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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 Reply to Response to Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b)(6)

Respondents concede that Mr. Wood's Motion for Relief from Judgment is a proper motion brought under Rule 60(b)(6) and not a successive petition. (ECF No. 122 at 3 n.1 ("Wood contends that his motion is a valid 60(b)(6) motion and not an unauthorized second or successive petition because he challenges this Court's procedural rulings. . . . Wood appears to be correct.")). They

acknowledge that a number of the Rule 60(b)(6) factors favor relief from judgment. (ECF No. 122 at 5-8.) In essence, the only question remaining before this Court is whether Mr. Wood is entitled to invoke *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), in this Motion.

A. Mr. Wood's Claims are Substantial Under *Martinez*.

Mr. Wood properly invokes *Martinez* because state PCR counsel failed to pursue substantial claims, *i.e.*, claims where "the claim has some merit." *Id.* at 1318. By using the words "some merit," the Court made clear that, to obtain relief under *Martinez*, Mr. Wood does not have to demonstrate that the substantial claims are meritorious.

1. The Denial of a Neurologic Exam, Claim VI.

The trial court denied Mr. Wood's request for evidence of neurological impairment, involving neuromapping. Respondents contend this claim is not cognizable under *Martinez* because it does not allege ineffective assistance of counsel. (ECF No. 122 at 9.) They are wrong under the reasoning of *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013). In *Nguyen*, the Ninth Circuit held that *Martinez* applies to claims that appellate counsel was ineffective. The Court recognized that the rationales supporting the *Martinez* decision apply equally to claims of ineffective assistance of appellate counsel. There is no functional difference between this claim (that the trial court erred) and a claim that appellate counsel was ineffective for failing to raise it on direct appeal. The reason is that a defendant establishes that he was prejudiced by appellate counsel's ineffectiveness when he shows that, but for counsel's error, there was a reasonable probability that the outcome of the appeal would have been different. *Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir. 1996); *Mayo v. Henderson*, 13 F.3d 528, 534 (2d Cir. 1994); *Matire v. Wainwright*, 811 F.2d 1430, 1439 (11th Cir. 1987). Here, Mr. Wood has alleged more than ineffectiveness and alleges that the trial

court actually violated his Eighth and Fourteenth Amendment rights. As stated in the Motion, on Monday, July 21, 2014, Mr. Wood expects to supplement the record with the reports from Clinical Psychologist and Certified Addiction Specialist Robert L. Smith, Ph.D. and from Dr. Kenneth Benedict who evaluated him recently after the appointment of the Federal Public Defender as counsel. These reports will demonstrate that he was prejudiced by the lack of the examination.

2. Counsel Was Ineffective for Failing to Cross-Examine Officer Anita Sueme's Questionable Testimony that She Did Not Alter the Gun.

The applicability of the grave risk factor for the Arizona Supreme Court was admittedly a close factor when it was decided. The Court acknowledged that "there is merit to Defendant's arguments" that the factor did not apply. *State v. Wood*, 881 P.2d 1158, 1174 (1994). The victims were shot at close range. The Arizona Supreme Court termed the circumstances of the case "unusual." One of the unusual circumstances that the Court found important, that Mr. Wood allegedly cocked and uncocked his gun, was subject to challenge but the Court was not aware of that available impeachment evidence. No eyewitness testified to these alleged

acts.

Respondents do not contest that trial counsel failed to impeach Officer Sueme with a significant prior inconsistent statement shedding significant doubt on her claim she had not altered Mr. Wood's gun. She testified she never opened the gun's cylinder. Before trial, though, she told author Stewart Gellman that she had started to unload it. Ignoring the actual language in the Arizona Supreme Court's opinion indicating that Officer Sueme's testimony was important, Respondents claim her testimony did not add substantially to the Court's determination. They point to three factors: the presence of others; the assertion

that Mr. Wood pointed the gun at someone else; and that one person struggled with Mr. Wood for the gun.

As to the first point, by the Arizona Supreme Court's own admission, the "mere presence of bystanders . . . does not bring the murderous act within A.R.S. sec. 13-703(F)(3)." *Wood*, 881 P.2d at 1174. The Court added that the "risk to others factor could not be found merely because [the] defendant took [a] weapon into [a] crowded public place where [a] bystander could be hurt." *Id.* (citing *State v. Smith*, 707 P.2d 289, 301 (Ariz. 1985)).

Next, the assertion that Mr. Wood was going to shoot someone else was based on equivocal testimony where the witness said he did not know if Mr. Wood was going do that.

A. Jimmy was working on the front of the Supra. As he went out Jimmy had walked around this way and as he went out he yelled out something. I don't know what he yelled. He panicked. Jimmy.

Q. Jimmy yelled something out?

A. Yeah, he turned around and went down through this door right here.

Q. This is Jimmy Dietz?

A. Yes.

Q. Where was Joe at this time when Jimmy did this?

A. As he was going out and Jimmy went out he stopped.

Q. Joe stopped?

A. Yes, faced him. I thought he was going to run after him but he just, he had his gun here, seemed like he had his legs kind of spread out a little bit, kind of bent at the knees, I thought he was going to shoot but Jimmy, he really got out of there fast so he didn't follow him, he just went out.

Q. You thought he was going to shoot Jimmy?

A. *I don't know*, I thought he was going to shoot him.

Q. Jimmy?

A. Jimmy, yes, but he didn't.

(R.T. 2/20/91, 166-67 (emphasis added).)

Notably, the State never called Jimmy Dietz as a witness at trial. Mr. Dietz never testified he thought he would be shot. Moreover, the Arizona Supreme Court has held that pointing a gun at a person to quiet him does not fall within this factor. *Id*. at 1174 (citing *State v. Jeffers*, 661 P.2d 1105, 1130 (Ariz. 1983)). At most, that was what happened here. Jimmy Dietz had yelled.

Finally, the person who grappled with Mr. Wood, Donald Dietz, did not testify he thought he was in any significant danger. When he grappled with Mr. Wood, he testified that Mr. Wood merely "threw me aside." (R.T. 2/20/91, 183.)

This is not a new claim, as Respondents assert. The claim in the habeas petition specifically mentions that the Arizona Supreme Court relied on Officer Sueme's testimony. (ECF No. 24 at 130.) It also asserts that impeaching the witnesses, including Officer Sueme, would have led to a different sentence. (ECF No. 24 at 136 ("The Ninth Circuit has noted: "We can think of no error more prejudicial than one that is the precipitating cause of an erroneous death sentence." *Thompson v. Calderon*, 120 F.3d 1045, 1053 (9th Cir. 1997)). *See also* ECF No. 32 at 147 ("In habeas, petitioner addresses this failure to impeach the state's witnesses as to its impact at both trial and sentencing.").) Finally, the averments of this claim are incorporated into claim X.C.3.b. which also challenges the death sentence. (ECF No. 24 at 142.)

Given that the Arizona Supreme Court recognized the merits of Mr.

Wood's argument on appeal and that it relied heavily on Officer Sueme's testimony, this claim is substantial, *i.e.*, at a minimum, it has some merit.

3. Appellate Counsel's Conflict of Interest.

It is beyond dispute that appellate counsel labored under a conflict of interest in this case. The Arizona Supreme Court ordered him off the case. In this claim, all Mr. Wood needs to identify is an actual conflict, *i.e.*, an adverse effect. He has done so. *Mickens v. Taylor*, 535 U.S. 162, 174-75 (2002); *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980).

In error, Respondents contend that Mr. Wood did not raise any appellate issues that appellate counsel should have raised. To the contrary, in his Motion (and his habeas petition), Mr. Wood asserted that appellate counsel failed to pursue that Ms. Dietz was pursuing a covert relationship with Mr. Wood before the homicides, *i.e.*, he did not argue her duplicity. (ECF No. 116 at 25.) That is, appellate counsel did not seek to discredit the State's story that she was trying to distance herself from Mr. Wood which the State used as motive for the homicides. Respondents initially note this pursuing-a-covert-relationship argument but do not – and cannot -- explain how this is not an appellate argument that appellate counsel failed to make. (ECF No. 122 at 11-12.)

Mr. Wood did not consent to counsel's conflict. Respondents are wrong when they contend otherwise. Mr. Wood wrote a letter dated March 25, 1992 expressly stating he did not waive the conflict. He told Mr. Baker Sipe, "Please note that I do not wish to waive the conflict of interest issue created by your employment with the Pima County Legal Defender's Office." (ECF No. 25, Exh. 15.)

Respondents acknowledge that the Ninth Circuit has held that *Martinez* applies to ineffective assistance of appellate counsel. *Nguyen v. Curry*, 763 F.3d 1287 (9th Cir. 2013). (ECF No. 122 at 11.) Claim XI is one of ineffectiveness.

(ECR No. 24 at 148 ("Appellate Counsel was Ineffective for Failing to Withdraw . . . when his Office Possessed a Conflict of Interest . . . .").)

Contrary to Respondents' contention, Mr. Wood is presenting all of Claim XI in this Motion, demonstrating the number of deficiencies in Mr. Baker Sipe's conflicted performance.

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

Respondents do not contest that trial counsel performed deficiently at sentencing. While they assert that Mr. Wood has cited no authority for the proposition that he is entitled to funding for investigation and experts in his capital habeas proceeding they do not dispute that the cases he cited stand for the proposition that proper resources should be provided so that defendants can file appropriate appeals. *Griffin v. Illinois*, 351 U.S. 12 (1955), *Douglas v. California*, 372 U.S. 353, 355 (1963), and *Evitts v. Lucey*, 469 U.S. 387, 405 (1985), stand for the proposition that defendants should get the resources to appropriately conduct their cases. Respondents do nothing to distinguish them. Here, there can be no doubt that Dr. Marc Walters' affidavit states a strong case for the provision of resources for a neuropsychological evaluation. (ECF No. 25, Exh. 7.) Mr. Wood, in a capital case, should have been provided with the proper resources to litigate this habeas. For years, he was not provided such resources despite numerous requests and this Court's agreement that Mr. Wood was diligent.

For the reasons stated supra at 3, Mr. Wood intends to file expert reports on Monday, July 21, to further support this claim. As noted in Mr. Wood's Motion, Dkt. 116 at 4, the experts were only recently able to evaluate Mr. Wood. Due to the need to bring this claim to the Court's attention under the exigent circumstances, Mr. Wood was unable to append those reports to the Motion. However he fully expects to file the reports as a supplement as they become

available, or in any case, no later than noon on Monday, July 21.

B. Every *Phelps* Factor Favors Granting the 60(b) Motion.

1. The Supervening Change of Law is Remarkable.

Respondents agree and the Ninth Circuit has held that *Martinez* is remarkable. Respondents also agree this factor favors Mr. Wood. They have no explanation, however, for why an admittedly "remarkable" change of law favors Mr. Wood only "minimally."

2. Mr. Wood is Bringing this Motion Diligently.

Incredibly, Respondents think Mr. Wood should have pursued a *Martinez* argument before *Martinez* was law. (ECF No. 122 at 6.) The Ninth Circuit has roundly rejected this argument.

> We make clear that we do not fault Lopez for failing to raise his PCR counsel's ineffectiveness before the district court or before us in his original federal habeas proceedings. We agree with Lopez that imposing such a penalty would have the perverse effect of encouraging federal habeas lawyers to raise every conceivable (and not so conceivable) challenge – even those challenges squarely foreclosed by binding circuit and Supreme Court precedent. We do not believe that *Gonzalez* intended such an effect.

Lopez v. Ryan, 678 F.3d 1131, 1136 (9th Cir. 2012); *Barnett v. Roper*, 941 F. Supp. 2d 1099, 1119 (E.D. Mo. 2013) (same). In any event, unlike Lopez, who the Ninth Circuit held should have raised *Martinez* in his petition for certiorari, Mr. Wood did raise *Martinez* before that Court.

Perhaps as a consequence, Respondents concede this factor "has little weight in either direction." (ECF No. 122 at 6.)

As stated in the Motion, Mr. Wood did seek a remand pursuant to *Martinez* from the Ninth Circuit. Respondents incorrectly state that Mr. Wood did not identify any claims that were subject to the remand. (*See* Ninth Cir. ECF No. 74 at 13-15 (identifying ineffectiveness at sentencing and demonstrating claim was

substantial because the Ninth Circuit granted COA on it)).

3. Finality.

Respondents fail to acknowledge the competing interests in finality. Understandably, they assert the victims' interests in finality. However, they fail to acknowledge the irreversible finality of death in a case where important claims remain undecided.

4. The Time Between Denial of Certiorari and the Rule 60(b) Motion.

Respondents acknowledge that this factor could weigh in Mr. Wood's favor. (ECF No. 122 at 7.)

5. Degree of Connection with *Martinez*.

Mr. Wood's 60(b) Motion relies extensively on *Martinez*. By way of illustration, Respondents have briefed *Martinez* extensively. They acknowledge one of the claims, the Officer Sueme claim, fits within the framework. Although they don't admit it in this section of their Response, elsewhere they appear to admit that the claim about appellate counsel's conflict of interest is the same as an ineffective assistance of appellate counsel claim that the Ninth Circuit recognizes is legitimately subject to *Martinez*. *Nguyen*, *supra*. And, while they assert that the claim the trial court erred in not granting the neurological neuromapping study is not subject to *Martinez*, they fail to acknowledge how closely that parallels a claim alleging the ineffective assistance of appellate counsel. Finally, they have not mentioned the claim that trial counsel was ineffective for failing to adequately represent Mr. Wood at sentencing. That claim also relies on *Martinez* because PCR counsel did not conduct a mitigation investigation**.**

6. Comity.

Respondents fail to acknowledge that the Ninth Circuit's discussion in

Phelps demonstrates that this factor favors Mr. Wood. *Phelps v. Alameida*, 569 F.3d 1120, 1139 (9th Cir. 2009). While Respondents cite *Lopez v. Ryan* in support of their view of this factor, they do not mention that in *Lopez* the Court ultimately decided not to rest its decisions on the six *Phelps* factors, but instead assessed the underlying claim. *Lopez*, 678 F.3d at 1137.

Conclusion

For the reasons stated in the Motion for Relief from Judgment and for those stated in this Reply, Mr. Wood requests that the Court grant the Motion. In the alternative, Mr. Wood requests that the Court hold a hearing to determine whether Mr. Wood has demonstrated cause in support of this Motion.

Respectfully submitted this 19th day of July 2014.

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Julie S. Hall

s/ Jennifer Y. Garcia
Counsel for Petitioner

Certificate of Service

I hereby certify that on July 19, 2014, I electronically filed the foregoing Reply to Response to 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/ Julie Hall_____