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9 ATTORNEYS FOR DEFENDANTS

10 UNITED STATES DISTRICT COURT
 11 DISTRICT OF ARIZONA

12 Joseph Rudolph Wood, et al.,
 13 Petitioner,
 14 -vs-
 15 Charles L. Ryan, et al.,
 16 Respondents.

CV 98-00053-TUC-JGZ

**RESPONSE TO MOTION FOR
 RELIEF FROM JUDGMENT
 PURSUANT TO FED. R. CIV.
 P. 60(b)(6)**

17 Citing Rule 60(b)(6), Fed. R. Civ. P., Petitioner Joseph Rudolph Wood, III
 18 (“Wood”), seeks relief from this Court’s judgment entered on October 24, 2007
 19 (ECF No. 79), based primarily on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).
 20 Respondents hereby respond to Petitioner’s Motion for Relief from Judgment
 21 Pursuant to Fed. R. Civ. P. 60(b). Wood has 1) failed to establish the extraordinary
 22 circumstances necessary to reopen the prior habeas proceeding and 2) failed to
 23 state a substantial ineffective-assistance-of-counsel claim. This Court should deny
 24 his motion.

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DATED this 18th day of July, 2014.

Respectfully submitted,

Thomas C. Horne
Attorney General

s/ Jeffrey A. Zick
Chief Counsel

John Pressley Todd
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MEMORANDUM OF POINTS AND AUTHORITIES

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2 In August 1989, Wood shot and killed his former girlfriend, Debra Dietz, and
3 her father, Eugene Dietz; the trial court sentenced him to death for each murder.
4 *State v. Wood*, 881 P.2d 1158, 1165 (Ariz. 1994). In the 25 years since the
5 murders, Wood has unsuccessfully challenged his convictions and sentences in
6 state and federal court. This Court denied habeas relief on October 25, 2007.
7 (Dkt. # 80.) The Ninth Circuit affirmed this Court's ruling, *Wood v. Ryan*, 693
8 F.3d 1104 (9th Cir. 2012), and, after the United States Supreme Court denied
9 certiorari, issued its mandate on October 15, 2013, *see Wood v. Ryan*, No. 08–
10 99003, Dkt. # 99, marking the conclusion of Wood's habeas proceeding. *See Ryan*
11 *v. Schad*, ___ U.S. ___, 133 S. Ct. 2548, 2550 (2013) (“[O]nce [the Supreme] Court
12 has denied a petition [for writ of certiorari], there is generally no need for further
13 action from the lower courts.”); *see generally* FRAP 41(d)(2)(D). On May 28,
14 2014, the Arizona Supreme Court issued a warrant for execution, and fixed July
15 23, 2014, for Wood's execution.

16 In the present motion for relief from judgment, Wood seeks to reopen the
17 habeas proceeding under Federal Rules of Civil Procedure 60(b)(6) in order to
18 litigate whether this Court should excuse his procedural default of three habeas
19 claims under *Martinez*. (Dkt. # 116.) Wood has failed to show that extraordinary
20 circumstances warrant reopening the habeas proceeding. Moreover, *Martinez* does
21 not apply to two of his claims, and the third is not a substantial ineffective-
22 assistance claim. This Court should deny Wood's motion.¹

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25 ¹ Wood contends that his motion is a valid Rule 60(b) motion and not an
26 unauthorized second or successive petition because he challenges this Court's
27 procedural rulings. (Petition, at 16–20.) Wood appears to be correct. *See Cook v.*
28 *Ryan*, 688 F.3d 598, 608 (9th Cir. 2012) (agreeing with district court that 60(b)(6)
motion was not SOS petition because Cook was challenging district court's finding
that his claim that counsel was ineffective for failing to investigate and prepare

(continued ...)

1 **I. MARTINEZ DOES NOT CREATE THE EXTRAORDINARY CIRCUMSTANCES**
2 **REQUIRED TO REOPEN THE JUDGMENT DENYING WOOD’S FIRST**
3 **HABEAS PETITION.**

4 In order to reopen a final judgment, Wood must establish one of the grounds
5 specified in Rule 60(b). Wood relies on Rule 60(b)(6), which permits this Court to
6 relieve a party from a final judgment for “any ... reason that justifies relief,” Fed.
7 R. Civ. P. 60(b)(6), and requires a petitioner to show “extraordinary
8 circumstances,” *Gonzalez v Crosby*, 545 U.S. 524, 535 (2005) (quotations
9 omitted).² Wood specifically contends that the Supreme Court’s decision in
10 *Martinez* constitutes an extraordinary circumstance under Rule 60(b)(6) because,
11 in light of *Martinez*, this Court erred in finding procedurally defaulted his claims
12 that 1) the trial court erroneously denied his request for neurological testing
13 (Habeas Claim VI), 2) trial counsel was ineffective for failing to impeach a police
14 officer (Habeas Claim X.C.2), and 3) appellate counsel labored under a conflict of
15 interest (Habeas Claim XI). (Dkt. # 116, at 26–27.) Wood also identifies as an
16 extraordinary circumstance the fact that this Court denied funding for investigation
17 and mental-health experts during the habeas proceeding. Wood’s arguments fail
18 and this Court should reject them.

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(... continued)

23 mitigation was procedurally barred); *id.* (“A habeas petitioner does not seek merits
24 review ‘when he merely asserts that a pervious ruling which precluded a merits
25 determination was in error—for example, a denial for such reasons as failure to
26 exhaust, procedural default, or statute-of-limitations bar.’”) (quoting *Gonzalez*, 545
U.S. at 532 n.4 (2005)).

27 ² No specific time period governs a Rule 60(b)(6) motion, but a party should
28 bring such a motion “within a reasonable time.” Fed. R. Civ. P. 60 (c)(1).

1 **A. Wood has failed to show that Martinez is an extraordinary**
2 **circumstance that justifies reopening the habeas petition.**

3 When a party, like Wood, argues that a change in the law constitutes an
4 extraordinary circumstance, this Court considers several factors: (1) whether “the
5 intervening change in the law ... overruled an otherwise settled legal precedent”;
6 (2) whether the petitioner was diligent in pursuing the issue; (3) whether “the final
7 judgment being challenged has caused one or more of the parties to change his
8 legal position in reliance on that judgment;” (4) whether there is “delay between
9 the finality of the judgment and the motion for Rule 60(b)(6) relief;” (5) whether
10 there is a “close connection” between the original and intervening decisions at
11 issue in the Rule 60(b) motion; and (6) whether relief from judgment would upset
12 the “delicate principles of comity governing the interaction between coordinate
13 sovereign judicial systems.” *Phelps v. Alameida*, 569 F.3d 1120, 1133–40 (9th Cir.
14 2009) (quotations omitted). “[I]t is clear that ‘a change in the law will not *always*
15 provide the truly extraordinary circumstances necessary to reopen a case.” *Jones v.*
16 *Ryan*, 733 F.3d 825, 839 (9th Cir. 2013). On balance, these factors weigh against
17 Wood.

18 **Change in the law:** Wood argues that *Martinez* is a “remarkable” change in
19 the law. (Dkt. # 116, at 28–29.) The Ninth Circuit has found that *Martinez* is “a
20 ‘remarkable—if limited—development in the Court’s equitable jurisprudence’ that
21 ‘weigh[s] slightly in favor of reopening the petitioner’s habeas case.” *Jones*, 733
22 F.3d at 839 (quoting *Lopez (Samuel) v. Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012)
23 (additional quotations omitted); *see also Gonzalez*, 545 U.S. at 536–39 (finding
24 that change in the law did not constitute an extraordinary circumstance).
25 Accordingly, if this factor weighs in Wood’s favor, it does so only minimally.

26 **Diligence:** The change in the law presented in *Martinez* “is all the less
27 extraordinary” in Wood’s case because of his lack of diligence in pursuing a claim
28 that ineffective assistance of PCR counsel was cause to overcome procedural

1 default. *Gonzalez*, 545 U.S. at 537. This factor weighs against Wood, as he filed
2 the present motion over 2 years after *Martinez* was decided, and after a warrant of
3 execution had been issued. Further, he did not allege post-conviction counsel’s
4 ineffectiveness as cause to excuse a procedural default until approximately 5
5 months after *Martinez* issued. See Ninth Cir. No. 08–99003, Dkt. # 74. See
6 *Samuel Lopez*, 678 F.3d at 1136 (diligence factor weighed against petitioner where
7 he raised ineffective-assistance-of-PCR-counsel for the first time after *Martinez*).
8 And even then, Wood failed to present any explanation how *Martinez* applied to
9 his specific claims, or why they were substantial. Ninth Cir. No. 08–99003, Dkt. #
10 74.

11 Wood attempts to minimize the delay by arguing that the Federal Public
12 Defender (FPD), which possesses greater resources than prior counsel, was not
13 appointed until approximately 2 months ago. (Dkt. # 116, at 29.) But prior
14 counsel could easily have filed the present motion at an earlier date as it does not
15 appear to be dependent on resources; the FPD, for example, attaches no expert
16 reports to the motion. This factor weighs against granting the motion. At best, it
17 “has little weight in either direction.” *Jones*, 733 F.3d at 839 (giving diligence
18 factor little weight despite newly-appointed counsel’s argument that prior counsel
19 was conflicted and could not raise certain claims).

20 **Reliance:** Wood’s of-right legal proceedings are complete. See *Schad*, 133
21 S. Ct. at 2550. An execution warrant has issued. “The State’s and the victim’s
22 interests in finality, especially after a warrant of execution has been obtained and
23 an execution date set, weigh against granting post-judgment relief.” *Samuel Lopez*,
24 678 F.3d. at 1136; see also *Styers v. Ryan*, 2013 WL 1149919, *7 (D. Ariz. Mar.
25 20, 2013) (“[R]eopening the case to permit relitigation of Claim 8 would further
26 delay resolution of Petitioner’s case and interfere with the State’s legitimate
27 interest in finality.”). This factor “weighs strongly against [Wood].” *Jones*, 733
28 F.3d at 840 & n.4 (considering in assessment of reliance “the likely need to restart

1 the entire execution process” under Arizona’s rules if habeas proceeding were
2 reopened).

3 **Delay:** The United States Supreme Court denied certiorari on October 7,
4 2013, and the Ninth Circuit issued its mandate on October 15, 2013. *See Wood v.*
5 *Ryan*, No. 08–99003, Dkt. # 98, 99. Wood filed the present motion approximately
6 9 months later. This lengthy delay weighs against Wood. And if it weighs in his
7 favor, it does so only minimally. *See Jones*, 733 F.3d at 840 (finding that a 2-
8 month gap between denial of certiorari and Rule 60(b) motion to weigh slightly in
9 petitioner’s favor).

10 **Degree of connection:** *Martinez* holds that PCR counsel’s ineffectiveness
11 can constitute cause to excuse the procedural default of an ineffective-assistance-
12 of-trial counsel claim. 132 S. Ct. at 1316–18. *Martinez* bears no relationship to
13 Claims VI and XI because they do not allege ineffective assistance of counsel.
14 Although *Martinez* may be related to Claim X.C.2, which alleges ineffective
15 assistance at trial, that relationship should not carry heavy weight. This Court
16 should weigh this factor against Wood.

17 **Comity:** In litigation spanning over two decades, the state and federal
18 courts have considered Wood’s claims for relief, which included several challenges
19 to trial counsel’s ineffectiveness. *See Samuel Lopez*, 678 F.3d at 1137 (“In light of
20 [the Ninth Circuit’s] previous opinion and those of the various other courts that
21 have addressed the merits of several of Lopez’s claims, and the determination
22 regarding Lopez’s lack of diligence, the comity factor does not favor
23 reconsideration.”). This factor weighs against reopening the habeas proceeding.

24 ***B. This Court’s denial of funding is not an extraordinary***
25 ***circumstance warranting reopening the habeas petition.***

26 Wood argues that this Court’s purportedly erroneous denial of funding for
27 neuropsychological testing and mitigation investigation, which could have shown
28 counsel’s ineffectiveness at sentencing, constitutes an extraordinary circumstance

1 warranting reopening the habeas petition. Wood is incorrect. Wood cites no
2 authority holding that the erroneous denial of funding can constitute an
3 extraordinary circumstance. Further, that Wood was denied funding while
4 petitioners represented by the FPD obtain funding is of no moment, because Wood
5 has no right to the effective assistance of habeas counsel, or to evidentiary
6 development on habeas. *Cf. Harris v. United States*, 367 F.3d 74, 77, 81–82 (2nd
7 Cir. 2004) (existence of extraordinary “circumstances will be particularly rare
8 where the relief sought [in a Rule 60(b)(6) motion] is predicated on the alleged
9 failures of counsel in a prior habeas petition. That is because a habeas petitioner
10 has no constitutional right to counsel in his habeas proceeding, and therefore, to be
11 successful under Rule 60(b)(6), must show more than ineffectiveness under
12 *Strickland v. Washington*, 466 U.S. 668 (1984).”) (citation and parallel citations
13 omitted); *see generally Bracy v. Gramley*, 520 U.S. 899 (1997).

14 **II. WOOD HAS NOT ESTABLISHED CAUSE TO OVERCOME THE**
15 **PROCEDURAL DEFAULT OF HABEAS CLAIMS VI, X.C.2, OR 11.**

16 Even if the *Phelps* factors militate in favor of reopening the judgment under
17 Rule 60(b), Wood’s “underlying claim[s] do[] not present a compelling reason to
18 reopen the case,” *Samuel Lopez*, 678 F.3d at 1137, because they are not substantial
19 under *Martinez*. *Martinez* recognizes a narrow exception that “[i]nadequate
20 assistance of counsel at initial-review collateral proceedings may establish cause
21 for a prisoner’s procedural default of a claim of ineffective assistance at trial.” 132
22 S. Ct. at 1315. In other words, a federal habeas court may consider a prisoner’s
23 otherwise procedurally defaulted IAC-trial claim if the prisoner establishes: (1) his
24 state PCR counsel was constitutionally ineffective in failing to raise the claim in
25 state court, and; (2) the underlying IAC-trial claim is “a substantial one.” *Id.* at
26 1318.

27 “In order to show ineffectiveness of PCR counsel, [a prisoner] must show
28 that PCR counsel’s failure to raise the claim that trial counsel was ineffective was

1 an error ‘so serious that counsel was not functioning as the “counsel” guaranteed
2 the defendant by the Sixth Amendment,’ and caused [the prisoner] prejudice.”
3 *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012) (quoting *Strickland*, 466
4 U.S. at 687); *see also Samuel Lopez*, 678 F.3d at 1138 (“To have a legitimate IAC
5 claim a petitioner must be able to establish both deficient representation *and*
6 prejudice.”). Because PCR “[c]ounsel is not necessarily ineffective for failing to
7 raise even a nonfrivolous claim,” he “would not be ineffective for failure to raise
8 an ineffective assistance of counsel claim with respect to trial counsel who was not
9 constitutionally ineffective.” *Sexton*, 679 F.3d at 1157 (citing *Knowles v.*
10 *Mirzayance*, 556 U.S. 111, 127 (2009)). Wood cannot establish cause to overcome
11 the procedural default of his claims because 1) *Martinez* does not apply to two of
12 those claims, and 2) the claims are not substantial.

13 ***A. Martinez does not apply to Claim VI.***

14 In Claim VI of the habeas petition, Wood argued that the trial court violated
15 his Eighth and Fourteenth Amendment rights by denying his request for a
16 neurological evaluation and brain mapping (“neuromapping”). (Dkt. # 23
17 (amended habeas petition), at 81–88.) In his Rule 60(b)(6) motion, Wood seeks to
18 apply *Martinez* to excuse this claim’s procedural default. (Dkt. # 116, at 20–22.)
19 But because Claim VI does not allege trial counsel’s ineffectiveness, *Martinez*
20 does not apply, and post-conviction counsel’s purported ineffectiveness cannot
21 constitute cause to set aside the procedural default. *See Hunton v. Sinclair*, 732
22 F.3d 1124, 1126–27 (9th Cir. 2013) (declining to apply *Martinez* to excuse
23 procedural default of *Brady v. Maryland* claim); *see generally Martinez*, 132 S. Ct.
24 at 1320 (“The rule of *Coleman* governs in all but the limited circumstances
25 recognized here.”). And even if *Martinez* did apply, Wood’s Claim VI is not
26 substantial because Wood has failed to produce evidence that the requested
27 neuromapping would have proved that he suffers brain damage, or produced other
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1 compelling mitigation. The claim is therefore speculative and does not warrant
2 relief. Accordingly, Wood has failed to excuse Claim VI's procedural default.

3 **B. Claim X.C.2 is not substantial.**

4 In Claim X.C.2, Wood alleged, in pertinent part, that counsel was ineffective
5 for failing to impeach Officer Anita Sueme with her prior statements to an author
6 indicating that she had unloaded the murder weapon, which would have rebutted
7 the State's evidence of premeditation. (Dkt. # 23, at 128–132.) Wood now
8 contends these statements would have rebutted the State's argument that Wood had
9 cocked and recocked the gun, and would have undermined the grave risk of death
10 aggravating factor. (Dkt. # 116, at 22–25.) This appears to be a new claim—in the
11 habeas petition, Wood argued that the Suame evidence would have rebutted a
12 finding of *premeditation*, not the grave risk of death factor.³ The presentation of a
13 new, procedurally-defaulted claim does not warrant reopening the habeas
14 proceeding under Rule 60(b). *See Jones*, 733 F.3d at 826 (Rule 60(b) is not “a
15 second chance to assert new claims”) Moreover, any new claim is time-barred. *See*
16 28 U.S.C. § 2244(d)(1).

17 In any event, the claim is not substantial. Evidence suggesting that Wood
18 may not have cocked, uncocked, and recocked the murder weapon would not
19 negate the substantial other evidence of the grave risk of death factor. In affirming
20 this factor, the Arizona Supreme Court also relied on 1) the presence of others in
21 the confined garage where the murders happened, 2) Wood's conduct in pointing
22 the weapon at another employee, and 3) the fact that another employee fought with
23 Wood for control over the gun. *Wood I*, 881 P.2d at 1175–76. Any impeachment
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25 _____
26 ³ To the extent he reurges that argument, it fails: his claim is not substantial
27 because of the abundant evidence of premeditation. (*See* Dkt. # 63, at 22–23)
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1 of Sueme would not have affected this evidence, and would not have created a
2 reasonable probability of a different result. This claim is not substantial.

3 ***C. Claim XI is not substantial.***

4 In Claim XI,⁴ Wood contends that appellate counsel labored under a conflict
5 of interest and thus performed deficiently on appeal. (Dkt. # 116, at 25–26.)
6 Wood specifically argues that counsel’s former representation of victim Debra
7 Dietz prevented him from reurging the trial defense theme that Wood and Debra
8 had been “involved in a covert relationship which she was hiding from her
9 parents,” and instead presented an unsupported argument that Wood was insane.
10 (*Id.*) This is not an ineffective-assistance-of-counsel claim; it is a conflict of
11 interest claim, and thus outside the contours of *Martinez*. See *Jones*, 733 F.3d at
12 840 (“*Martinez* ... says nothing about conflicts of interest ...”). Accordingly,
13 *Martinez* does not apply.

14 Assuming for the sake of argument that *Martinez* applies to this claim,⁵ it is
15 not substantial. Before filing the opening brief, Wood’s appellate counsel, Barry J.
16 Baker Sipe, moved to withdraw because the agency with which he was to begin
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19 ⁴ Although this Court divided Claim XI into Claims XI.A (which concerned
20 appellate counsel’s alleged conflict of interest), and Claims XI.B (which concerned
21 appellate counsel’s purportedly disorganized appellate brief), Wood refers
22 generally to “Claim XI” in his argument. (Dkt. # 116, at 25–26.) The context of
23 Wood’s argument, however, makes clear that he is raising only Claim XI.A. (*Id.*)

24 ⁵ The Ninth Circuit Court of Appeals has extended *Martinez* to apply where
25 post-conviction counsel ineffectively fails to raise a substantial claim of *appellate*
26 counsel’s ineffectiveness. See *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014);
27 *Nguyen v. Curry*, 763 F.3d 1287 9th Cir. 2013). Although they acknowledge
28 *Nguyen* binds this Court, Respondents maintain that the Ninth Circuit has
unreasonably expanded *Martinez* and intend to present this issue to the United
States Supreme Court in a certiorari petition from *Hurles*.

1 employment, the Pima County Legal Defender's Office, had previously
2 represented Debra Dietz. (*See* Dkt. # 63-1, at 39-40.) Pursuant to an order from
3 the Arizona Supreme Court, the trial court held a status conference on appellate
4 counsel's motion, at which the court suggested that the Legal Defender's Office
5 provide the court with Debra's file for in camera inspection. (*Id.*) Nothing in the
6 record indicates that anything further came of this procedure. Then, 2 days later,
7 the Arizona Supreme Court granted the motion to withdraw. (*Id.*) However, likely
8 because the trial court's action resolved the issue, Baker Sipe nonetheless filed the
9 opening brief and represented Wood in the direct appeal. *Wood*, 881 P.2d 1158
10 (listing Baker Sipe of the Pima County Legal Defender as counsel for Wood). In
11 his opening brief, Baker-Sipe asserted that no conflict of interest existed, and that
12 Wood had consented to his representation. (*Id.*)

13 At trial, Wood's counsel argued to the jury that the State failed to prove
14 premeditation because he acted impulsively. *Wood I*, 881 P.2d at 1167
15 ("Premeditation was the main trial issue. The defense was lack of motive to kill
16 either victim and the act's alleged impulsiveness, which supposedly precluded the
17 premeditation required for first degree murder."). But Wood fails to identify any
18 *appellate* issues that counsel failed to raise due to his office's duty of loyalty to
19 Ms. Dietz. Because an appellate lawyer does not pursue trial defenses on appeal,
20 Wood's contention that *appellate* counsel abandoned the *trial* defense of
21 impulsivity is illogical. Moreover, Wood's contention that Baker Sipe elected to
22 argue that Wood was insane is in fact based on appellate counsel's argument that,
23 because an expert report prepared for sentencing raised issues of insanity,
24 impulsivity, and involuntary and voluntary intoxication, Wood was entitled to a
25 new trial in which the jury had access to those findings as they related to guilt.
26 (Opening Brief, at 39-43.) This argument did not, as Wood now contends,
27 represent counsel's abandonment of a more viable issue, but rather his assertion
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1 that the jury should have received additional evidence supporting the lack-of-
2 premeditation defense.

3 Accordingly, because Wood has failed to identify any viable alternative
4 appellate issues that Baker Sipe failed to raise due to his office's loyalty to Debra
5 Dietz, he cannot meet his burden of demonstrating an actual conflict, much less a
6 substantial negative impact on the outcome of his appeal. *See Jenkins*, 148 Ariz. at
7 467, 715 P.2d at 720; *Padilla*, 176 Ariz. 81, 83, 859 P.2d 191, 193.

8 **V. CONCLUSION.**

9 For the reasons previously stated, this Court should deny and dismiss
10 Wood's motion.

11
12 RESPECTFULLY SUBMITTED this 20th day of April, 2012.

13 THOMAS C. HORNE
14 ATTORNEY GENERAL

15 /s/
16 LACEY STOVER GARD
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1 I hereby certify that on July 18, 2014, I electronically transmitted the
2 attached document to the Clerk's Office using the ECF System for filing and
transmittal of a Notice of Electronic Filing to the following ECF registrant:

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