No. 13–16928

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT GLEN JONES, JR.,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV–97–02577–PHX–ROS

RESPONSE TO PETITION FOR REHEARING *EN BANC*

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I. INTRODUCTION/SUMMARY OF ARGUMENT

A three-judge panel of this Court affirmed the district court's denial of Petitioner/Appellant Robert Glen Jones' motion for relief from judgment under Federal Rule of Civil Procedure 60(b). (Dkt. # 19.) Jones timely filed the instant petition for rehearing en banc. (Dkt. # 21.) In his motion, Jones first contends that the panel erred by concluding that his Rule 60(b) motion constituted an unauthorized second or successive ("SOS") habeas petition. (*Id.*) He specifically argues that *Martinez v. Ryan*, __ U.S. __, 132 S.Ct. 1309 (2012), changed the analysis under Rule 60(b). But as the panel correctly held, *Martinez* was a limited ruling that had no effect on the Rule 60(b) analysis governed by *Gonzalez v. Crosby*, 545 U.S. 524 (2005). Second, Jones contends that the panel erred by finding, in the alternative, that *Martinez* did not constitute a change in the law that amounted to an "extraordinary circumstance" under the factors set forth in *Phelps v. Alameida*, 569 F.3d 1120, 1134–35 (9th Cir. 2009). (*Id.*)

A petition for rehearing *en banc* must state that either 1) the panel decision conflicts with a decision of the United States Supreme Court or this Court and that en banc consideration "is therefore necessary to secure and maintain uniformity of the court's decisions," or 2) the "proceeding involves one or more questions of exceptional importance." FRAP 35(b)(1). *En banc* rehearing "is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to

secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FRAP 35(a); *see also* Ninth Cir. R. 35–1 ("When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc."). Jones has failed to show that *en banc* rehearing is necessary to maintain uniformity of this Court's decisions, or that this proceeding involves an exceptionally important question. This Court should therefore deny his motion.

II. STATEMENT OF THE CASE

In the summer of 1996, Jones and co-defendant Scott Nordstrom murdered six people while robbing two Tucson businesses, the Moon Smoke Shop and the Firefighters' Union Hall, and Jones was sentenced to death for each murder conviction. *State v. Jones*, 4 P.3d 345, 352–53, ¶¶ 1–11 (Ariz. 2000). For a full recitation of the facts underlying Jones' convictions, Respondents respectfully refer this Court to its Opinion of October 18, 2013 (No. 13–16928, Dkt # 19, at 4–8), and its Opinion of August 16, 2012. *See Jones v. Ryan*, 691 F.3d 1093, 1096–99 (9th Cir. 2012).

Following the State's request for an execution warrant from the Arizona Supreme Court, Jones sought relief under Rule 60(b)(6) from the district court's

2010 judgment dismissing his habeas petition, arguing that 1) habeas counsel, who was also state post-conviction counsel, labored under a conflict of interest during the habeas proceeding, which prevented him from raising three ineffective assistance of trial counsel claims he had not exhausted in state court and from challenging his own effectiveness under *Martinez*, and 2) the State purportedly suppressed exculpatory evidence during the habeas proceeding relating to an electronic-monitoring system that formed a state witness's alibi for the Union Hall murders. The district court denied the motion, finding Jones' Rule 60(b) motion to be an unauthorized SOS petition. (*See* Dkt. # 19, at 2.) A three-judge panel of this Court affirmed. (*Id.*)

III. ARGUMENTS REGARDING REHEARING.

This Court should deny Jones' petition for rehearing and suggestion for rehearing *en banc*. First, the panel correctly found that, because Jones' Rule 60(b) motion raised new, substantive claims and did not attack a defect in the habeas proceeding's integrity, it constituted an unauthorized SOS petition. Contrary to Jones' position, there is no tension between *Martinez* and *Gonzalez*, the panel opinion does not conflict with decisions from other circuits, and there is no intra-circuit split regarding *Martinez*'s retroactivity. In making each of the foregoing arguments, Jones conflates the analytically distinct concepts of procedurally

defaulted *claims* and SOS *petitions* disguised as Rule 60(b) motions. *Martinez* is relevant only to the former, while *Gonzales* continues to control the latter.

Second, the panel correctly determined, in the alternative, that Jones had not shown extraordinary circumstances under the *Phelps* factors. Jones' effort to contest the panel's resolution of three of these factors is unpersuasive and does not warrant *en banc* rehearing.

A. *The panel majority correctly found that Jones' Rule 60(b) motion constituted an SOS petition.*

As the panel observed, a proper Rule 60(b) motion challenges "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings."[1] *Gonzalez*, 545 U.S. at 532. (Dkt. # 19, at 11.) A Rule 60(b) motion is proper if "neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction." *Id.* at 533. If a motion "seeks to add a new ground" for relief, however, it constitutes a second or successive petition. *Id.* at 532; *see also Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) ("*Thompson II*") (treating habeas petitioner's Rule 60(b) motion as

[1] Jones does not challenge the panel's rejection of his claim under *Brady v. Maryland*, 373 U.S. 83 (1963), because that resolution was correct. He has therefore waived any argument that this Court should consider that issue *en banc*.

an SOS petition governed by AEDPA where the motion's factual predicate stated a claim for a successive petition).

Quoting *Gonzalez*, 545 U.S. at 532 n.5, the panel noted that "'an attack based on … habeas counsel's omissions'"—like the one mounted by Jones—"'ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably.'" (Dkt. # 19, at 11.) *See Towery v. Ryan*, 673 F.3d 933, 941 (9th Cir. 2012) (per curiam) ("A federal habeas petitioner—who as such does not have a Sixth Amendment right to counsel—is ordinarily bound by his attorney's negligence, because the attorney and the client have an agency relationship under which the principal is bound by the actions of the agent."). Jones challenges the panel's reliance on this portion of *Gonzales*, arguing that it is irreconcilable with *Martinez* and the United States Supreme Court's recent jurisprudence regarding attorney abandonment. (Dkt. # 21, at 1, 6–7, citing *Maples v. Thomas*, __ U.S. __, 132 S.Ct. 912 (2012), and *Holland v. Florida*, 560 U.S. 631 (2010).)

As a threshold issue, to the extent Jones claims to have been abandoned by his first habeas counsel, this Court should reject that argument. The failure to raise a claim on habeas constitutes, at most, attorney negligence. *See Towery*, 673 F.3d at 941–44 (distinguishing *Maples* and *Holland* and finding no abandonment where attorney did not refuse to represent prisoner or renounce attorney-client

relationship but instead diligently pursued habeas relief and simply omitted a constitutional claim). This is particularly true where, as here, counsel raises numerous claims for relief, including multiple ineffective-assistance-of-counsel claims. *See id*.

Further, by arguing that *Martinez* conflicts with *Gonzales*, Jones confuses two distinct issues. *Martinez* is, by its express terms, a narrow holding that provides an avenue for a state prisoner, under certain limited circumstances, to show cause and prejudice to excuse the procedural default of a trial-level ineffectiveness claim. 132 S.Ct. at 1315, 1317, 1320. *Martinez* addresses *only* PCR counsel's performance and, even then, does not recognize a constitutional right to such counsel's effectiveness. Nothing in *Martinez* confers a right to the effective assistance of habeas counsel, or to conflict-free habeas counsel. And *Martinez* does not even address Rule 60(b), let alone establish that habeas counsel's conflict of interest or negligence would permit a prisoner to reopen a habeas proceeding and raise any and all previously-omitted, procedurally-defaulted ineffectiveness claims. In short, as the panel correctly found, *Martinez* "did not change the rule in *Gonzalez* that Rule 60(b) cannot be used as a vehicle to bring new claims."[2] (Dkt. # 19, at 16.)

[2] Jones' also asserts that the panel incorrectly deemed the claims he sought to raise "'new,'" rather than technically exhausted but procedurally defaulted by PCR counsel's failure to raise them in state court. (Dkt. # 21, at 7.) He posits that (continued ...)

Jones, however, maintains that prior habeas counsel's conflict of interest constituted a defect in the federal habeas proceedings that warranted Rule 60(b) relief. But as the panel correctly noted, at the time prior habeas counsel represented Jones' in federal court, it was well-settled that ineffective assistance of PCR counsel was not an independent claim for habeas relief, *see* 28 U.S.C. § 2254(i), and could not serve as cause to excuse the procedural default of other habeas claims. *See Martinez*, 132 S. Ct. at 1315 (citing *Coleman v Thompson*, 501 U.S. 722 (1991)). *Martinez* was issued nearly 8 years after counsel filed Jones' habeas petition, and the district court dismissed the petition more than 2 years before *Martinez*. In other words, prior counsel did not possess a conflict of interest until the case was well through the district court and pending on appeal—in fact, even if a non-conflicted attorney had represented Jones in district court, that attorney could not have asserted PCR counsel's ineffectiveness as cause. As the panel correctly recognized, "a proceeding is not without integrity when [it is] in accord with law." (Dkt. # 19, at 15–16.)

(... continued)

the panel created "a distinction without a difference." (*Id.*) This argument fails because there is, in fact, a stark procedural difference between 1) a claim presented in a habeas petition but not exhausted in state court, and therefore deemed technically exhausted but procedurally defaulted, and 2) a claim that was *never included* in the habeas petition and not raised (in any forum) until *after* habeas proceedings had concluded. The present case presents the latter circumstance.

Jones also chastises the panel for failing to cite in its decision an unpublished opinion on which he heavily relied, *Gray v. Pearson*, 2013 WL 2451083 (4th Cir. June 7, 2013). (Dkt. # 21, at 2–3.) But that case is easily distinguished.[3] In *Gray*, the federal district court appointed the same attorneys who had represented the petitioner in state collateral proceedings to represent him in his federal habeas proceeding. *Gray*, 2013 WL 2451083, at *1. The district court denied habeas relief, and one of the two claims on which the court issued a certificate of appealability was whether the petitioner was "entitled to the appointment of independent counsel under" *Martinez*, "which was handed down during the pendency of [the petitioner's] federal habeas proceedings." *Id.* The appellate court answered this question in the affirmative, reasoning that under *Martinez*, "a clear conflict of interest exists in requiring [petitioner's] counsel to identify and investigate potential errors that they themselves may have made in failing to uncover ineffectiveness of trial counsel while they represented [petitioner] in his state post-conviction proceedings." *Id.* at *3.

In *Gray*, *Martinez* was decided, and habeas counsel was alerted to his potential conflict, during the district court proceeding. Here, as noted, *Martinez*

[3] Jones' reliance on *Bergna v. Benedetti*, 2013 WL 3491276 (Nev. July 9, 2013), is equally unavailing. (Dkt. # 21, at 3.) In *Bergna*, the State moved to disqualify habeas counsel *during the district court proceedings* because she had represented the prisoner in state court. *Id.*

was not decided until 2 years after the district court proceeding had concluded. Also, in *Gray*, the petitioner asked for new counsel pursuant to *Martinez* on appeal from the denial from habeas relief; here, in contrast, Jones did not request new counsel on appeal, and instead sought to assert new claims through a Rule 60(b)(6) motion *after* his appeal was final.[4] *Gray's* different procedural posture renders that case inapposite and unpersuasive here. Jones has shown no inter-circuit split on this issue.

Nor has Jones shown an intra-circuit split. Jones interprets the panel opinion to hold that *Martinez* does not apply to his case because the district court denied relief 2 years before *Martinez* issued. (Dkt. # 21, at 4 (citing Dkt. # 19, at 15).) Jones observes that the "*Martinez* Court gave its decision full retroactive effect," and suggests that the panel's refusal to do so conflicts with several cases, including *Martinez*, in which this Court has remanded habeas matters to district court for consideration of *Martinez* claims. (Dkt. # 21, at 4–5.) But Jones misapprehends the panel opinion and divorces its comments from their context. The panel did not hold that *Martinez* lacked retroactive effect. Instead, it correctly observed that the Supreme Court did not issue *Martinez*, and did not recognize that PCR counsel's ineffectiveness could constitute cause for a procedural default, until 2 years after

[4] Notably, substitute counsel was appointed while Jones' certiorari petition was pending and before his habeas appeal was final, but did not seek to raise the present claims until after certiorari had been denied.

Jones' habeas proceedings concluded in district court. As a result, Jones' counsel did not possess a conflict of interest during those proceedings, and the integrity of that proceeding is not in doubt. (Dkt. # 19, at 15–16.)

As the panel correctly observed, "*Gonzales* firmly stands for the principle that new claims cannot be asserted under the format of a Rule 60(b) motion" and *Martinez* did not overrule this holding. (Dkt. # 19, at 16.) Because Jones sought to present new, substantive claims for relief, rather than to challenge a defect in the habeas proceeding's integrity, his Rule 60(b) motion constituted an unauthorized SOS petition. *See Gonzales*, 545 U.S. at 531 ("Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts."); *Thompson v. Calderon*, 122 F.3d 28, 30 n.2 (9th Cir. 1997) ("*Thompson I*") ("[W]here a habeas petitioner tries to raise new facts or new claims not included in prior proceedings in a Rule 60(b) motion, such motion should be treated as the equivalent of a second petition for writ of habeas corpus.") (quotations omitted); *Lopez v. Ryan*, 2012 WL 1520172, *7 (D. Ariz. April 30, 2012) (aspect of Rule 60(b) motion asserting new claim for relief constituted an SOS petition). This Court should deny the petition for *en banc* rehearing.

B. *The Phelps factors weigh against Jones.*

In the alternative, the panel majority applied the *Phelps* factors and determined that Jones had failed to show that *Martinez* constituted a change in the law amounting to an extraordinary circumstance that would warrant relief under Rule 60(b)(6). The panel addressed the *Phelps* factors in the first instance, even though the district court did not reach them. (Dkt. # 19, at 22.) *See id.* at 1134–35 (although *Phelps* factors are generally addressed by the district court in the first instance, "appellate courts may, in their discretion, decide the merits of a Rule 60(b) motion in the first instance on appeal"). The panel correctly weighed these factors.

Change in the law. The panel found that this factor "weigh[ed] slightly in Jones' favor" because *Martinez* was a "remarkable—if limited—development in the Court's equitable jurisprudence." (Dkt. # 19, at 24, quotations omitted) Even assuming that *Martinez* was a "remarkable" development in habeas law, the panel correctly afforded it little weight in the *Phelps* analysis. (*Id.*)

Diligence. The panel found that this factor had little weight in either direction. (*Id.*) This finding was not unreasonable, where Jones waited 17 months after *Martinez* was decided to file his motion, but only a few months after his new counsel was appointed. *See Lopez (Samuel) v. Ryan*, 678 F.3d 1131, 1136 (9th Cir.

2012) (diligence factor weighed against petitioner where he raised IAC of PCR counsel claim for the first time after *Martinez*).

Reliance/Finality. The panel appropriately found that "this factor weighs strongly against Jones." (*Id.* at 25.) The Arizona Supreme Court has issued an execution warrant and fixed an execution date. "The State's and the victim's interests in finality, especially after a warrant of execution has been obtained and an execution date set, weigh against granting post-judgment relief." *Samuel Lopez*, 678 F.3d. at 1136; *see also Styers v. Ryan*, 2013 WL 1149919, *7 (D. Ariz. Mar. 20, 2013) ("[R]eopening the case to permit relitigation of Claim 8 would further delay resolution of Petitioner's case and interfere with the State's legitimate interest in finality."). This is particularly true where Jones seeks to litigate new claims never before presented in any proceeding.

This Court should reject Jones' contention that he possesses a "life interest" that will be "extinguished" upon his execution (Dkt. # 21, at 8), as Jones has had 17 years to litigate contest his convictions and sentences. In addition, while Jones filed his Rule 60(b) motion prior to the execution warrant being issued, he did so *after* the State had requested the warrant. The panel correctly weighed this factor against Jones.

Delay. The panel found that this claim weighed "slightly in Jones' favor" because he waited only 2 months to file his Rule 60(b) motion after the United

States Supreme Court denied certiorari. (Dkt. 19, at 25.) If this factor weighs in Jones' favor, it does so only minimally.

Degree of connection. The panel found that this factor weighed "heavily against Jones" because *Martinez* "says nothing about conflicts of interest, nor does it overrule the proposition in *Gonzalez* that 'an attack based on … habeas counsel's omissions … ordinarily does not go to the integrity of the proceedings.'" (*Id.* (quoting *Gonzalez*, 545 U.S. at 532 n.5).) The panel's decision was correct. As previously stated, *Martinez* does not provide an avenue for prisoners whose habeas proceedings have concluded to reopen those proceedings and present claims never before raised. Jones arguments to the contrary fail for the reasons discussed above. (Dkt. # 21, at 9.) This factor weighs against reopening the habeas proceeding.

Comity. The panel also found that this factor weighed heavily against Jones because Jones sought "to bring merits claims disguised as a Rule 60(b) motion because his initial habeas corpus petition was already fully adjudicated on the merits and denied." (Dkt. # 19, at 26.) Under these circumstances, the panel found that granting the Rule 60(b) motion would "upset principles of comity." (*Id.*) This is particularly true where, in litigation spanning over a decade, the state and federal courts have considered Jones' claims for relief, which included several challenges to trial counsel's ineffectiveness. *See Samuel Lopez*, 678 F.3d at 1137 ("In light of [the Ninth Circuit's] previous opinion and those of the various other courts that

have addressed the merits of several of Lopez's claims, and the determination regarding Lopez's lack of diligence, the comity factor does not favor reconsideration."). This factor weighs against reopening the habeas proceeding.

IV. CONCLUSION

Respondents respectfully request this Court deny Jones' petition for rehearing and suggestion for rehearing en banc.

DATED this 19th day of October, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 19, 2013.

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