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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Joseph Rudolph Wood, III, Petitioner, vs. Charles L. Ryan, et al., Respondents.	CV-98-00053-TUC-JGZ DEATH-PENALTY CASE Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b)(6)

Petitioner Joseph Rudolph Wood III, who served our country in the Air Force and received an honorable discharge, requests that this Court, pursuant to Fed. R. Civ. P. 60(b)(6), grant relief from the final judgment in this case. Rule 60(b)(6) allows the Court, "upon such terms as are just," to grant relief from a final judgment for "any other reason justifying relief from the operation of the judgment." The rule gives the Court "a grand reservoir of equitable power to do

justice in a particular case." *Thompson v. Bell*, 580 F.3d 423, 444 (6th Cir. 2009) (Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice in a particular case and should be liberally construed when substantial justice will thus be served.").

Here, because of post-conviction counsel's ineffectiveness, *see Martinez v. Ryan*, 132 S. Ct. 1309 (2012), this Court did not address important, substantive habeas claims that Mr. Wood raised on the merits. The Court did not address: (1) the claim that the trial court prevented Mr. Wood from obtaining important neurological mitigating evidence; (2) the claim that counsel was ineffective for failing to impeach police officer Anita Sueme with an inconsistent statement that reasonably would have led finders-of-fact to find that she altered Mr. Wood's gun when she picked it up and started to unload it; and (3) the claim that appellate counsel had a conflict of interest because his employer, the Pima County Legal Defender, had represented the victim, Debra Dietz.

Mr. Wood's development of his case was further prevented. He repeatedly requested funding from this Court for a full neurological and neuropsychological work-up. (ECF No. 13 at 2.) ("Petitioner seeks funding for a neuro-psychologist to demonstrate that the Petitioner suffers from organic brain damage"); (ECF No. 24 at 86 n.1.) ("Petitioner's request for a complete battery of neurological tests had not yet been granted . . . Petitioner hereby renews his request . . . ."), (ECF No. 69 at 38-39.) ("Petitioner will require the appointment of a mitigation specialist and neuropsychologist, previously requested by Petitioner in these proceedings . . .").) These requests were never granted. (ECF No. 79 at 71-72.) ("The record, which contains, among other items, all of the reports prepared by the mental health experts who had evaluated Petitioner is sufficient to resolve this claim [of trial counsel's ineffectiveness].")

Mr. Wood, while represented by a CJA panel attorney and still seeking the same resources, filed a *Martinez* remand motion in the Ninth Circuit so he could develop his claims. (9th Cir. ECF No. 74 at 12-13.) ("Mr. Wood now is entitled to discovery and investigation as to the ineffective assistance of trial and sentencing claims . . . ."). That motion, too, was never granted. In stark contrast, other habeas petitioners have received *Martinez* remands in several capital cases. *Martinez v. Ryan*, No. 08-99009, Order dated July 7, 2014, *Walden v. Ryan*, No. 08-99012, Order dated July 7, 2014 (9th Cir.); *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014); *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013); *Lopez v. Ryan*, No. 09-99028, Order dated April 26, 2012 (9th Cir.); *Runningeagle v. Ryan*, No. 07-99026, Order dated July 18, 2012 (9th Cir.). These petitioners' counsel had or obtained the resources to retain experts and conduct mitigation investigations in support of the remand request. Despite the requests, Mr. Wood's CJA attorney did not get the resources.

In brief, this case presents extraordinary circumstances permitting reopening of the judgment. First is the change of law while this case was pending on appeal in the Ninth Circuit, specifically, *Martinez*. Second, when compared to other capital defendants whose counsel did have funding to conduct investigation and develop a record, Mr. Wood was denied his equal protection and due process rights because he did not have the resources available to him to bring a successful *Martinez* remand motion and show prejudice. *See Douglas v. California*, 372 U.S. 353 (1963) (indigent defendant entitled to counsel on first appeal); *Griffin v. Illinois*, 351 U.S. 12 (1955) (indigent defendant entitled to transcript of proceedings or its equivalent on appeal).

I. STATEMENT OF FACTS

Mr. Wood was convicted and sentenced to death for the homicide of his ex-girlfriend, Debra Dietz, and her father, Eugene Deitz. The homicide victims were

the only persons shot and they were shot at close range. Even Donald Deitz, the uncle and brother of the victims, who struggled with Mr. Wood over Mr. Wood's gun, was not hurt. Mr. Wood was also convicted of aggravated assault for lifting a weapon off the ground when approached by police officers who then shot and wounded him.

A. The Trial Court Prevented Trial Counsel From Obtaining Important Mitigating Evidence and Counsel's Scant Mitigation Presentation.

Before trial, trial counsel requested and obtained Rule 11 (competency) evaluations for Mr. Wood. One of the examining experts was clinical psychologist Catherine L. Boyer, Ph.D. In her report, she recommended an in-depth neuropsychological and neurological assessment:

> Regarding concerns about organic impairment, with his head injuries and extensive alcohol and drug abuse, it would not be surprising for Mr. Wood to have some organic impairment. However, he does not appear to have any serious cognitive deficiencies and any impairment is likely to be mild. There is no evidence of cognitive impairment to a degree which would preclude him from being aware of and understanding his own behavior. There is a possibility that his head injury in 1981 affected his emotional functioning – the personality change he referred to. This is not an uncommon phenomenon with head injuries. It is possible that a past head injury may have increased his emotional lability. He has stated that, even though he gets upset, as long as he is not intoxicated, he is able to cope with this emotional arousal. Thus, even if a head injury led to increased lability, it appears likely that the alcohol intoxication is what impairs his self-control, rather than the head injury. The best way to document the possible emotional effects of such a head injury would be to interview those who have known him both prior and subsequent to that injury and to obtain their observations about his behavior. More in-depth neuropsychological and neurological assessment could be conducted, although even if they showed some deficiencies, it is unlikely that they would be sufficient to preclude his being aware of his own behavior. They might provide some information which could be mitigating, however.

(PCR ROA 57, Exh. 1.)[1] No "in-depth neuropsychological and neurological assessment" was done before trial.

At trial, counsel presented two mental health experts. During the guilt phase, he presented Dr. James Allender at trial to testify to the defense that the Mr. Wood was impulsive. He then presented at sentencing Dr. Michael Breslow, a psychiatrist, who testified mainly that Mr. Wood suffers from alcohol and stimulant dependency.

Dr. Allender was presented as a neuropsychologist but had only conducted an evaluation relevant to the guilt phase. In his affidavit provided to post-conviction counsel, he stated that counsel limited his examination to the issues of Mr. Wood's loss of memory and impulsivity related to the diminished capacity defense.

> Lamar Couser [trial counsel] did not discuss with me the legal standard for diminished capacity defenses under State v. Christiansen prior to my evaluation. Instead, he requested that I examine the Defendant for purposes of determining if the memory was organically based or if impulsivity was a problem.

(PCR ROA 48, 4/22/96 Affidavit of James Allender, Ph.D.) The limited scope of the question posed to Dr. Allender explains the limited scope of his evaluation in which he only gave Mr. Wood the following tests: Wechsler Adult Intelligence Scale-Revised, i.e., an I.Q. test; Wechsler Memory Scale-Revised and Rorshach Test. (PCR ROA 1089, Exh. 34.) A much more detailed and varied neuropsychological battery was available at the time. (ECF No. 25, Exh. 7, Affidavit of Marc S. Walter, Ph.D. ("Dr. Allender did not purport to conduct an in-depth neurological screening . . . . [A]n in-depth neurological screening would include eleven additional tests.").)

[1] "PCR ROA" refers to the record in the Pima County Superior Court, Case No. CR-28449, prepared for Mr. Wood's appeal to the Arizona Supreme Court following the denial of his first state post-conviction petition.

At trial, Dr. Allender testified that Petitioner was someone with impulsive tendencies. (R.T. 2/22/91, 153.) Dr. Allender could not give a source of Mr. Wood's memory loss concerning the homicides. *Id*. at 153-54.

Despite Dr. Allender's testimony, Mr. Wood was convicted on February 25, 1991 of first degree homicide and the sentencing by the trial court was set for later. Trial counsel was, however, too busy after the initial phase of the trial to devote significant time to Mr. Wood's case investigating and developing mitigation. On May 8, 1991, trial counsel moved to continue the sentencing hearing scheduled for May 28, 1991. In the motion, he stated, he "had many heavy cases and trials in recent weeks which have made it impossible to devote enough time to this matter. (ROA 130 at 1.) He added that he needed to have Mr. Wood examined by a psychiatrist and that he was bringing the motion for more time because he "ha[d] an awesome responsibility in trying to save Defendant's life." *Id.* at 2.

Subsequently, Dr. Michael Breslow examined Mr. Wood on July 3, 1991 and July 10, 1991. (R.T. 7/12/91, 8.) The examination occurred less than two weeks before Dr. Breslow testified. *Id.* at 8. His substantive testimony, which does not include his testimony about his qualifications, spanned only 15 pages. *Id.* at 8-23. He was the only witness trial counsel presented in the sentencing hearing. Dr. Breslow did not perform any neuropsychological testing. In that connection, he did provide trial counsel with a letter recommending a thorough neurologic exam. Dr. Breslow wrote:

> [Mr. Wood's] history does support the possibility of organic brain disease caused by his three motorcycle accidents. Such injuries often cause subtle neurologic changes which result in impaired emotional and behavioral control. I would request a thorough neurologic exam and brain mapping (computerized electroencephalogram analysis). These evaluations could confirm or exclude such neurologic impairment as a contributor to your client's impulsiveness and violence.

(See letter dated 6/16/91, PCR ROA 1808.) On June 24, 1991, trial counsel filed a motion with the trial court seeking the brain mapping. The motion was never granted.

In addition to Dr. Breslow's brief testimony, counsel's sentencing presentation included a transcript of an interview with Mr. Wood's father, Joseph Wood, Jr., a transcript of an interview with a friend of Mr. Wood's, and a stack of Veteran's Administration and Air Force records that counsel neither discussed nor analyzed. Counsel gave a four page closing argument, only one page of which was devoted to mitigation. (R.T. 7/12/91, 24-28.)

In the presentence report in this capital case, the presentence investigator questioned whether Mr. Wood had actually received an honorable discharge. The investigator discussed Mr. Wood's military service noting that Mr. Wood served in Korea and added:

> In early 1983, the defendant returned to the states after completion of his overseas assignment, but was not allowed to reenlist based on his conduct while in the service, and was discharged. Military records have not been received to verify the type [of] discharge although the defendant states it was honorable.

(PCR ROA 57, Exh. 7.) However, counsel had in his possession and presented to the court a number of Air Force records including documentation of Mr. Wood's honorable discharge. (PCR ROA 576.) Counsel never mentioned this record to the court and the court did not find in mitigation that Mr. Wood was honorably discharged.

The trial court made the following findings regarding aggravation and mitigation. For the former, it found that Mr. Wood created a grave risk of danger to other persons in addition to the victims and that he had been convicted of one or more homicides. As for mitigation, it found the lack of prior felonies, the mitigation found in the presentence report, and the testimony of the psychiatrist.

(The mitigation found in the presentence report included the lack of prior felonies and that the defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution. (PCR ROA 57, Exh. 7.) The court found that the mitigating circumstances did not outweigh the aggravating circumstances. (R.T. 7/12/91, 32.)

In his habeas petition filed with this Court, Mr. Wood argued that the trial court erred and violated his Eighth and Fourteenth Amendment rights because it prevented the presentation of mitigating evidence. (ECF No. 24 at 81-88.) Petitioner asserted that he made a sufficient proffer to obtain the neuro-mapping in state court and presented the Affidavit of Marc Walter, Ph.D., an exhibit in the habeas petition, in further support of the request. Among other things, Dr. Walter informed this Court that:

> 10. That Petitioner's gradual but marked change in personality and behavior subsequent to his most severe head injury corroborates that the brain damage exists;
>
> 11. That Petitioner's impulsive behavior as described by his parents and as demonstrated by several examples of his behavior also corroborates that the brain damage exists;
>
> 12. That organic brain damage can have a significant impact on an individual's impulse control and ability to deliberate their actions:
>
> . . .
>
> 19. That I feel very confident that comprehensive neuropsychological testing could provide irrefutable evidence that Mr. Wood suffers from organic brain impairment;
>
> 20. That Dr. Allender did not purport to conduct an in-depth neurological screening and the two tests he did conduct (the WAIS-R and the Wechsler Memory Scale-Revised) suggested some neurological impairment
>
> 21. That, in my view, an in-depth neurological exam would include eleven additional tests;
>
> 22. That I would strongly recommend that Mr.

> Wood undergo a quantitative EEG or brain electrical activity mapping test to identify abnormal electrical patterns in his brain function;
>
> 23. That such tests provide reliable diagnostic information about whether a subject possesses organic brain damage;

(ECF No. 25, Exh. 7.)

This Court concluded that this claim was procedurally barred and no additional testing was permitted. (ECF No. 63 at 32.)

B. Trial Counsel's failure to impeach Officer Anita Sueme.

At trial, the State presented testimony from officers who were at the scene when Mr. Wood shot the victims and when he was shot by the officers. Officer Anita Sueme testified she recovered the gun and she never opened the cylinder of the gun. (R.T. 2/21/91, 13.) Relying on this testimony, the State presented evidence that the cylinder displayed an odd sequence of two live rounds between three spent cartridges. (R.T. 2/22/91, 13-14; R.T. 2/21/91, 58.) (testimony of homicide detective about sequence in which bullets were found). It presented further testimony that the placement of the cartridges could be explained by the cocking and uncocking of the weapon. *Id.* at 15. The State then argued that this showed that Mr. Wood's actions were premeditated. "Two live rounds, between three spent charges. How does that happen? You pull the hammer back, and you let the hammer down. You pull the hammer back when Jimmy Dietz is running through interior [sic] and you let the hammer down, you pull the hammer back when you are getting ready to blow away Jimmy Dietz again, and you let the hammer down." (R.T. 2/25/91, 30-31.)

This testimony was important to the Arizona Supreme Court's affirmance of the death sentence and finding of the grave risk aggravator. This aggravator stated: "In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the

offense." Ariz. Rev. Stat. § 13-703(F)(3) (1989) The Court noted that "there is merit to Defendant's arguments," that the facts of the case do not bring the case within the "grave-risk-to-another" aggravator, but "under the unusual circumstances of the case," the court rejected Mr. Wood's argument. *State v. Wood*, 881 P.2d 1158, 1174 (Ariz. 1994). The Court initially recognized "the general rule . . . that the mere presence of bystanders . . . does not bring a murderous act within A.R.S. sec. 13-703(F)(3)." *Id.* The Court stated, however, that an important factor was the location of the bullets found in the gun cylinder:

> Moreover, a firearms expert testified that the position of the fired and unfired cartridges in the murder weapon showed that Defendant cocked and uncocked the gun twice between shooting Eugene and Debra. Thus, there is evidence Defendant knowingly prepared the gun to fire both when he assumed a shooting stance toward one employee and when he grappled with another. *Id.* at 1174-75.

Telling a vastly different story than her trial testimony, when interviewed for a book by author Stuart Gellman, Officer Sueme, told Mr. Gellman about the event as follows:

> "Put your arms behind your back" she yells. He does, and Espinoza kicks the gun toward her. **Anita picks it up, starts to remove the remaining bullets**, and then thinks, "Wait a second, somebody might be dead here, and I'm going to have to mark where the bullets are in the chamber."

(ECF No. 25, Exh. 2.) (emphasis supplied).) Trial counsel had this statement in his possession. He attached it to a motion to change venue but inexplicably failed to use it to challenge Officer Sueme's testimony. (Exhibit to Supplement to Motion for Change of Trial Site, PCR ROA at 1631.)

At trial, the State's expert conceded that that any simple rotation of the cylinder could have affected his conclusion about whether Mr. Wood cocked and re-cocked the revolver. (R.T. 2/22/91, 13-15.) ("Q. Okay. How do you rotate the

cylinder? A. Well, . . . [a]nother way you could do it is to open the cylinder up and rotate it manually and close it up again.").)

In his Amended Habeas Petition, Mr. Wood claimed that counsel was ineffective for failing to cross-examine Officer Sueme with her statement to Mr. Gellman, as this would have damaged the State's case at trial and in sentencing. (Habeas Claim X. C. 2., ECF No. 24 at 128-36.)

This Court held that this claim was procedurally barred because it was not presented to the state court. (ECF No. 63 at 36.) The Ninth Circuit Court of Appeals also held it was procedurally defaulted. *Wood v. Ryan*, 693 F.3d 1104, 1119 (9th Cir. 2012) ("We affirm the district court's dismissal of the claim because it was not fairly presented to the state courts.").

C. Appellate Counsel's Conflict of Interest.

Because of a conflict of interest, on March 25, 1992, the Arizona Supreme Court granted direct appeal counsel's motion to withdraw from representing Petitioner. (ECF No. 25, Exh. 15.) Counsel, Barry Baker Sipe, was joining the Pima County Legal Defender's Office which had represented one of the victims, Debra Dietz. Despite the conflict and the court order directing him to withdraw, Mr. Baker Sipe remained as counsel. Apparently, Mr. Baker Sipe stayed with the case because two days earlier, on March 23, 1992, the trial court directed the Legal Defender to deliver Ms. Dietz's file to the court for an *in camera* inspection and the court stated it would produce all exculpatory or mitigating material (presumably to appellate counsel) or seal the file.

As a result, Mr. Baker Sipe filed Mr. Wood's direct appeal brief. In that brief, Mr. Baker Sipe kept away from a theme that trial counsel sought to develop, that, after a break-up, Mr. Wood and Ms. Dietz had been involved in a covert relationship which she was hiding from her parents. Instead, he argued that Mr. Wood was insane, a proposition which had no basis in testimony in the record. If

counsel had pursued the covert relationship, he would have given the Arizona Supreme Court a reason not to credit hearsay declarations about Ms. Dietz's statements about Mr. Wood which it used to bolster the case for premeditation.

Counsel performed abysmally on appeal in other ways. The Arizona Supreme Court spoke disparagingly about his written advocacy.

> Defense counsel reproduced 20 excerpts of trial testimony amounting to 14 pages in his opening brief and then made a generic claim that all the testimony was improperly admitted on hearsay, relevance, opinion testimony, or Rule 404 grounds. To say the least, this is an unhelpful appellate practice. On appeal, counsel must clearly identify the objectionable portions of testimony and the specific basis for each claimed error. *See* Ariz. R. Crim. P. 31.13(c)(1)(iv). Because this is a capital case and we must search for fundamental error, we will examine the evidentiary claims before considering the question of any waiver by appellate counsel.

State v. Wood, 881 P.2d at 1166 n.3. Basically, Mr. Wood received the same review as if his counsel had not briefed the claims at all.

Furthermore, in his appellate brief, Mr. Baker Sipe liberally used the phrase, "incorporated by reference." For example, the brief tells the Court that to fully understand Argument 16, it must also read arguments 14, 11, 10, 9, 8, 4, and 2. (Argument 4 is not incorporated by Argument 16 expressly, but is incorporated in Argument 10 which Argument 16 refers to.)

The claim that appellate counsel was conflicted was raised as Claim XI in the habeas petition. This Court held that the claim was defaulted. (ECF No. 63 at 40-41.) The Ninth Circuit reached the same conclusion. *Wood v. Ryan*, 693 F.3d at 1121 ("Wood did not raise this particular ineffective assistance claim on direct appeal or in his PCR proceedings, so the district court dismissed it as unexhausted and procedurally defaulted.").

D. The Inadequate Mitigation Investigation by Trial Counsel.

Trial counsel conducted almost no mitigation investigation. At the sentencing hearing, he presented the father and a friend of Mr Wood's via

interview transcript only. These were the only lay witnesses.

1. Many other witnesses and records were available to much more fully describe Petitioner's life and background.

From available witnesses and records, counsel could have put together a more compelling social history. Not simply Mr. Wood, but many of Mr. Wood's relatives struggled with addiction, mental illness and domestic violence. Mr. Wood's maternal grandfather, Antonio Ramirez, was an alcoholic. He verbally abused Mr. Wood's mother, Mary Wood, and her siblings. He physically abused his wife, Liberada. Mary Wood's youngest brother, Joe, developed a substance abuse problem, spent most of his life in prison and died of a heroin overdose. Her brother, Porfilio, committed suicide by hanging. Her brother, Frank, suffered from severe depression and abused drugs and alcohol. Her sister, Pauline, was an alcoholic who served eight years in prison for killing her boyfriend. Her sister Petra's daughter suffers from mental illness. Another sister, Beatrice, has two sons with substance abuse problems.

Mr. Wood's paternal grandfather, Joseph Wood, Sr., was also an alcoholic who drank heavily. Wood, Sr. beat and cursed his wife, Hester. Mr. Wood's paternal aunt, Carolyn, suffered from post-partum depression and attempted suicide by overdosing on pills. Another paternal aunt, Anna Sue, was hospitalized after overdosing on prescription antidepressants. Her son, Tommy, drank heavily and experienced large mood swings.

While trial counsel obtained testimony from Mr. Wood's mother during the guilt phase, he did not present her testimony in the sentencing phase. (*Compare* Mary Wood Aff. (ECF No. 25, Exh. 8.) *with* R.T. 2/22/91, 54-68 (guilt phase testimony).) Also, trial counsel did not interview Mr. Wood's aunts and uncles who could have provided information about his many family members' troubled mental health and addiction problems.

2. Mr. Wood's father suffered from PTSD from his days of serving in the Vietnam War.

Joseph Jr. served in the Air Force in Vietnam during the Vietnam War returning in 1970. Joseph Jr. served at Cam Ranh Bay Airbase in Vietnam which was subject to weekly rocket attacks from opposing forces. He left with shrapnel in his left arm, and had flashbacks and nightmares. He exhibited symptoms of hyperarousal. Joseph Jr. was a commended leader in the Air Force. Mr. Wood's father did not talk with him about the war.

3. Expert Reports

In connection with mitigating evidence that was available to Mr. Wood's counsel at the time of trial, Mr. Wood will supplement this Motion upon receipt of reports from Clinical Psychologist and Certified Addiction Specialist Robert L. Smith, Ph.D. and from Dr. Kenneth Benedict, a neuropsychologist. Dr. Smith evaluated Mr. Wood on June 17, 2014 and Dr. Benedict evaluated him on June 25 and 26, 2014.

This Court held that the federal habeas claim that trial counsel had failed to adequately prepare and present evidence and obtain an in-depth neurological evaluation, Claim 10.C.3.a. was not procedurally barred. (ECF No. 63 at 37.) It denied the claim, (ECF No. 79 at 46-62.), but it also denied Mr. Wood additional funds for a mitigation expert and a neuropsychologist. (ECF No. 79 at 71-72.)

II. PROCEDURAL HISTORY

Mr. Wood was convicted by jury on February 25, 1991. At the conclusion of a sentencing hearing that lasted less than one day, the trial judge sentenced Mr. Wood to death on July 12, 1991, on each of the two first degree murder charges and ordered him to serve an aggravated term of 15 years in prison on each of two aggravated assault counts.

Mr. Wood's convictions and sentences were affirmed by the Arizona

Supreme Court on October 11, 1994. *State v. Wood*, 180 Ariz. 53, 881 P.2d 1158 (1994). That court denied rehearing and the United States Supreme Court subsequently denied Mr. Wood's petition for writ of certiorari. *Wood v. Arizona*, 515 U.S. 1147 (1995).

Mr. Wood's first petition for post-conviction relief, filed in the Pima County Superior Court, was denied by Judge Howard Hantman on June 6, 1997 and a petition for review was denied by the Arizona Supreme Court on November 12, 1997. Mr. Wood subsequently initiated federal habeas corpus proceedings. *Wood v. Schriro*, No. CV-98-053-TUC-JMR (D. Ariz.). While those proceedings were ongoing, Mr. Wood filed a second petition for post-conviction relief in the Pima County Superior Court on August 6, 2002. Judge Hantman dismissed that petition on November 7, 2002, and the Arizona Supreme Court denied review. *State v. Wood*, CR-03-0311-PC (Ariz. Sup. Ct. May 26, 2004).

The United States District Court for the District of Arizona denied relief on October 24, 2007. Mr. Wood appealed that decision to the Ninth Circuit Court of Appeals, which affirmed the district court on September 10, 2012. *Wood v. Ryan*, 693 F.3d 1104 (9th Cir. 2012). The panel denied the petitions for rehearing and rehearing en banc. *Wood v. Ryan*, No 08-99003 Order (9th Cir. Jan. 10, 2013). The United States Supreme Court again denied cert. *Wood v. Ryan*, No. 13-5150 (U.S. Oct. 7, 2013).

On May 6, 2014, Mr. Wood filed his third petition for post-conviction relief in the Pima County Superior Court, Judge D. Douglas Metcalf presiding. *State v. Wood*, No. CR-28449. In that Petition, Mr. Wood asserted that there was a significant change of law regarding Arizona's requirement that mitigation have a causal nexus to the crimes. Mr. Wood also alleged that his direct appeal attorney labored under a conflict of interest. That petition was denied on July 9, 2014. Mr. Wood has filed a petition for review from the superior court's decision which

petition has been denied today.

III. PRIOR COUNSEL

At trial, Mr. Wood was represented by R. Lamar Couser, Esq. Mr. Couser has been found ineffective in other cases. *E.g.*, *Clabourne v. Lewis*, 64 F.3d 1373, 1387 (9th Cir. 1995); *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999).

On direct appeal, Mr. Wood was represented by Barry J. Baker Sipe, whom the Arizona Supreme Court recognized to be conflicted because he worked for the same public defense office that represented the victim, Debbie Dietz, and whose advocacy that Court criticized.

On post-conviction, Mr. Wood was represented by Harriette Levitt, the post-conviction attorney whose conduct led to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which recognized that prisoners have an equitable interest in effective post-conviction counsel.

IV. ARGUMENT

Mr. Wood brings this Rule 60(b) motion because of defects in the integrity of his federal habeas proceedings. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (a proper Rule 60(b) motion "attacks, 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"). As stated above, several substantial claims were defaulted. Furthermore, Mr. Wood's claim that counsel's performed ineffectively at sentencing was compromised because the Court did not provide him with the resources to investigate.

A. Mr. Wood's Motion is a 60(b) Motion and not a Successive Habeas Petition.

A 60(b) motion is not a successive petition if it does not attack a ruling on the merits. *Gonzalez v. Crosby*, 545 U.S. 524, 521 (2005); *Jones v. Ryan*, 733 F.3d 825, 834 (9th Cir. 2013). The Ninth Circuit has held that there is no bright

line rule for determining what is a 60(b) motion and what is a successive habeas petition subject to the strictures of 28 U.S.C. sec. 2244(b). *Id.*

Courts frequently hold that a proper 60(b) motion attacks a ruling which was not on the merits. *Gonzalez*, 545 U.S. at 533 (challenge of statute of limitations ruling is proper 60(b) motion); *Thompson v. Bell*, 580 F.3d 423, 443 (6th Cir. 2009) (Rule 60(b) motion could properly challenge district court's decision that claims were dismissed for failing to seek discretionary review); *Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. 2007) (Rule 60(b) motion properly brought to challenge district court's ruling that claim was procedurally defaulted because state habeas lawyer only filed boilerplate petition); *Barnett v. Roper*, 941 F. Supp. 2d 1099, 1109 (E.D. Mo. 2013) (Rule 60(b) motion properly challenged district court ruling that claims were procedurally barred due to default during post-conviction).

In a capital case, like this one, the Ninth Circuit presumes that a motion brought under Rule 60(b) is a permissible 60(b) motion. *Jones*, 733 F.3d at 838 ("Assuming for the sake of argument that Jones's motion is permissible under Rule 60(b) as a challenge to a defect in the integrity of his prior habeas corpus proceedings under *Gonzalez*, an assumption we are willing to make to expedite and promote a full review in this death penalty context, we address whether Jones has satisfied the standards for relief from judgment under that Rule.").

Here, Mr. Wood seeks relief from judgment finding three of the claims raised in the habeas petition defaulted: the trial court's failure to provide testing for neurological impairment; trial counsel's failure to utilize important impeachment against a key State witness; and appellate counsel's conflict of interest. These were not merits rulings and are proper basis for a 60(b) motion.

Furthermore, this Court denied Mr. Wood funding for a mitigation expert and for neurological/neuropsychological evaluations which funding would have

assisted Mr. Wood in developing his claim that counsel was ineffective at sentencing. This, too, is akin to a default ruling because the Court made its decision based on the state court record which Mr. Wood could not supplement with additional investigation and evaluations.

In the words of *Gonzalez*, the denial of the investigatory resources represented a breakdown in the integrity of the system. Mr. Wood repeatedly requested from this Court a full neurological and neuropsychological work-up. (ECF No. 13 at 2.) ("Petitioner seeks funding for a neuro-psychologist to demonstrate that the Petitioner suffers from organic brain damage"); (ECF No. 24 at 86 n.1.) ("Petitioner's request for a complete battery of neurological tests had not yet been granted . . . Petitioner hereby renews his request . . . ."); (ECF No. 69 at 38-39.) ("Petitioner will require the appointment of a mitigation specialist and neuropsychologist, previously requested by Petitioner in these proceedings . . ."). The Court never granted the requests. (ECF No. 79 at 71-72.) ("The record, which contains, among other items, all of the reports prepared by the mental health experts who had evaluated Petitioner is sufficient to resolve this claim [of trial counsel's ineffectiveness].")

Mr. Wood, while represented by a CJA panel attorney and still seeking the same resources, filed a *Martinez* remand motion in the Ninth Circuit so he could develop his claims. (9th Cir. ECF No. 74 at 12-13.) ("Mr. Wood now is entitled to discovery and investigation as to the ineffective assistance of trial and sentencing claims . . . ."). Likewise, that motion was never granted. In stark contrast, clients whose counsel had funding from this Court or whose counsel were the Federal Defender's Office have received *Martinez* remands from the Ninth Circuit in a number of capital cases. *Martinez v. Ryan*, No. 08-99009, Order dated July 7, 2014 (9th Cir.), *Walden v. Ryan*, No. 08-99012, Order dated July 7, 2014 (9th Cir.); *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014); *Detrich v.*

Ryan, 740 F.3d 1237 (9th Cir. 2013); *Lopez v. Ryan*, No. 09-99028, Order dated April 26, 2012; *Runningeagle v. Ryan*, No. 07-99026, Order dated July 18, 2012. Mr. Wood's CJA attorney does not have resources to investigate or retain experts without funding from the district court.

Without resources, Mr. Wood is like the indigent defendants in *Griffin v. Illinois*, 351 U.S. 12 (1955), and *Douglas v. California*, 372 U.S. 353, 355 (1963), who were deprived of the resources to conduct their appeals. Those defendants lacked trial transcripts and counsel. Mr. Wood needed and didn't have resources to show prejudice when counsel performed deficiently. By ready analogy, the words *of Douglas v. California*, apply here: "where the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." 372 U.S. at 355. Similarly, and unfortunately for Mr. Wood, in his one and only habeas as "of right," a "line was drawn" between counsel with resources and counsel like his, who up until now, did not have resources for investigation and experts.

The Supreme Court's explanation of appellants' denial of due process and equal protection rights in those cases equally explains Mr. Wood's predicament. "In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants – indigent ones – differently for purposes of offering them a meaningful appeal. Both of these concerns were implicated in the *Griffin* and *Douglas* cases and both Clauses supported the decisions reached by this Court." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985). Mr. Wood, here, was deprived of "a fair opportunity" to develop his habeas claims.

In this case, the Court denied funding because it believed that the state court

record was "sufficient." However, it never addressed the necessity of funding for defaulted claims where the record was not sufficient, for example, the claim that Mr. Wood was denied a neurologic mapping study for use at sentencing. Furthermore, the Court did consider whether it should provide resources to habeas counsel so that Mr. Wood could demonstrate that post-conviction counsel was ineffective with regard to claims that were exhausted. Finally, the Court relied on "reports prepared by the mental health experts who had evaluated Petitioner." However, the majority of those experts evaluated him to determine competency under Rule 11. That is very different from an evaluation for mitigation purposes. *Summerlin v. Schriro*, 427 F.3d 623, 642 (9th Cir. 2005) (penalty phase defense evaluation is different from competency evaluation).

B. The Claims are Substantial Under *Martinez*

Pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), this Court may hold that there is cause for a default based upon "[i]nadequate assistance of counsel at initial-review collateral proceedings." *Id*. at 1315. In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Supreme Court explained the rationale of the *Martinez* decision. "[F]ailure to consider a lawyer's 'ineffectiveness' during an initial-review collateral proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim." *Id*. at 1921. For that reason, the Supreme Court ruled that "[t]o overcome the default, a prisoner must also demonstrate that the underlying . . . claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S. Ct. at 1318. The claims Petitioner seeks to pursue are all substantial, i.e., they have some merit.

1. The Failure to Permit Neuromapping, Habeas Claim VI.

The trial court denied Mr. Wood's request for evidence of neurological

impairment, neuromapping. Two doctors, Dr. Boyer and Dr. Breslow recommended that Mr. Wood have a neurological evaluation. Dr. Allender only performed a limited neuropsychological examination for a limited purpose, the guilt phase.

The trial court's denial of the request for further neurological evaluation, i.e., neuromapping, deprived Mr. Wood of substantial rights. Dr. Breslow supported the request for neuromapping. He told trial counsel and the trial court:

> [Mr. Wood's] history does support the possibility of organic brain disease caused by his three motorcycle accidents. Such injuries often cause subtle neurologic changes which result in impaired emotional and behavioral control. I would request a thorough neurologic exam and brain mapping (computerized electroencephalogram analysis). These evaluations could confirm or exclude such neurologic impairment as a contributor to your client's impulsiveness and violence.

(See letter dated 6/16/19, attached to PCR ROA 1808.) Many courts have found evidence of organic brain damage to be mitigating. *Jefferson v. Upton*, 130 S. Ct. 2217, 2218 (2010) (finding "permanent brain damage" that "causes abnormal behavior," resulting from head injury); *Sears v. Upton*, 130 S. Ct. 3259, 3261 (2010) ("frontal lobe brain damage"); *Porter v. McCallum*, 130 S. Ct. 447, 454 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005); *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."); *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 256 (2007) (even "possible neurological damage" is mitigating).

Here, Mr. Wood was deprived of evidence that demonstrated the mitigating effect of brain damage that substantially impacted his behavior. However, trial

counsel did not argue and neither the trial court nor the Arizona Supreme Court found that Mr. Wood had brain damage. As cited, legal precedent holds that brain damage is significant mitigation and the claim is a substantial one.

The trial court's denial of the motion denied Mr. Wood important constitutional rights. The rights to due process, to present a defense, and against cruel and unusual punishment demand that a capital defendant be given broad latitude to present mitigating evidence relevant to his character, record, and background, and that a capital sentencing jury be allowed to give full consideration and effect to such mitigating evidence. *See Williams v. Taylor*, 529 U.S. 362, 393 (2000); *see also Penry v. Lynaugh*, 492 U.S. 302, 307 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Mills v. Maryland*, 486 U.S. 367 (1988).

The court's rejection of the request for funding was unreasonable because individualized sentencing necessarily entails, "'the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death.'" *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990)).

2. Counsel's Ineffectiveness for Failing to Impeach Officer Sueme, Habeas Claim X.C.2.

Counsel could have, but failed to, undermine confidence in the grave risk aggravator found by the Arizona Supreme Court. At trial, the State relied on testimony and an argument that the placement of the spent and unspent bullets in the cylinder of Mr. Wood's gun demonstrated that he had cocked and recocked the gun. The Arizona Supreme Court relied on this testimony to find the grave risk aggravator, former A.R.S. sec. 13-703(F)(3). The Court stated:

> Moreover, a firearms expert testified that the position of the fired and unfired cartridges in the murder weapon showed that Defendant cocked and uncocked the gun twice between shooting Eugene and Debra. Thus, there is evidence Defendant knowingly prepared the gun to fire both when he assumed a shooting stance toward one employee and when he grappled with another.

State v. Wood, 881 P.2d 1158, 1174-75 (Ariz. 1994). The officer who recovered Petitioner's gun, Anita Sueme, testified at trial that she never opened the cylinder of the gun. (R.T. 2/21/91, 13.)

However, she made a different statement about the events of this case to author Stuart Gellman. It is reflected in his manuscript:

> "Put your arms behind your back" she yells. He does, and Espinoza kicks the gun toward her. **Anita picks it up, starts to remove the remaining bullets**, and then thinks, "Wait a second, somebody might be dead here, and I'm going to have to mark where the bullets are in the chamber."

(ECF No. 25, Exh. 2.) (emphasis added). A galley draft of this book was appended to a motion to change venue by trial counsel. (ECF No. 24 at 130 n. 58; *see also* PCR ROA at 1631.) Incredibly, counsel never used it at trial.

If counsel had confronted Officer Sueme with her prior statement, that she started to remove the bullets, a finder of fact could reasonably infer that she opened the cylinder. This is important because the placement of the bullets in the cylinder could be explained simply by someone opening the cylinder and rotating it. (R.T. 2/22/91, 13-15.)

On direct appeal, the Arizona Supreme Court noted that "there is merit to Defendant's arguments" objecting to the grave risk aggravator. *State v. Wood*, 881 P.2d at 1174. For instance, the victims were both shot at close range. (R.T. 2/20/91, 164.) (George Granillo, employee of Dietz and Sons, testifies: "Q. And you say he got close to Eugene? A. About three to four feet. Q. And then you say he leaned? A. He leaned forward like this and fired."); *Id.* at 193 (Richard Brown, family member and employee at Dietz and Sons, testified: "He come

running in with the gun down to his side and he run right up to Debra and then grabbed her around the neck . . . . And at that time Joe had his other hand poking the gun around her stomach and then he braced it up and got it up to her chest and shot her once."); *Id*. at 183 (Donald Dietz testified he was "eyeball to eyeball" with Mr. Wood and struggled with him; Donald Dietz was not shot).) Given this testimony, the Arizona Supreme Court concluded that the location of the bullets within the cylinder was an important factor. The importance of this evidence is demonstrated by the fact that the Court's description of the location of the bullets started with the word, moreover, meaning "more importantly." Specifically, the Court stated, "Moreover, a firearms expert testified that the position of the fired and unfired cartridges in the murder weapon showed that Defendant cocked and uncocked the gun twice . . . ." *Id*. at 1174-75.

However, trial counsel never cross-examined Officer Sueme with her statement to Mr. Gellman that she started to unload the bullets. Had counsel done so, the important fact of the location of the bullets in the cylinder would have been put in significant doubt. There is a reasonable probability that the grave risk aggravator would have been undermined leading to a different weighing of aggravation and mitigation at sentencing.

Failure to impeach an important witness like Officer Sueme constitutes ineffective assistance of counsel. In *United States v. Tucker*, 716 F.2d 576, 586 (9th Cir. 1983), defense counsel failed to confront prosecution witnesses with their prior statements. Those statements, "which raised questions as to [the witnesses'] credibility or which were more supportive of [defendant's] theory of defense than the testimony they gave at trial" should have been used at trial and the failure to do so resulted in ineffective assistance of counsel. *Id*. at 585. *See Lewis v. Mayle*, 391 F.3d 989, 998-99 (9th Cir. 2004) (counsel's failure to impeach witness with a prior conviction contributed to a finding of adverse effect

in an ineffective assistance of counsel claim); *Berryman v. Morton*, 100 F.3d 1089 (3d Cir. 1996) (counsel ineffective for failing to use victim's inconsistent identification testimony from do-defendant's earlier trial); *Moffett v. Kolb*, 930 F.2d 1156, 1161 (7th Cir. 1991) (failure to impeach witness whose trial testimony put murder weapon in possession of another individual "fell beneath an objective standard of reasonableness"). Here, counsel failed to use compelling evidence, the prior inconsistent statement and admission by Officer Sueme that she altered the gun. Ariz. R. Evid. 801 (d)(1) (witness's prior inconsistent statement is not hearsay); Ariz. R. Evid. 801(d)(2) (opposing party's or party's representative's statement is not hearsay). It put the State's theory of the case into significant doubt but she was never confronted with it and it was never made a part of the trial record.

The claim was never heard on the merits and it is a substantial one.

3. Direct Appeal Counsel's conflict of interest. Habeas Claim XI.

While representing the defendant on appeal, direct appeal counsel went to work for the same Legal Defender office that represented the victim, Debra Dietz. The Arizona Supreme Court recognized the conflict and granted counsel's motion to withdraw. (ECF No. 25, Exh. 15.) Nonetheless, counsel represented Mr. Wood on direct appeal.

Under *Mickens v. Taylor*, 535 U.S. 168, 173-74 (2002), Mr. Wood was denied his constitutional right to counsel because the conflict adversely affected appellate counsel's performance. To his client's detriment, Mr. Baker Sipe avoided the defense trial theme that, after the break-up before the homicides, Mr. Wood and Ms. Dietz had been involved in a covert relationship which she was hiding from her parents. Instead, appellate counsel argued that Mr. Wood was insane, a proposition with no evidentiary basis in the record. If counsel had

pursued the covert relationship, he would have given the Arizona Supreme Court reason not to credit hearsay testimony recounting Ms. Dietz's statements about Mr. Wood which it used to bolster the case for premeditation. In addition, the quality of representation was so poor that the Arizona Supreme Court openly criticized his written advocacy. *State v. Wood*, 881 P.2d at 1166 n.3. He used a mind-numbing combination of incorporations by reference in an appellate brief.

There is no doubt that the direct appeal in any case – and especially a capital case -- is extremely important. *Evitts v. Lucey*, 470 U.S. 387 (1985). As the Supreme Court stated in *Evitts*, "A system of appeal as of right is established precisely to assure that only those who are validly convicted [and Mr. Wood adds: sentenced] have their freedom drastically curtailed." *Id.* at 399, 400. Here, laboring under a conflict as a result of his new legal employer, Mr. Wood's appellate counsel at times presented almost no advocacy at all. Appellate counsel was adversely impacted by the conflict. Under *Mickens*, to prevail Mr. Wood need only show deficient performance, which was abundantly present in the conduct of this appeal. *Mickens*, 535 U.S. at 174 (case argued and decided on the assumption that the petitioner only needs to show deficient performance and not probable effect on the outcome).

This, too, is a substantial claim.

4. Failure to Investigate, Develop and Present Mitigating Evidence.

Trial counsel presented only one witness at the sentencing proceeding, Dr. Michael Breslow who did not interview Mr. Wood until less than two weeks before the sentencing hearing. Dr. Breslow's testimony in mitigation takes up only 18 transcript pages. (R.T. 7/12/91, 8-23.) In addition to Dr. Breslow's brief testimony, counsel's sentencing presentation included a transcript of an interview with Mr. Wood's father, Joseph Wood, Jr., a transcript of an interview with a

friend of Mr. Wood's and a stack of Veteran's Administration and Air Force records that counsel neither discussed nor analyzed. (R.T. 7/12/91, 24-28.)

Trial counsel failed to get a number of available records and interview important mitigation witnesses. He did not learn about and did not present the vast extent of the addiction and mental health problems on both sides of Mr. Wood's family. Mr. Wood's grandparents were alcoholics. Numerous aunts, uncles and cousins had serious mental health problems and some committed suicide. He did not show that Mr. Wood's father suffered from PTSD upon return from Vietnam, relying on a taped interview which only briefly mentioned the father's service in Vietnam.

Incredibly, trial counsel did not refute the statement in the presentence report ordered by the trial judge questioning whether Mr. Wood received an honorable discharge from the Air Force. The discharge was in the very papers, but hidden in the voluminous number of pages, that counsel submitted to the trial court. Counsel made no mention of it and neither the trial court nor the Arizona Supreme Court found honorable discharge for service to our country as a mitigating factor. *But see Porter v. McCollum*, 130 S. Ct. 447, 455 (2009) (service to country in the armed services is mitigating circumstance that Florida Supreme Court should not have discounted).

The claim of ineffective assistance of counsel at sentencing is a substantial one. The Supreme Court has found counsel ineffective on numerous occasions in capital cases for failing to adequately investigate and present mitigating evidence. *E.g.*, *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); and *Sears v. Upton*, 130 S. Ct. 3259 (2010).

C. Post-conviction counsel was ineffective.

While initial post-conviction counsel filed a petition and raised claims she

failed to raise the issues of substantial merit set forth above: the denial of the funds for the neuromapping, the claim that counsel was ineffective for failing to impeach Officer Sueme, and the apparent-from-the record claim of appellate counsel's conflict.

While she included claims of ineffective assistance of counsel, she almost entirely failed to conduct investigation to support those claims. She did not request or receive the assistance of a mitigation specialist and did not interview a single life history witness, aside from Mr. Wood himself (although only as to limited topic areas), or collect a single social history document or retain an expert. She did not interview Mr. Wood's mother, father, sister (his brother had died in 1993), son, and former spouse. The deposition of trial counsel, which she did undertake, could not be considered a mitigation investigation. The state post-conviction court denied an evidentiary hearing because post-conviction counsel failed to present evidence of prejudice to establish a claim of ineffective assistance of counsel. As a consequence, post-conviction counsel was ineffective.

D. Various factors favor granting this Rule 60(b) motion

Rule 60(b)(6) provides for relief from judgment for "any other reason that justifies relief" from operation of the judgment. It is "properly invoked where there are extraordinary circumstances, or where the judgment may work an extreme an undue hardship, and should be liberally construed when substantial justice will be served." *Cornell v. Nix*, 119 F.3d 1329, 1322 (8th Cir. 1997).

1. The Supervening Change of Law is Remarkable.

It is well-established that the decision in *Martinez v. Ryan*, which underlies this motion, is remarkable. The Ninth Circuit has recognized this. "Unlike the 'hardly extraordinary' development of the Supreme Court resolving a circuit split, . . ., the Supreme Court's development in *Martinez* constitutes a remarkable – if 'limited,' *Martinez*, 132 S. Ct. at 1319 – development in the Court's equitable

jurisprudence." *Lopez v. Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012). Dissenting from *Martinez*, Justice Scalia acknowledged how far *Martinez* strayed from prior Supreme Court precedent. He complained that the Court's holding was "a repudiation of the longstanding principle governing procedural default, which Coleman and other cases consistently applied." *Martinez*, 132 S. Ct. at 1324 (Scalia, J., dissenting). He added that *Martinez* resulted in "a radical alteration of our habeas jurisprudence." *Id*. at 1327.

Martinez was decided when Mr. Wood's habeas case was on appeal to the Ninth Circuit. While the appeal was pending, Mr. Wood sought a remand under *Martinez* but it was never granted.

This factor weighs in favor of granting the motion.

2. Mr. Wood is Diligent in Bringing this Motion.

As noted, Mr. Wood's case, up until now, has never received the mitigation investigation it requires. The Supreme Court in *Williams* and *Wiggins* held that capital counsel have an "obligation to conduct a thorough investigation of the defendant's background" for "all reasonably available mitigating evidence." *Wiggins*, 539 U.S. at 522, 524 (quoting *Williams*, 529 U.S. at 396). This motion is brought approximately two months after counsel from the Federal Public Defender were appointed to this case. Undersigned counsel and their staff have striven to conduct a proper mitigation investigation in the ensuing two months. The two month delay in bringing this motion is reasonable. While some of the claims presented are not directly tied to the investigation, it would not have benefitted Mr. Wood to present such claims earlier with an intention to bring another, serial Rule 60(b) motion.

In other capital cases, courts have held that much more extensive periods of time are reasonable. *Thompson v. Bell*, 580 F.3d 423, 443 (6th Cir. 2009) (four years); *Ruiz v. Quarterman*, 504 F.3d 523, 525-26 (5th Cir. 2007) (after habeas

judgment was filed, petitioner returned to state court and after the state court ruled, petitioner returned to federal court and was diligent); *Barnett v. Roper*, 941 F. Supp. 1099, 1118-19 (E.D. Mo. 2013) (six years).

This factor weighs in favor of granting the motion.

3. Finality.

To be sure there are competing interests in finality. On the one hand, the state and the victim have an interest in carrying out the judgment. On the other hand, this is a capital case in which Mr. Wood faces the more irreversible finality of death. *See Barnett*, 941 F. Supp. 2d at 1119. It is generally acknowledged that "death is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976).

In *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005), the United States Supreme Court held it "give[s] little weight to the respondent's appeal to the virtues of finality" as "[t]hat policy consideration standing alone, is unpersuasive in the interpretation of a provision [60(b)] whose sole purpose is to make an exception to finality."

Because of the irreversible finality of death, because appeals by respondents for finality are not given much weight in this context, and because a number of substantial claims have not been heard on the merits, this factor favors Mr. Wood. *See Thompson*, 580 F.3d at 444 ("In this case, the finality of the judgment against Thompson must be balanced against the more irreversible finality of his execution[.]").

4. Time between Denial of Cert. and Rule 60(b) Motion.

Mr. Wood's petition for a writ of certiorari to the United States Supreme Court was denied on October 7, 2013. He is filing his 60(b) petition only nine and a half months after that. He is filing it now because he has had for only the past two months the benefit of the investigatory resources of the Office of the Federal

Public Defender.

This factor, too, favors Mr. Wood.

5. The degree of connection between *Martinez* and the motion.

Mr. Wood's motion is integrally tied to *Martinez*. Every aspect of his motion relates to *Martinez* and post-conviction counsel's ineffectiveness. Indeed, this case is more tied to *Martinez* than many 60(b) motions because the post-conviction counsel in this case is the same person who was post-conviction counsel in *Martinez*.

6. Comity.

In *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), the Ninth Circuit explained, "in the context of Rule 60(b)(6), we need not be concerned about upsetting the comity principle when a petitioner seeks reconsideration not of a judgment on the *merits* of his *habeas* petition, but rather of an *erroneous* judgment that prevented the court from ever *reaching* the merits of that petition." *Id*. at 1139. Here, the federal courts have never reached the merits of the claims regarding the denial of the neuromapping, the ineffectiveness claim relating to Officer Sueme's testimony and the grave risk aggravation, and the conflict of interest claim. The claim regarding the ineffective assistance of counsel at sentencing focuses on the district court's failure to fund adequate investigation, not the merits. That, too, has a significant non-merits component.

Comity, therefore, weighs in favor of Mr. Wood.

V. CONCLUSION

Mr. Wood's 60(b) motion attacks the integrity of the habeas proceedings, focusing on claims that were once defaulted that are no longer defaulted because of *Martinez*. It also focuses on this Court's denial of resources that prevented Mr. Wood from adequately developing his claim that counsel was ineffective during sentencing. As all of the Rule 60(b) factors weigh in favor of granting relief from

judgment, Mr. Wood requests that the Court grant his motion.

Respectfully submitted this 17th day of July 2014.

Jon M. Sands
Federal Public Defender
Dale A. Baich
Jennifer Y. Garcia
Julie S. Hall

s/ Jennifer Y. Garcia
Counsel for Petitioner

Certificate of Service

I hereby certify that on July 17, 2014, I electronically filed the foregoing Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b)(6) with the Clerk's Office by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Robin Stoltze
Legal Assistant
Capital Habeas Unit