No. 13-16928

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT GLEN JONES, JR.,

Petitioner-Appellant,

v.

CHARLES L. RYAN, et al.,

Respondents-Appellee.

REPLY TO RESPONSE TO PETITION FOR REHEARING *EN BANC*

Capital Case

Execution scheduled for October 23, 2013

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I. Introduction.

Respondents defend the panel opinion on two bases: 1) *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), "was a limited holding that had no effect on the Rule 60(b) analysis governed by *Gonzalez v.* Crosby, 545 U.S. 524 (2005); and, 2) *Martinez* did not constitute an "extraordinary circumstance" under the factors set forth in *Phelps v. Alameida*, 569 F.3d 1120, 1134-35 (9th Cir. 2009), to merits relief from judgment. Response to Petition for Rehearing *En Banc* at 2. Respondents then expand on those themes.

Respondents misunderstand the degree to which the Supreme Court's precedents *are* related. Respondents' view ignores the fact that *Jones* is still on federal habeas review and is entitled to application of *Martinez*, but their analysis would consider Jones' request for Rule 60(b) relief divorced from that context. That likely explains why Respondents omit any discussion whatever of the now numerous Arizona capital habeas appeals cited in the Petition for Rehearing *En Banc* and previously, which this Court has stayed and remanded for application of *Martinez*. Of course Respondents opposed each of those requests for stay and remand and, therefore, necessarily disagree generally with the Court's understanding of *Martinez*.

II. *Martinez* and *Gonzalez* are interrelated.

Respondents quote the dicta in *Gonzalez* to the effect that an attack based "on habeas counsel's omissions . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." Resp. at 6, *quoting from Gonzalez*, 545 U.S. at 532 n. 5. Jones acknowledges that "ordinarily" may be true, but Jones' § 2254 counsel, Dan Maynard, was conflicted as of the decision in *Martinez* due to his earlier representation of Jones in state post-conviction relief ("PCR") proceedings. And Jones does not ask for "a second chance to have the merits determined favorably,"

which is the point of footnote 5. He asks to have meritable claims of ineffective assistance of counsel determined for a first time.

Respondents' reliance on *Holland v. Florida*, 560 U.S. 631 (2010), in support of that same proposition is similarly misplaced. *Holland* was a case in which the dereliction of § 2254 counsel caused the petitioner's petition not to be timely filed. The *Holland* Court invoked equity to forgive the late filing of the petition. Jones invokes the equity conferred by *Martinez*, which includes a right to counsel not burdened with a *per se* conflict, to allow the presentation of claims omitted from his first § 2254 petition. *Holland* was the first case in the continuing line to detract from long-stated agency principles

Respondents assert that *Martinez* has no application here because "*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." Resp. at 7. *Martinez* did not come to the Supreme Court in a Rule 60(b) posture, thus the Court was not required to discuss its application to such cases or supply dicta that might control some hypothetical case.

Martinez determined that otherwise settled judgments, i.e., claims that had been ruled procedurally defaulted, could be reopened were the petitioner to establish that his PCR counsel was ineffective under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). 132 S.Ct at 1318. Jones reasonably seeks application of that principle here, and it is there that *Gonzalez* must yield in a small way to *Martinez*.

What has been lost is the concern the Court was addressing in *Martinez*. As the Court noted:

> 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. The right to effective assistance of counsel at trial is a bedrock in our justice system.

Martinez, 132 S.Ct. at 1317. It is what the Court stated "assure[s] a fair trial." *Id*. The Court further stated that the right to effective assistance of trial counsel is "a bedrock principle in our justice system." *Id*. Thus, the Court was not speaking of the right to effective counsel in the abstract. It was concerned about the fairness and accuracy of the process of adjudicating guilt. Although *Martinez* was not a capital case, certainly its concerns apply with equal force here.

III. The *Phelps* factors favor reopening the judgment.

As Jones noted in the Petition for Rehearing *En Banc*, the panel failed to accord the change in the law of *Martinez* the weight it was due, including with respect to the weight attributed to the factors of finality and comity. It constituted a sea change in the Supreme Court's procedural jurisprudence. It was not one that Jones could have foreseen after this Court had rejected similar claims since the Supreme Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991). *See Bonin v. Calderon*, 77 F.3d 1155 (9th Cir. 1996). Jones rests on the argument made in the Petition with respect to the balance the panel should have struck with respect to the test of *Phelps v. Alameida*, 569 F.3d 1120 (2009).

IV. Conclusion.

Martinez substantially alters the view of how attorney negligence undermines the integrity of capital habeas corpus proceedings. The ineffective assistance of Jones' PCR counsel undermined the fairness and accuracy with which his capital conviction and sentence should be viewed. The Court should grant rehearing *en banc* to consider whether *Martinez* provides him with relief from judgment under Rule 60(b).

/ / /

Respectfully submitted this 20th day of October, 2013

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 912 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Certificate of Service

I hereby certify that on this 20th day of October, 2013, I electronically transmitted the attached document to the Clerk's office of the United States Court of Appeals for the Ninth Circuit using the CM/ECF System for filing and transmitted a Notice of Electronic Filing to the following registrants:

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