petition pursuant
8 to *Gonzalez*.

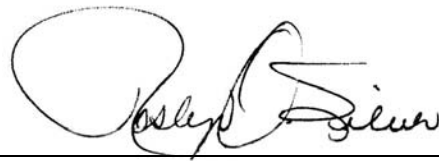
9 **CONCLUSION**

10 Petitioner's Rule 60(b) motion seeks to litigate a claim already adjudicated on the
11 merits by this Court. It is therefore a second or successive petition, and this Court lacks
12 jurisdiction to consider it absent authorization from the court of appeals pursuant to
13 § 2244(b)(3).

14 Accordingly,

15 **IT IS ORDERED** that Petitioner's Motion for Relief from Judgment Pursuant to Rule
16 60(b)(6) (**Doc. 145**) is dismissed as an unauthorized second or successive petition.

17 DATED this 18th day of September, 2013.

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22 Roslyn O. Silver
23 Senior United States District Judge
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