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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Joseph Rudolph Wood, et al.,

Petitioner,

-vs-

Charles L. Ryan, et al.,

Respondents.

CV 98-00053-TUC-JGZ

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

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

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DATED this 18th day of July, 2014.

Respectfully submitted,

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s/ Jeffrey A. Zick
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MEMORANDUM OF POINTS AND AUTHORITIES

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

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

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[1] Wood contends that his motion is a valid Rule 60(b) motion and not an unauthorized second or successive petition because he challenges this Court's procedural rulings. (Petition, at 16–20.) Wood appears to be correct. *See Cook v. 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 ...)

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

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

(... continued)

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

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

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

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

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

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

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

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

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

the entire execution process" under Arizona's rules if habeas proceeding were reopened).

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

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

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

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

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

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

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

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

"In order to show ineffectiveness of PCR counsel, [a prisoner] must show that PCR counsel's failure to raise the claim that trial counsel was ineffective was

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

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

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

compelling mitigation. The claim is therefore speculative and does not warrant relief. Accordingly, Wood has failed to excuse Claim VI's procedural default.

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

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

In any event, the claim is not substantial. Evidence suggesting that Wood may not have cocked, uncocked, and recocked the murder weapon would not negate the substantial other evidence of the grave risk of death factor. In affirming this factor, the Arizona Supreme Court also relied on 1) the presence of others in the confined garage where the murders happened, 2) Wood's conduct in pointing the weapon at another employee, and 3) the fact that another employee fought with Wood for control over the gun. *Wood I*, 881 P.2d at 1175–76. Any impeachment

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[3] To the extent he reurges that argument, it fails: his claim is not substantial because of the abundant evidence of premeditation. (*See* Dkt. # 63, at 22–23)

of Sueme would not have affected this evidence, and would not have created a reasonable probability of a different result. This claim is not substantial.

C. *Claim XI is not substantial.*

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

Assuming for the sake of argument that *Martinez* applies to this claim,[5] it is not substantial. Before filing the opening brief, Wood's appellate counsel, Barry J. Baker Sipe, moved to withdraw because the agency with which he was to begin

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[4] Although this Court divided Claim XI into Claims XI.A (which concerned appellate counsel's alleged conflict of interest), and Claims XI.B (which concerned appellate counsel's purportedly disorganized appellate brief), Wood refers generally to "Claim XI" in his argument. (Dkt. # 116, at 25–26.) The context of Wood's argument, however, makes clear that he is raising only Claim XI.A. (*Id.*)

[5] The Ninth Circuit Court of Appeals has extended *Martinez* to apply where post-conviction counsel ineffectively fails to raise a substantial claim of *appellate* counsel's ineffectiveness. *See Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014); *Nguyen v. Curry*, 763 F.3d 1287 9th Cir. 2013). Although they acknowledge *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*.

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

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

that the jury should have received additional evidence supporting the lack-of-premeditation defense.

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

V. CONCLUSION.

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

RESPECTFULLY SUBMITTED this 20th day of April, 2012.

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I hereby certify that on July 18, 2014, I electronically transmitted the 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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