No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2013

ROBERT GLEN JONES, Jr., *Petitioner*,

vs.

CHARLES L. RYAN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EXECUTION DATE: OCTOBER 23, 2013

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Robert Jones was represented in state post-conviction relief ("PCR") proceedings by court appointed counsel, Daniel D. Maynard. Mr. Maynard raised claims of guilt phase ineffective assistance of counsel ("IAC"). The state PCR court denied relief. The United States District Court then appointed Mr. Maynard to represent Mr. Jones in the § 2254 proceedings. That court denied relief on the exhausted IAC claims.

While Maynard awaited oral argument in the Ninth Circuit, the Court decided *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), which found in equity a right to the effective assistance of counsel in a first state PCR proceeding that could serve as "cause" to excuse PCR counsel's failure to exhaust substantial trial IAC claims. Maynard took no account of *Martinez* or its implications for his representation of Mr. Jones in state PCR proceedings. The Ninth Circuit affirmed, and after Mr. Maynard petitioned the Court for certiorari, the Ninth Circuit allowed him to withdraw.

New counsel filed a Motion for Relief from Judgment that alleged the change in law of *Martinez* constituted an extraordinary circumstance that allowed relief from the district court's judgment. Mr. Jones pleaded three meritable IAC claims, which were unexhausted as a result of Mr. Maynard's ineffectiveness, and, Jones alleged, Mr. Maynard dwelled under an actual conflict of interest caused by his having represented Jones in PCR and § 2254 proceedings. Mr. Maynard failed to investigate and present the claims in the federal habeas proceedings. The district court dismissed the motion as a second or successive ("SOS") petition. The Ninth Circuit affirmed.

In *Gonzales v. Crosby,* 545 U.S. 524, 533 (2005) the Court ruled that a Rule 60(b)(6) motion would not be treated as an SOS petition when the motion attacks a defect in the integrity of the habeas proceeding. Mr. Jones urges that the decision in *Martinez* exposes a substantial defect in the integrity of his federal habeas proceedings, and results in a showing of extraordinary circumstance entitling him to relief under Rule 60(b)(6), where substantial claims of ineffective assistance of his trial counsel were not presented for two reasons: 1) Mr. Maynard was ineffective in the state PCR, and, 2) after *Martinez*, Mr. Maynard was burdened by an actual conflict of interest which resulted in his failure to investigate and present evidence of his own PCR ineffectiveness. *See Gray v. Pearson*, No. 12-5, 2013 WL 2451083 (4th Cir. June 7, 2013).

Question: Does a movant's post-judgment motion for relief under Rule 60(b)(6) in a § 2254 proceeding demonstrate substantial defects in the integrity of his federal habeas proceedings and avoid treatment as an SOS petition, when he alleges substantial unexhausted claims of ineffective assistance of his trial counsel, and those claims were never presented because of ineffectiveness of his state PCR counsel and because that same counsel had an ethical conflict of interest that derived from his having represented the petitioner in both PCR and § 2254 proceedings, which prevented investigation or presentation of the claims in federal habeas proceedings?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed on the cover of this document. Respondent is not a corporation.

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PRAYER

Petitioner Robert Glen Jones, Jr., requests that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, which affirmed the district court's dismissal of a Motion for Relief from Judgment under Fed. R. Civ. P. 60(b).

OPINIONS BELOW

The Arizona Supreme Court affirmed Mr. Jones' convictions and death sentence. Opinion, *State v. Jones*, 4 P.2d 345 (Ariz. 2000) (App. A). The Superior Court of Pima County denied post-conviction relief. Minute Entry, *State v. Jones*, Pima County No. CR-57526, (Sept. 18, 2002) (App. B). The state supreme court denied discretionary review. Order, *State v. Jones*, Arizona Supreme Court No. CR-03-0002-PC (Sept. 11, 2003) (App. C).

The United States District Court for the District of Arizona denied relief pursuant to 28 U.S.C. § 2254. Memorandum of Decision and Order, *Jones v. Ryan*, No CV-03-00478-TUC-DCB (Jan. 29, 2010) (App. D). The Ninth Circuit affirmed the denial of habeas corpus relief. Opinion, *Jones v. Ryan*, 691 F.3d 1093 (9th Cir. 2012) (App. E).

The district court dismissed a Motion for Relief from Judgment. Order Dismissing Motion for Relief from Judgment, No. CV-03-00478-TUC-DCB (Sept. 24, 2013) (App. F). The Ninth Circuit affirmed the dismissal of the Rule 60(b) motion. Opinion, *Jones v. Ryan*, Ninth Cir. No. 13-16928 (October 18, 2013) (App. G).

JURISDICTION

The Ninth Circuit filed an Opinion on October 18, 2013, in which it affirmed the district court's dismissal of a Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b). On October 21, 2013, the Ninth Circuit denied a petition for rehearing *en banc*. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law."

Federal Rule of Civil Procedure 60(b):

> **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
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> ***
>
> (6) any other reason that justifies relief.

STATEMENT OF THE CASE

I. Introduction.

Robert Jones and David and Scott Nordstrom were indicted on six counts of first degree murder and related offenses for events that occurred in Tucson, Arizona, in 1996. At trial and at all times subsequent, including in the federal proceedings, Mr. Jones has asserted that he is innocent of the underlying offenses and that he has been confused with David Nordstrom.

At Mr. Jones' trial, David Nordstrom testified he was indicted for two murders at the Moon Smoke Shop ("Moon") on May 30, 1996, and four at the Fire Fighters Union Hall ("Fire Fighters") on June 13, 1996. David Nordstrom cut a deal in which he pleaded guilty to armed robbery at the Moon and agreed to testify against Mr. Jones and his brother, Scott Nordstrom, at their separate trials, in exchange for the dismissal of two first degree murder counts at the Moon. The four murder counts against David that arose from offenses at the Fire Fighters were also dismissed. Mr. Jones and Scott Nordstrom were convicted of all six homicides and sentenced to death. *See State v. Jones*, 4 P.3d 345, 352 (2000) (App. A); *State v. Nordstrom*, 25 P.3d 171 (2002). David served less than four years in prison.

II. Relevant trial facts.

A. David Nordstrom's testimony and purported electronic alibi.

The cases against Mr. Jones turned largely on the testimony of David Nordstrom, whom the Arizona Supreme Court characterized as the state's "key witness." *See Jones*, 4 P.2d at 351. David testified he was on a curfew as part of his parole after his release from prison on January 25, 1996. His curfew was monitored by the parole division of the Arizona Department of Corrections ("ADC") through an electronic monitoring system ("EMS"). His compliance with curfew was monitored by Fritz Ebenal, a parole officer with the ADC.

David testified to a narrative that included riding in Mr. Jones' pick-up truck on May 30, 1996. Mr. Jones suggested they rob the Moon after they had broken into a car at a Tucson hospital and obtained a 9 mm. handgun. David had already obtained a .380 handgun from a friend, and the .380 was already in the truck. According to David, Mr. Jones drove to a location behind the Moon, where he and Scott exited to commit the robbery and instructed David to drive

the truck. Three witnesses who survived the Moon shooting testified to the shooting deaths of one customer and one employee, but could not identify the two shooters. The bodies of a store patron and employee were found near the front door and in a back room, respectively. David testified that he heard shots, then Mr. Jones and Scott returned to the truck. David claimed to have received some of the proceeds from the robbery. Noel Engles, one of the Moon survivors, saw a light colored pick-up truck in the alley after the shooting but he saw only two persons in the truck. David drove in the direction of Interstate 10, entered the expressway, and drove home. The 9 mm. and .380 were never found, and no physical evidence connected Mr. Jones to either the Moon or Fire Fighters.

While David testified that the events at the Moon transpired before the time his curfew began on May 30, 1996, he testified he returned home a half hour before curfew on June 13, 1996, after working that day and being driven home by Scott Nordstrom. The Fire Fighters homicides occurred at 9 p.m., after his curfew. David testified he was awakened by Mr. Jones late that night, and Mr. Jones indicated that he and Scott had robbed the Fire Fighters and killed four people.

Ebenal testified that he was David's parole officer and that computer printouts showed David was not in violation of curfew on either May 30 or June 13, 1996. Rebecca Matthews testified she was a supervisor in ADC's parole division and that she conducted a test in 1997, the year after the homicides, on an EMS unit of the same type used to monitor Nordstrom, but she conceded she did not know whether the ankle bracelet she tested was actually the one worn by Nordstrom. She testified that the test she ran on a unit with Detective Brenda Woolridge was not run on the same telephone line that had been operative in the Nordstrom residence when David was on the EMS system.

B. Testimony of Lana Irwin.

The prosecution's other key witness was Lana Irwin, who testified to having overheard Mr. Jones tell her boyfriend, Stephen Coats, that he killed four people in Tucson. She also purportedly heard Mr. Jones say a door at one crime scene needed to be kicked in. The state

post-conviction court later ruled that Detectives Woolridge and Joseph Godoy testified falsely at Mr. Jones' trial, that perpetrators kicked in a door at the Moon, because Godoy had testified at Scott Nordstrom's trial eight months earlier that police had kicked in the door. That false testimony bolstered Irwin's credibility. Prosecutor David White stated in closing argument that the officers' testimony concerning the kicked-in door corroborated Irwin's testimony.

III. State and federal post-conviction claims of ineffective assistance of counsel.

A. State post-conviction relief ("PCR") proceedings.

Daniel D. Maynard and Jennifer Sparks were appointed to represent Mr. Jones in the state PCR proceedings.[1] Mr. Maynard raised 13 claims of ineffective assistance of trial counsel ("IAC") in the PCR petition. He also raised a claim of ineffective assistance of direct appellate counsel as "cause" to excuse the failure to raise claims of prosecutorial misconduct on direct appeal. The PCR court denied relief on September 18, 2002, and the Arizona Supreme Court declined review. App. B, C.

B. Federal habeas corpus and appeal.

The district court appointed Mr. Maynard to represent Mr. Jones in the § 2254 proceedings, and Mr. Maynard would remain Mr. Jones' counsel in federal court until after he filed the petition for writ of certiorari on April 11, 2013. On April 19, 2013, he moved the Ninth Circuit for the association or substitution of counsel. On April 24, 2013, the court ordered him removed and appointed the Federal Public Defender for the District of Arizona ("FPD").

In the § 2254 proceedings, Mr. Maynard presented the exhausted IAC claims, but he presented no claim in addition to what he had presented in state court. The district court denied relief on those claims and granted a COA on the claim that ineffective assistance of direct appellate counsel constituted "cause" to excuse the procedural default of the prosecutorial misconduct claims. On Mr. Jones' Rule 59(e) motion, the court expanded the COA to include all claims of prosecutorial misconduct for which it denied relief. The matter was appealed.

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[1] Jones refers only to "Mr. Maynard" for ease of reference and because he was lead counsel throughout the state and federal post-conviction proceedings.

Mr. Maynard filed Mr. Jones' reply brief in the Ninth Circuit on January 14, 2011. This Court issued its decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), on March 20, 2012. Oral argument took place in *Jones* in June 2012. The Ninth Circuit denied relief on August 16, 2012. *Jones v. Ryan*, 691 F.3d 1093 (9th Cir. 2012) (App. E). Mr. Maynard filed a petition for writ of certiorari on April 11, 2013, and was ordered removed as counsel on April 24, 2013. Certiorari was denied on June 17, 2013. On June 25, 2013, the State of Arizona moved for a warrant of execution, which was later granted on August 27, 2013.

C. The Motion for Relief from Judgment.

On August 21, 2013, Jones, through newly-appointed FPD counsel, filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). The Motion alleged two theories for relief from the judgment of January 29, 2010: 1) the Court's recent decision in *Martinez*, 132 S.Ct. 1309, met the requirements of the Ninth Circuit's Rule 60(b) "change-in-the-law" jurisprudence under *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009); and, 2) Respondent's suppression in the § 2254 proceedings of evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), constituted a defect in the district court's consideration of the prejudice prong of a claim raised in the § 2254 petition.[2]

Mr. Jones alleged that *Martinez* served as cause to excuse the procedural default of three IAC claims that were neither exhausted in the PCR court nor raised by Mr. Maynard in the § 2254 petition. Two claims alleged ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), at the guilt phase. One IAC claim alleged counsel failed to challenge the guilt phase testimony of David Nordstrom and the admission of his EMS alibi, which had not previously been found to meet state evidence standards for admissibility under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), or state evidence foundational requirements for admission. The trial court had conditionally ruled the EMS evidence inadmissible because the pretrial test of an EMS unit by Detective Woolridge and Parole Officer Matthews was not performed with the actual EMS components used to monitor Nordstrom and, therefore, the

[2] Jones does not seek certiorari on the *Brady* claim.

evidence lacked foundation. The prosecution failed to produce foundation evidence the following day, as it had promised to do, but defense counsel negligently failed to renew the foundation objection and the evidence was admitted.

The second claim alleged trial counsel's ineffectiveness for failure even to interview the other party to Mr. Jones' purported conversations with Lana Irwin, Stephen Coats. Coats later averred for the Rule 60(b) motion that the conversations supposedly overheard by Irwin did not contain the inculpatory subject matter to which she testified.

The third claim alleged trial counsel's ineffectiveness for failure to object to the state sentencing court's application of an unconstitutional causal nexus test, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Mr. Jones alleged the sentencing court's invocation of the causal nexus test prevented it from weighing non-statutory mitigating evidence of Mr. Jones' history of drug abuse, which would have mitigated the present offenses and others used in aggravation, his having been physically abused and exposed to the physical abuse of his mother when he was a child, and a diagnosed personality disorder. That is a claim upon which this Court and the Ninth Circuit have granted federal habeas corpus relief. *See Tennard v. Dretke*, 542 U.S. 274 (2004); *Williams (Aryon) v. Ryan*, 623 F.3d 1258, 1271 (9th Cir. 2010); *Styers v. Schriro*, 547 F.3d 1026, 1034-36 (9th Cir. 2008) (*per curiam*).

The district court ordered the Motion for Relief from Judgment dismissed on September 24, 2013. App. F.

D. The Ninth Circuit's judgment, which is the subject of the instant Petition.

The Ninth Circuit stated the issues presented to it as follows:

> We confront issues concerning whether and how the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), affects the standards for when a Federal Rule of Civil Procedure 60(b) ("Rule 60(b)") motion may be filed, and for when a second or successive 28 U.S.C. § 2254 habeas corpus petition may be filed.

Opinion, *Jones v. Ryan*, Ninth Cir. No. 13-16928, at 2; App. G. After setting forth the relevant precedents of the Court and the Ninth Circuit, the court stated the issue to be "whether Jones' motion alleges a 'defect in the integrity of the federal habeas proceedings' and thus presents a

legitimate Rule 60(b) motion, or whether, as the district court ruled, it raises 'claims' and 'although labeled a Rule 60(b) motion, is in substance a successive habeas petition [that] should be treated accordingly." *Id.* at 12 (*quoting from Gonzalez v.Crosby*, 545 U.S. 524, 531-32 (2005).

The court set forth the three claims of ineffective assistance of trial counsel Mr. Jones alleged required merits rulings were the court to allow relief from judgment, and summarized Mr. Jones' argument that he was entitled to relief from judgment:

> Jones contends he did not have a "fair shot" at raising these ineffective-assistance-of-trial-counsel claims in his first habeas proceeding because his habeas corpus counsel, Daniel Maynard, was also his state post-conviction relief counsel. As a result, Jones' argument proceeds as follows: Maynard operated under a *per se* conflict of interest during Jones' habeas corpus proceeding that precluded him from objectively evaluating the thoroughness of the ineffective-assistance-of-trial-counsel claims he brought at the state level. In other words, Jones argues, for Maynard to have brought, at Jones' first federal habeas corpus proceeding, the three ineffective-assistance-of-trial-counsel claims that Jones now seeks to raise in his purported Rule 60(b) motion, Maynard in effect would have had to allege his own ineffective assistance in not bringing such claims at the state post-conviction relief stage.

Id. at 13-14. The court noted that Mr. Jones' argument is premised on the Court's decision in *Martinez*, which holds that PCR counsel's ineffective assistance "can serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim." *Id.* at 14 (*citing Martinez*, 132 S.Ct. at 1315). The court further summarized, "In light of *Martinez*, Jones contends that Maynard limited the claims of ineffective assistance of trial counsel *raised* on habeas review because he had a 'strong disincentive' to *raise* those that required him to assert his own ineffectiveness during state post-conviction proceedings." *Id.* at 14-15 (italics added).[3]

The court rejected Mr. Jones' argument for the following three reasons:

> First, the Supreme Court in *Gonzalez* said 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."

[3] Jones actually claimed that Maynard had a disincentive to review the trial record and investigate claims, not that he limited the claims he "raised."

545 U.S. at 532 n. 5. The Court in *Gonzalez* was careful to explain how Rule 60(b) could not be used to get a second chance to assert new claims.

> Second, even if habeas corpus counsel's conflict of interest could, in some circumstances, be a defect in the integrity of the proceedings assailable under Rule 60(b), Maynard's alleged conflict in Jones' case does not constitute such a defect. Jones filed his first petition for habeas corpus relief nearly eight years before *Martinez* was decided. The district court denied the petition more than two years before the rule in *Martinez* was announced. At all times during Maynard's representation of Jones in the first habeas corpus proceeding, *Coleman's* rule that state post-conviction relief counsel's ineffective assistance counsel not serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim was settled law. As a result, it cannot be argued that the integrity of Jones' first habeas corpus proceeding is in doubt, because a proceeding is not without integrity when in accord with the law. We reject Jones' argument that Maynard was ineffective at Jones' first habeas corpus proceeding for not trying to make Jones' case *Martinez* long before the Supreme Court granted certiorari in *Martinez*.
>
> Third, the rule announced in *Gonzalez*, that a valid Rule 60(b) motion "attacks . . . some defect in the integrity of the federal proceedings," *id.* at 532, must be understood in context generally to mean the integrity of the prior proceeding with regard to claims that were asserted in that proceeding. "That Jones did not raise in his first [habeas] proceeding the claim[s] he wants to raise here does not render the adjudication of the claims that he *did* raise suspect." *United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011) (per curiam). Rule 60(b) does not permit a petitioner to assert entirely new claims, i.e., "asserted federal bas[e]s for relief from a state court's judgment of conviction," *Gonzalez*, 545 U.S. at 530, that the petitioner contends were required to ensure those proceedings' integrity. *Martinez*, then, did not change the rule of *Gonzalez* that Rule 60(b) cannot be used as a vehicle to bring new claims. *Martinez* did not purport to overrule *Gonzalez*, nor is its language irreconcilable with that case's central holding. *Gonzalez* firmly stands for the principle that new claims cannot be asserted under the format of a Rule 60(b) motion, and instead Rule 60(b) is properly applied when there is some problem going to the integrity of the court process on the claims that were previously asserted.

Id. at 16-17. The court concluded that Mr. Jones did not attack a defect, but rather asked for a second chance to have the merits determined favorably in the context of an SOS petition. *Id.* at 17. The court ruled Mr. Jones' claims constituted the sort of attack on the federal court's "previous resolution of a claim on the merits" that is barred by *Gonzalez*, 545 U.S. at 532.

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REASONS FOR GRANTING THE WRIT

Compelling reasons exist for the Court to exercise its discretion to grant certiorari in this matter. The Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by the Court. Supreme Court Rule 10(c). The Ninth Circuit has decided that *Martinez*, 132 S.Ct. 1309, has no impact on how the federal courts are to analyze Rule 60(b) motions under *Gonzalez*, 545 U.S. 524. In addition, while the cases are not on all fours so as to allow Mr. Jones to claim a true circuit split on the issue *sub judice*, see Rule 10(a), the Ninth and Fourth Circuits come close, as their opinions diverge as to whether *Martinez* gives rise to an actual conflict of interest on the part of § 2254 counsel, where counsel represents a petitioner in PCR proceedings and would be required to raise his own ineffectiveness were he to raise an unexhausted claim in the § 2254 proceeding, and seek cause to excuse *his* procedural default under the new equitable right conferred by *Martinez*. *Compare Jones*, Ninth Cir. No. 13-16928, at 15-16, *with Gray v. Pearson*, No. 12-5, 2013 WL 2451083 (4th Cir. June 7, 2013), at * 3. *Gray* is discussed in detail at 15, *infra*.

A. The Court's decision in *Martinez* now stands in tension with the principles underlying the decision *Gonzalez*, which restricts, in habeas, when a judgment may be reopened due to a change in the law.

What the Ninth Circuit failed adequately to consider in applying the *Gonzalez* restrictions on presenting new claims, as well as the change-in-the law calculus set forth in *Gonzalez* and settled Ninth Circuit precedent, *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), to determine whether Mr. Jones was entitled to relief from judgment due to *Martinez*, is the significance this Court's recent decisions have attached to constitutionally effective assistance of trial counsel, especially in capital cases. The panel's reliance on *Gonzalez* to characterize Mr. Jones' Rule 60(b) motion, and its attack on his post-conviction relief ("PCR") counsel as a disguised and unauthorized SOS petition fails to consider the dramatic change in this Court's jurisprudence with respect to attorney negligence since *Gonzalez* was decided in 2005. It also fails to acknowledge that *Gonzalez* enacted no categorical ban on the relief from judgment Mr. Jones seeks here.

The Ninth Circuit quoted *Gonzalez* for the proposition that an attack on habeas counsel's omissions "*ordinarily* does not go to the integrity of the proceedings," as is required for Rule 60(b) relief in a habeas case. Op. at 15. The implication of that assertion in *Gonzalez* is that an omission of habeas counsel *may* go to integrity. Mr. Jones suggests that the Court should grant certiorari to determine whether the actual conflict to which *Martinez* gives rise goes to the integrity of the § 2254 proceeding, where PCR counsel omitted claims but had a disincentive to investigate his prior performance and faced an ethical bar to raising his own ineffectiveness in the PCR proceeding if he discovered the omitted claims.

Negligence that deprives a habeas petitioner of the ability to obtain merits rulings on substantial claims of ineffective assistance of trial counsel in a capital case constitutes a defect in the federal proceeding that the Court has, since the decisions following *Gonzalez*, determined will not bar consideration of those claims. *Martinez* is just the next in the line of cases that began with *Holland v. Florida*, 130 S.Ct. 2549 (2010), and includes *Maples v. Thomas*, 132 S.Ct. 912 (2012), which forgive defaults due to counsel's unprofessional behavior, including on the part of § 2254 counsel, or abandonment of his client. In *Holland*, § 2254 counsel's unprofessional conduct equitably tolled the statute of limitations of 28 U.S.C. § 2244(d)(1). 130 S.Ct. at 2564-65.

Martinez requires that Mr. Jones have the ability to challenge counsel's deficient performance in the state post-conviction proceedings. In *Martinez*, 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.* 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. *Martinez* was not a capital case, but its concerns apply with greater force here. It would not subvert *Martinez'* "narrow exception" characterization to allow merits consideration of substantial claims of ineffective assistance of counsel that would enhance the accuracy and fairness of the conviction and

sentence in a capital case. As the Ninth Circuit noted even as it affirmed the dismissal of the Rule 60(b) motion, "death is different." Op. at 41 (*quoting Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

The Ninth Circuit's second holding noted at 8-9, *supra*, further disrespects *Martinez* where it holds that the retroactive effect this Court and the Ninth Circuit have given *Martinez* fails to apply in the Rule 60(b) context. Certiorari should be granted to determine whether *Martinez* has any retroactive effect in Rule 60(b) proceedings.

But for the quirk of timing, Mr. Jones would be stayed in the Ninth Circuit and remanded for application of *Martinez* or, at a minimum, stayed pending the Ninth Circuit's *en banc* consideration of the interplay of *Martinez* with another precedent that predates *Martinez*, *Cullen v. Pinholster*, 130 S.Ct. 1388 (2011). *See Dickens v. Ryan*, Ninth Cir. No. 09-99017, Dkts. 69, 73, 89 (argued and submitted June 24, 2013).

The Court gave its decision in *Martinez* retroactive effect. *Martinez*, 132 S.Ct. at 1321 (remanding to "determine whether Martinez' attorney in his first state collateral proceeding was ineffective and whether his claim of ineffective assistance of trial counsel is substantial."). *See Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 90, 96 (1993) ("[W]e hold that this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision."). Six days after *Martinez* was decided, the Court granted certiorari, vacated, and remanded habeas cases to the United States Courts of Appeals for the Fifth, Sixth and Ninth Circuits for reconsideration in light of *Martinez*. *See Smith v. Colson*, No. 10-8629, 2012 WL 986816 (U.S. Mar. 26, 2012); *Cantu v. Thaler*, No. 10-11031, 2012 WL 986818 (U.S. Mar. 26, 2012); *Middlebrooks v. Colson*, No. 11-5067, 2012 WL 986820 (U.S. Mar. 26, 2012); *Newbury v. Thaler*, No. 11-6969, 2012 WL 986822 (U.S. Mar. 26, 2012); *Woods v. Holbrook*, No. 11-7978, 2012 WL 986823 (U.S. Mar. 26, 2012).

The Ninth Circuit, in turn, remanded *Martinez* to the district court for application of the Court's new rule. *See Martinez v. Ryan*, 680 F.3d 1160 (9th Cir. 2012). The Ninth Circuit has since stayed multiple Arizona capital § 2254 appeals, including oral argument, and remanded to the district court for consideration of cause and prejudice under *Martinez*. *See Lopez v. Ryan*,

No. 09-99028, Doc. No. 56. The Court has also affirmed the denial of habeas relief but remanded nonetheless for consideration of cause to excuse the default resulting from PCR counsel's failure to investigate and present entire claims or even facts supporting a claim of ineffectiveness of trial counsel. *See Runningeagle v. Ryan*, 686 F.3d 758 (9th Cir. 2012); *Runningeagle*, Ninth Cir. No. 07-99026, Dkts. 55 at 12-15, 59-1. The Ninth Circuit has failed to set briefing schedules in several Arizona capital habeas corpus appeals after so-called *Martinez* Motions have been filed. *See Lee v. Ryan*, Ninth Cir. No. 10-99022, Dkt. 25; *Ramirez v. Ryan*, Ninth Cir. No. 10-99023, Dkt. 10. A Ninth Circuit panel has even stayed its decision for the explicit purpose of awaiting the *en banc* decision in *Dickens* 18 months after oral argument. *See Gallegos v. Ryan*, Ninth Cir. No. 08-99029, January 8, 2013, Dkt. 56.

The Ninth Circuit's second holding is all the more incongruous where it concludes that Maynard's representation of Mr. Jones in the district court was controlled by "settled law" in the form of *Coleman v. Thompson*, 501 U.S. 722 (1991). Op. at 15. The court concluded that, "[a]s a result, it cannot be argued that the integrity of Mr. Jones' first habeas corpus proceeding is in doubt, because a proceeding is not without integrity when in accord with the law." *Id.* at 15-16.

That holding cannot be reconciled with the court's later finding that the change-in-the-law in *Martinez* constitutes a *Phelps* factor that "weighs slightly in Jones' favor." *Id.* at 24 (*citing Lopez* (*Samuel*) v. *Ryan* ,678 F.3d 1131, 1136 (9th Cir. 2012). If a proceeding "is not without integrity when in accord with the law," it is difficult to see how *Martinez* was held to cut in favor of both Petitioners Jones and Lopez when applying the test of *Phelps*. Given *Martinez'* interest in fairness and accuracy that derives from allowing § 2254 counsel to raise PCR counsel's ineffectiveness to excuse the procedural default of IAC of trial counsel claims, the balance should actually tip strongly, perhaps insurmountably, in a petitioner's favor when applying *Gonzalez* or the Ninth Circuit's test in *Phelps*. The interests in comity and finality should bow under those circumstances to accuracy and fairness.

The Ninth Circuit's third holding was that *Martinez* "did not change the rule in *Gonzalez* that Rule 60(b) cannot be used as a vehicle to bring new claims." Op. at 16. *Martinez* allows claims of IAC of trial counsel to be brought where the claims were procedurally defaulted

because PCR counsel failed to raise them in state court, and § 2254 counsel can demonstrate IAC of PCR counsel under *Strickland*, 466 U.S. 668.

Doctrinally, there is no principled way to treat the procedurally defaulted claims for which *Martinez* supplies a remedy any differently than the claims Mr. Jones posits here were omitted by his conflicted § 2254 counsel. Consistent with the district court's Memorandum of Decision and Order and established federal law, Mr. Maynard failed to exhaust them in the state courts, and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." App. D at 3-4 (*citing Coleman*, 501 U.S. at 735; *Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998). *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996).

In theory, the federal courts might allow Mr. Jones a stay of his § 2254 case and hold it in abeyance in order to permit him to return to the state courts to exhaust these three claims, *see Rhines v. Weber*, 544 U.S 269 (2005), but the Arizona courts would now find the claims defaulted under Ariz. R. Crim. P. 32.2(a)(3). Because there are no state court remedies available, the district court stated that such claims would be "technically exhausted but procedurally defaulted." App. D at 4. *See Martinez v. Schriro*, U.S.D.C. No. CV-05-1561-PHX-EHC, Dkt. 88 at 6 (March 20, 2008) ("[i]f no remedies are currently available pursuant to Rule 32, the claim is 'technically' exhausted but procedurally defaulted"; *Gulbrandson v. Stewart*, U.S.D.C. No. CV-98-2024-PHX-SMM, Dkt. 46 at 4 (August 30, 2000) (same).

That *Martinez* would find a right in equity to relieve a federal habeas petitioner of the procedural default of claims of ineffective assistance of trial counsel more than twenty years after *Coleman* further requires a remedy in equity for conflicted counsel not pleading defaulted claims in the § 2254 petition. Mr. Jones' claims should not be considered second or successive. As the Court is aware, it has not always characterized a second-in-time petition as second or successive and there are vehicles available for him to present these claims to the lower federal courts other than in an SOS posture. *See Panetti v. Quarterman,* 551 U.S. 930, 943-44 (2007) (citations omitted). That *Martinez* found a remedy in equity necessarily means that equity be employed here to fill in the other gaps that will accompany the application of *Martinez*.

B. The Court should grant certiorari to settle the inconsistent application of *Martinez* in Ninth and Fourth Circuit's with respect to the nature of the conflict created by *Martinez,* where PCR counsel is later appointed to represent the petitioner in the § 2254 proceedings.

The Court acknowledges the importance of granting certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . ." Rule 10 (a), Rules of the Supreme Court. Mr. Jones noted throughout the Rule 60(b) motion and the Ninth Circuit briefing that *Martinez* gave rise to a *per se* or actual conflict of interest on the part of Mr. Jones' appointed § 2254 counsel, Dan Maynard. This is because Mr. Maynard was appointed to represent Mr. Jones in the state PCR proceedings and, after *Martinez*, he could not investigate or allege his own ineffectiveness under *Strickland*, 466 U.S. 668, to excuse *his* failure to exhaust claims of IAC of trial counsel in the state courts.

Mr. Jones argued repeatedly in the Ninth Circuit briefing that the Arizona District Court's decision conflicted with the Fourth Circuit's decision in *Gray*, 2013 WL 2451083, with respect to the nature of the conflict *Martinez* created. In *Gray*, a capital petitioner, brought ten claims of ineffective assistance of trial counsel in the state PCR petition. *Id.* at *1. Relief was denied, and that decision was affirmed on appeal. The district court appointed the same counsel in the § 2254 proceeding. The court denied relief but granted a COA on one substantive claim and the claim that the decision in *Martinez* required the court to appoint "independent counsel" on the § 2254 case. *Id.*

In the Fourth Circuit, Gray argued, with new counsel and without suggesting that prior counsel had omitted any claim of ineffective assistance of trial counsel from the PCR or § 2254 petitions, that under the reasoning and holding of *Martinez*, "he is entitled to counsel who could vigorously examine and present *if available* potential claims of ineffective assistance of counsel by those very counsel in his state habeas proceedings." *Id.* (italics added). The Fourth Circuit ruled this was "a correct reading of *Martinez*." *Id.* The court noted the change in the law now allows a petitioner to establish "cause" to excuse a failure to exhaust if the PCR proceeding is the

first time a petitioner can, consistent with state law, bring an ineffective assistance of trial counsel claim. *Id.* at *2.

Gray contended that *Martinez* applied to his case, "and that his unique circumstance require[d] the appointment of new counsel to enable him to investigate *any available Martinez claims*." *Id.* (italics added). Gray further argued:

> that because he has been represented by the same counsel in both state and federal post-conviction proceedings, he is unable to identify any potential *Martinez* claims and to rely thereon to assert "cause" to excuse any such otherwise defaulted claims because in order to do so his current counsel would be required to argue their *own* ineffectiveness in their representation of him in state post-conviction proceedings. Gray maintains that such a task would create a conflict of interest that contravenes his counsels' professional ethical duties and thereby corrode their duty of vigorous representation.

Id. at *3.

The circuit found unpersuasive the warden's arguments in opposition that there was no conflict, that habeas counsels' duties did not change as a result of *Martinez*, and that if prior PCR and § 2254 counsel viewed a claim, they presented it without the need for independent counsel. *Id.* The court concluded:

> We find that a clear conflict of interest exists in requiring Gray'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 Gray in his state post-conviction proceedings; the conflict is anything but "theoretical." J.A. 1634. Indeed, the Virginia State Bar Ethics Counsel advised Gray's counsel that they are ethically barred from investigating their own ineffectiveness. J.A. 1695.

Id. at *3.

Even accounting for the differences in the stage of proceedings, the Ninth and Fourth Circuits are split over whether the conflict is an actual or *per se* one on the one hand, or whether any conflict must be analyzed on its facts to assess particular acts and omissions of counsel. Mr. Maynard did not and could not seek the relief Mr. Jones seeks here pursuant to *Martinez* because he could not ethically or practically bring claims of his own ineffectiveness, even if he later discovered and sought to raise the claims he overlooked earlier. At a minimum, Mr. Maynard may have suspected that some federal claim went uninvestigated or not presented by him in

either the state PCR or § 2254 proceeding, as the ground he stated for withdrawing was that "Mr. Jones has always maintained his innocence and his counsel needs to conduct a thorough investigation into the two witnesses against him." *Jones v. Ryan*, Ninth Cir. No. 10-99006, Dkt. 56 at 4. That implied the investigation had not yet occurred, which might constitute an ethical breach of the sort that appears to have motivated the request for substitution in *Gray*.

Based on *Martinez*, the state moved recently in the federal district court in Nevada for the removal of capital habeas corpus counsel, an assistant federal public defender, where she also represented the petitioner in state PCR proceedings. *Bergna v. Benedetti*, No. 3:10-CV-00389-RCJ, 2013 WL 3491276, at *2 (D.Nev. July 9, 2013). The court granted the request, noting:

> Following *Martinez*, there in truth can be no dispute that petitioner does not currently have conflict-free counsel. Following *Martinez,* competent federal habeas counsel would review the state proceedings to determine whether there were (a) possible additional claims of ineffective assistance of trial counsel that (b) were not pursued by state post-conviction counsel through inadequate assistance."

Id. at *2.

The Nevada District Court in reality described the duty that non-conflicted, independent § 2254 counsel in the post-*Martinez* world owes to his or her client. Mr. Jones was not the beneficiary of that diligence on the part of Mr. Maynard.

Certiorari should be granted so that the Court can determine the nature of the conflict to which *Martinez* gave rise. Should the Court determine that *Martinez* gave rise to a *per se* or actual conflict, the Court should determine the extent to which such a finding subverts the reasoning and result of the Ninth Circuit in this case and whether a finding of a *per* se conflict inures to Mr. Jones' benefit in his Rule 60(b) litigation so as to rescue his Rule 60(b) motion from the SOS designation applied to it by the Ninth Circuit.

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CONCLUSION

For the foregoing reasons, Robert Glen Jones, Jr., respectfully requests that the Court grant the Petition for Writ of Certiorari to correct the Ninth Circuit's decision that determined Mr. Jones Rule 60(b) Motion to be an unauthorized second or successive petition.

Respectfully submitted this 21st day of October, 2013.

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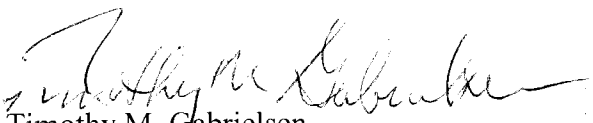
By: 
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October 21, 2013