No. 14-16380

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph Rudolph Wood, III, Petitioner-Appellant,

vs.

Charles L. Ryan, et al., Respondents-Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case No. 4:98-cv-00053-JGZ

OPENING BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The district court's jurisdiction over this habeas corpus case arises under 28 U.S.C. § 2254. This Court has appellate jurisdiction under 28 U.S.C. § 1291. This is an appeal from a district court order denying a motion for relief under Federal Rule of Civil Procedure 60(b)(6). An order granting or denying relief under Rule 60 is final and appealable. *See Harman v. Harper*, 7 F.3d 1455, 1457 (9th Cir. 1993. The order denying relief was filed July 20, 2014. (Dist. Ct. ECF No. 124.) On July 21, 2014, Mr. Wood filed a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e). (Dist. Ct. ECF No. 125.) The notice of appeal from the district court's order denying the Rule 59(e) motion was timely filed on July 21, 2014. (Dist. Ct. ECF No. ____.) Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. Whether Petitioner-Appellant Joseph Wood is entitled to relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6): (a) under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), because there are several substantial defaulted claims in his habeas petition that were not decided on the merits, and (b) because the district court declined to provide him with resources that would allow him to prove prejudice in his ineffective assistance of counsel claim.

STATEMENT OF THE CASE

Mr. Wood filed a Rule 60(b)(6) motion for relief from the judgment dismissing his habeas claim, asserting that there were substantial defaulted claims that had not been decided on the merits and that his trial counsel had been ineffective in failing to investigate or prepare a mitigation case. Mr. Wood sought relief on the following barred claims: (1) that trial counsel was ineffective for failing to cross-examine Officer Anita Sueme's trial testimony that she did not open the gun's cylinder with a prior inconsistent statement that she had started to remove the bullets, when the Arizona Supreme Court relied heavily on her trial testimony to find the grave risk aggravator, Ariz. Rev. Stat. § 13-703(F)(3) (1989); (2) that Mr. Wood's direct appeal attorney was laboring under a conflict of interest and it adversely effected that attorney's representation; and (3) that the trial court denied Mr. Wood the opportunity to develop and present mitigating evidence when it denied his motion for a neurological exam including neuromapping. Finally, in an exhausted–or, partially exhausted–claim, Mr. Wood alleged the ineffective assistance of counsel at sentencing for failing to investigate, prepare, and present mitigating evidence. In the federal habeas proceedings, up until the appointment of the Federal Public Defender's Office less than three months ago, however, he had been denied the resources to prove how he was prejudiced and, as a result, he effectively defaulted on the claim that could have had the benefit of *Martinez*.

The district court held that claims regarding Officer Sueme's inconsistent statement and appellate counsel's conflict were not substantial. (Dist. Ct. ECF No. 124 at 17-20.) It held that *Martinez* did not apply to the defaulted claim that the trial court violated Mr. Wood's constitutional rights when it denied him the neurological, neuromapping exam. (Dist. Ct. ECF No. 124 at 16.) It held that the claim regarding the district court's denial of resources to prove prejudice from the ineffective assistance of counsel claim was a second or successive petition and declined to entertain it. (Dist. Ct. ECF No. 124 at 20-22.) It also held that Mr. Wood had not demonstrated extraordinary circumstances under Rule 60(b). (Dist. Ct. ECF No. 124 at 11-17.)

Following the denial of the 60(b) motion, Mr. Wood moved to amend or alter the judgment. (Dist. Ct. ECF No. 125.) He requested that the district court consider his constitutional arguments that the denial of resources violated his equal protection and due process rights which it did not address in its order denying the Rule 60(b) motion. He attached two expert reports, one from neuropsychologist Dr. Kenneth Benedict, the other from psychologist Dr. Robert Smith. Following a comprehensive neuropsychological exam, Dr. Benedict concluded that Mr. Wood suffered from brain-based difficulties with sustained attention, speed of processing information, and adaptive problem-solving under stressful and changing conditions. These were exacerbating influences on Mr. Wood's behavior at the

time of the offenses. (Dist. Ct. ECF No. 125, Ex. 1 at 12.) Dr. Smith gave the opinion, among others, that "[a]s a result of the combined effect of his disorders (i.e., Persistent Depressive Disorder, neurocognitive impairments, and substance abuse), Mr. Wood's capacity to conform his conduct to the requirements of the law was significantly impaired." (Dist. Ct. ECF No. 125, Ex. 2 at 13.)

On July 21, 2014, the district court denied the motion to amend or alter the judgment. (Dist. Ct. ECF No. 126 at 1-4.) In the same order, it granted a certificate of appealability, holding that "reasonable jurists could debate its denial of Petitioner's Rule 60(b) motion." (Dist. Ct. ECF No. 126 at 5.)

STATEMENT OF FACTS

Mr. Wood was convicted and sentenced to death for the homicide of his ex-girlfriend, Debra Dietz, and her father, Eugene Dietz. The homicide victims were the only persons shot and they were each 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. 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. One of

them, Officer Anita Sueme, testified she recovered the gun and that she never opened the cylinder of the gun. (Tr. 2/21/91 at 13.) Relying on this testimony, the State presented evidence that the cylinder displayed an odd sequence of two live rounds between three spent cartridges. (Tr. 2/22/91 at 13-14; Tr. 2/21/91 at 58 (testimony of homicide detective about sequence in which bullets were found).) The State presented further testimony that the placement of the cartridges in the gun could be explained by the cocking and uncocking of the weapon. (*Id.* at 15.) The State then argued that this evidence 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." (Tr. 2/25/91 at 30-31.)

This testimony was important to the Arizona Supreme Court's affirmance of Mr. Wood's death sentence and its finding of the grave risk aggravating factor. This aggravating factor required: "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."

(Dist. Ct. ECF No. 25 Ex. 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. (PCR ROA at 1631.)[1]

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. (Tr. 2/22/91 at13-15 ("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 trial counsel was ineffective for failing to cross-examine Officer Sueme with her statement to Mr. Gellman, expressly citing the Arizona Supreme Court's reference to the testimony, as this would have damaged the State's case at trial and in sentencing. (Dist. Ct. ECF No. 24 at 128-36.) The district court held that this claim was procedurally barred because it was not presented to the state court. (Dist. Ct. ECF No. 63 at 36.) This Court agreed. *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.").

[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.

B. 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 Mr. Wood. (Dist. Ct. ECF No. 25 Ex. 15.) Counsel, Barry Baker Sipe, was joining the Pima County Legal Defender's Office, and that office 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.[2] 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 at trial, namely 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 or evidence in the record. If counsel had continued the theme regarding 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.

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[2] 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.

> 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.

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

The claim that appellate counsel was conflicted was raised as Claim XI in the habeas petition. The district court held that the claim was defaulted. (Dist. Ct. ECF No. 63 at 40-41.) This Court reached the same conclusion. *Wood*, 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.").

C. 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, Ex. 1.) No "in-depth neuropsychological and neurological assessment" was done before trial.

Instead, trial counsel presented two mental health experts. During the guilt phase, he called Dr. James Allender to testify to the defense that Mr. Wood was impulsive. At sentencing, he then called Dr. Michael Breslow, a psychiatrist, who testified mainly that Mr. Wood suffered 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.) The limited scope of the question posed to Dr. Allender explains the limited scope of his evaluation, in which he administered only the following tests to Mr. Wood: Wechsler Adult Intelligence Scale-Revised, i.e., an I.Q. test; the Wechsler Memory Scale-Revised, and the Rorschach Test. (PCR

ROA 1089, Ex. 34.) A much more detailed and varied neuropsychological battery was available at the time. (Dist. Ct. ECF No. 25, Ex. 7 ("Dr. Allender did not purport to conduct an in-depth neurological screening . . . . [A]n in-depth neurological screening would include eleven additional tests.").)

At trial, Dr. Allender testified that Mr. Wood was someone with impulsive tendencies. (Tr. 2/22/91 at 153.) Dr. Allender could not explain 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 murder 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 investigating and developing mitigation for Mr. Wood's case. 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. (Tr. 7/12/91 at 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 fifteen pages. (*Id.* at 8-23.) He was the only witness that trial counsel called at the sentencing hearing. Dr. Breslow did not perform any neuropsychological testing. However, he provided 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.

(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. (Tr. 7/12/91 at 24-28.)

Further, 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, Ex. 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.

In sentencing Mr. Wood, the trial court made 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, Ex. 7.) The court found that the mitigating circumstances did not outweigh the aggravating circumstances. (Tr. 7/12/91at 32.)

In his federal habeas petition, Mr. Wood argued that the trial court erred and violated his Eighth and Fourteenth Amendment rights because it prevented the presentation of mitigating evidence. (Dist. Ct. ECF No. 24 at 81-88.) Mr. Wood asserted that he made a sufficient proffer to obtain the neuromapping 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;

(Dist. Ct. ECF No. 25, Ex. 7.) The court concluded that this claim was procedurally barred and no additional testing was permitted. (Dist. Ct. ECF No. 63 at 32.) This Court agreed, holding that the claim was defaulted by the actions of both appellate and post-conviction counsel. *Wood*, 693 F.3d at 1121-22.

D. The Inadequate Mitigation Investigation by Trial Counsel

Trial counsel conducted almost no mitigation investigation. At the sentencing hearing, he presented evidence from Mr. Wood's father Joseph Wood Jr. 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 only 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. Joseph 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. (Dist Ct. ECF No. 25, Ex. 8.) *with* Tr. 2/22/91 at 54-68 (guilt phase testimony).) Also, trial counsel failed to 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 Joseph Wood Jr. 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 Demonstrate Significant Mitigation

Neuropsychologist Dr. Kenneth Benedict has evaluated Mr. Wood and found that he suffers from a number of neurocognitive deficits. He states that, at the time of the crime, Mr. Wood suffered from brain-based difficulties with sustained attention, speed of processing information, and adaptive problem-solving under stressful and changing conditions. These were exacerbating influences on Mr. Wood's behavior at the time of the offenses. (Dist. Ct. ECF 125, Ex. 1 at 12).

In addition, Mr. Wood has been diagnosed with Persistent Depressive Disorder, Early Onset, Severe, Stimulant Use Disorder, Alcohol Use Disorder, and Neurocognitive Impairment by clinical psychologist/certified addiction

specialist, Dr. Robert Smith. (Dist. Ct. ECF No. 125, Ex. 2 at 3.) Dr. Smith noted that Mr. Wood, like all children of alcoholics, was at severe risk for developing his own addiction. (*Id.* at 8.) Dr. Smith concludes that, "[a]s a result of the combined effect of his disorders (i.e., Persistent Depressive Disorder, neurocognitive impairments, and substance abuse), Mr. Wood's capacity to conform his conduct to the requirements of the law was significantly impaired." (*Id.* at 13.)

4. Mr. Wood's Unsuccessful Attempts to Obtain Resources from the District Court for a Mitigation Investigation and to Get An Evaluation

Mr. Wood repeatedly requested that the district court provide him with the resources for a full neurological and neuropsychological work-up. (Dist. Ct. 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 denied all the requests. (Dist. Ct. 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 with this Court 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 denied. (9th Cir. ECF No. 77.) In stark contrast, clients whose counsel had funding from the district court or who were represented by the Federal Public Defender's Office have received *Martinez* remands from this Court 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 (9th Cir.); *Runningeagle v. Ryan*, No. 07-99026, Order dated July 18, 2012 (9th Cir.). Mr. Wood's CJA attorney did not have resources to investigate or retain experts without funding from the district court.

5. 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, Debra Dietz, and whose advocacy that Court criticized in its opinion.

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.

SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 60(b)(6) allows the district 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 that 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), the district court did not address important, substantive habeas claims that Mr. Wood raised on the merits. Mr. Wood's development of his case was further prevented because he was repeatedly denied funding from the district court for a mitigation investigation and full neurological

and neuropsychological work-up. This Court declined to grant a similar motion. Other attorneys with access to investigative resources, including the Federal Public Defender's Office or those that did receive funding from the district court, have obtained *Martinez* remands.

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).

All of the claims Mr. Wood is pursuing are substantial: counsel's failure to cross-examine an important state witness whose testimony was key to the finding of the grave risk aggravator; appellate counsel's conflict of interest because the office he worked for had represented the victim, Debra Dietz; the trial court's failure to provide funding for a neurological study to present mitigating evidence; and counsel's ineffectiveness at sentencing now that, in the

last two and a half months, Mr. Wood obtained investigative resources that demonstrate prejudice.

Mr. Wood has been diligent. He pursued resources in the district court repeatedly, even before *Martinez*. He unsuccessfully sought a *Martinez* remand from this Court and argued *Martinez* when he filed his petition for certiorari in the United States Supreme Court. He brought a Rule 60(b)(6) motion less than three months after the Federal Public Defender's Office was appointed as co-counsel. He brought it at that point in time so as not to burden the courts with piecemeal litigation. On balance, the factors set forth in *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009), favored granting the motion and, given the extraordinary circumstances including *Martinez* and the lack of previous resources, the district court abused its discretion when it denied Mr. Wood's Rule 60(b) motion.

ARGUMENT

Standard of Review

This Court reviews a district court ruling on a motion under Rule 60(b)(6) for an abuse of discretion. *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012). A district court abuses its discretion when the court does not apply the correct law or rests its

decision on a clearly erroneous finding of a material fact. *See Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011).

An error of law is an abuse of discretion. *Strauss v. Comm'r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1137 (9th Cir. 2011). Thus, the court abuses its discretion by erroneously interpreting a law, *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1289 (9th Cir. 1994), or by resting its decision on an inaccurate view of the law, *Richard S. v. Dep't of Dev. Servs.*, 317 F.3d 1080, 1085-86 (9th Cir. 2003).

I. Mr. Wood Seeks to Remedy Defects in the Integrity of the Process.

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"). Several substantial claims were defaulted because of counsel's ineffectiveness. 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*, 545 U.S. at 521; *Jones v. Ryan*, 733 F.3d 825, 834 (9th Cir. 2013). This Court 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.* Other Courts have frequently held that a proper 60(b) motion attacks a non-merits ruling. *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, this Court 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."). Respondents agree that the 60(b) motion was a proper 60(b) motion: "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." (Dist. Ct. ECF No. 122 at 3 n.1.)

Here, Mr. Wood seeks relief from judgment finding three of the claims raised in the habeas petition defaulted. Furthermore, the district 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 a full neurological and neuropsychological work-up from the district court. (Dist. Ct. ECF No. 13 at 2 ("Petitioner seeks funding for a neuro-psychologist to demonstrate that the Petitioner suffers from organic brain damage"); Dist. Ct. 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 . . . ."); Dist. Ct. 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 denied the

requests, and then denied the claim on the basis of the state court record. (Dist. Ct. 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 this Court 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 denied. In stark contrast, clients whose counsel had funding from the district court or whose counsel were in the Federal Public Defender's Office have received *Martinez* remands from this Court 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 (9th Cir.); *Runningeagle v. Ryan*, No. 07-99026, Order dated July 18, 2012 (9th Cir.). Mr. Wood's CJA attorney did 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 did not have resources to show prejudice when counsel performed deficiently. By ready analogy, the words *of Douglas* 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' 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 district 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 district court did not 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, at least partially, 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), 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: "[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.

Furthermore, when defining "some merit," the *Martinez* Court cited *Miller–El v. Cockrell*, 537 U.S. 322 (2003), and to the less rigorous "standards for showing required for a certificate of appealability to issue." By virtue of the definition of "some merit" in *Martinez*, the district court's grant of a certificate of appealability (Dist. Ct. ECF No. 126 at 5) is a convincing demonstration that Mr. Wood's claims have "some merit" and meet the test of being substantial claims under *Martinez*. Put differently, a claim is not substantial if "it does not have any merit or . . . is wholly without factual support." *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013) (en banc) (citing *Martinez*, 132 S. Ct. at 1319). By that standard, too, the COA grant demonstrates that Mr. Wood's claims have "some merit."

1. 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 Arizona Revised Statute § 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.

Wood, 881 P.2d at 1174-75. The officer who recovered Mr. Wood's gun, Anita Sueme, testified at trial that she never opened the cylinder of the gun. (Tr. 2/21/91 at 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, Ex. 2 (emphasis added).) A galley draft of this book was appended to a motion to change venue by trial counsel. (Dist. Ct. 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. (Tr. 2/22/91 at 13-15.)

On direct appeal, the Arizona Supreme Court noted that "there is merit to Defendant's arguments" objecting to the grave risk aggravator. *Wood*, 881 P.2d at 1174. For instance, the victims were both shot at close range. (Tr. 2/20/91 at 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. The district court rejected this claim in the Rule 60(b) motion for two reasons and it was wrong on both counts. First, it held that this was a new claim. Second, it said it was not substantial. (Dist. Ct. ECF No. 124 at 17-18.)

The claim in the habeas petition specifically mentions that the Arizona Supreme Court relied on Officer Sueme's testimony when it affirmed the death sentence. (Dist. Ct. ECF No. 24 at 130 (citing *Wood*, 881 P.2d at 1175).) Mr. Wood asserted that impeaching the witnesses, including Officer Sueme, would have led to a different sentence. (Dist. Ct. ECF No. 24 at 136; *see also* ECF No. 32 (Mr. Wood's Traverse) at 147 ("In habeas, petitioner addresses this failure to impeach the state's witnesses as to its impact at both trial and sentencing.").)

Contrary to the district court's analysis, the claim is substantial. The district court said the Arizona Supreme Court relied on other factors besides the alleged placement of the bullets. But, the district court did not acknowledge that the Arizona Supreme Court found the question close stating "there is merit to Defendant's arguments." 881 P.2d at 1174. The other factors relied on are either not given great weight under Arizona law or the circumstances.

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. On this point, the Arizona Supreme 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 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. (Tr. 2/20/91 at 166-67 (" Q. You thought he was going to shoot Jimmy? A. *I don't know*, I thought he was going to shoot him.") (emphasis supplied).) Plus, even if the witness were threatened with the gun it was to get him to be quiet because he had yelled. (*Id.* at 166 ("Jimmy yelled out something . . . He panicked.").) Under similar circumstances, 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)). Notably, the State never called Jimmy Dietz as a witness at trial. Mr. Dietz never testified he thought he would be shot.

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." (Tr. 2/20/91 at 183.)

2. 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 office that represented the victim, Debra Dietz. The Arizona Supreme Court recognized the conflict and granted counsel's motion to withdraw. (Dist. Ct. ECF No. 25, Ex. 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, i.e., that she was duplicitous, and she was hiding the relationship 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 theme regarding 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. *Wood*, 881 P.2d at 1166 n.3. He used a mind-numbing combination of incorporations by reference in an appellate brief.

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.

In error, the district court held that it was not convinced that Mr. Baker Sipe's performance was affected. (Dist. Ct. ECF No. 124 at 19.) It then cited the Arizona Supreme Court for the proposition that "there was 'a great deal of evidence [of] premeditation." The district court erred under the law because it was assessing the claim from the standpoint of whether Mr. Wood has shown prejudice. As is stated, that is not the standard.

3. The Failure to Permit Neuromapping

The trial court denied Mr. Wood's request for evidence of neurological impairment and 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. (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); *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 256 (2007) (even "possible neurological damage" is mitigating).

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). 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)).

Now, Mr. Wood has evidence of brain dysfunction. Neuropsychologist Dr. Kenneth Benedict evaluated Mr. Wood and found that he suffers from a number of neurocognitive deficits. He states that, at the time of the crime, Mr. Wood suffered from brain-based difficulties with sustained attention, speed of processing information, and adaptive problem-solving under stressful and changing conditions. These were exacerbating influences on Mr. Wood's behavior at the time of the offenses. (Dist. Ct. ECF No. 125, Ex. 1 at 12). This important evidence was never presented to be weighed against the aggravation.

The district court held that this claim was not available under *Martinez* because it does not allege ineffective assistance of counsel. (Dist. Ct. ECF No. 124 at 16.) However, *Martinez* does apply to ineffective assistance of appellate counsel. *Nguyen v. Curry*, 763 F.3d 1287 (9th Cir. 2013). 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 standard is the same. 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). In other words, failure to appeal on a meritorious claim is ineffective assistance of counsel.

3. 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. (Tr. 7/12/91 at 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. (Tr. 7/12/91 at 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).

Here, trial counsel did not seek a thorough neurological exam as recommended by Dr. Breslow. (PCR ROA 1808.) If he had, he could have presented the results Dr. Benedict reported (Dist. Ct. ECF No. 125, Ex. 1), and, from that, the results Dr. Smith reported that, "[a]s a result of the combined effect of his disorders (i.e., Persistent Depressive Disorder, neurocognitive impairments, and substance abuse), Mr. Wood's capacity to conform his conduct to the requirements of the law was significantly impaired." (Dist. Ct. ECF No. 125, Ex. 2 at 13.)

Had this readily available evidence been presented at trial, Mr. Wood could have established the Ariz. Rev. Stat. § 13-703(G)(1) statutory mitigating factor. Now that it is presented, he is entitled to relief from his death sentence. When defendants have been able to make this causative showing—that they were significantly volitionally impaired—the Arizona Supreme Court has implicitly determined that a defendant's moral culpability and blameworthiness is sufficiently lessened to warrant reductions in capital sentences to life imprisonment. *State v. Jimenez*, 799 P.2d 785, 798, 800 (Ariz. 1990) (death sentence reduced to life imprisonment when statutory mitigating circumstance was found to exist in light of evidence that defendant's mental illness was a major contributing cause of his conduct); *State v. Mauro*, 766 P.2d 59, 81 (Ariz.

1988); *State v. Brookover*, 601 P.2d 1322, 1326 (Ariz. 1979); *State v. Doss*, 568 P.2d 1054, 1061 (Ariz. 1977).

The district court held that this portion of Mr. Wood's motion was second or successive. It was wrong because this portion targets the district court's failure to provide resources until it was almost too late. The failure to fund creates the due process and equal protection issues set forth above. *See Griffin*, *Douglas*, *Evitts*, *supra*. The district court never addressed these important rights, though Mr. Wood set them forth in his 60(b) and 59(e) Motions.

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. Neither the district court nor Respondents contested that 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). On pages 5 and 6 of its Order, the district court set forth the factors this Court considers when assessing a Rule 60(b) Motion. (Dist. Ct. ECF No. 124 at 5-6.)

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. *Lopez v. Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012); *Martinez*, 132 S. Ct. at 1324 (Scalia, J., dissenting). As Justice Scalia stated,

Martinez resulted in "a radical alteration of our habeas jurisprudence." *Id*. at 1327.

The district court and Respondents agree that this factor favors Mr. Wood. (Dist. Ct. ECF No. 122 at 5; Dist. Ct. ECF No. 124 at 12-13.) They have no explanation, however, for why an admittedly "remarkable" change of law favors Mr. Wood only "minimally."

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's Office 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*, 580 F.3d at 443 (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. 2d 1099, 1118-19 (E.D. Mo. 2013) (six years).

To no avail, Mr. Wood pressed *Martinez* in a motion before this Court and in his petition for writ of certiorari. The district court argues that Mr. Wood did not identify his specific claims until his Rule 60(b) motion and this weighs against Mr. Wood. However, the Court does not dispute that piecemeal litigation is discouraged. Mr. Wood has brought all his Rule 60(b) claims in one motion once he had the funding to investigate his case reasonably. Even Respondents concede that "[a]t best, [this factor] 'has little weight in either direction." (Dist. Ct. ECF No. 122 at 6.)

This factor weighs in favor of granting the motion or is neutral.

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*, 545 U.S. at 529, 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."

When it weighed this factor against Mr. Wood, the district court's analysis did not factor in *Barnett*, *Woodson* and *Gonzalez, supra*. At best, this factor, too, is neutral.

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 Rule 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. In addition, the cases the district court cited regarding the reasonableness of the time of the Rule 60(b) motion are all readily distinguished. (Dist. Ct. ECF No. 124 at 11-12.) In *Kingdom v. Lamberque*, 392 Fed. Appx. 520 (9th Cir. 2010) (not for publication), the grounds for the motion were known at the time the original judgment was entered. Here, *Martinez* was decided after the original judgment was entered. In *Ramsey v. Walter*, 304 Fed.

Appx. 827 (11th Cir. 2008), unlike here, the prisoner did not appeal the original dismissal. Finally, in *Horton v. Sheets*, 2012 WL 3777431 (S.D. Ohio Aug. 30, 2012), the petitioner gave no reason for the delay. Here, Mr. Wood has explained that the delay was prompted by the appointment of the Federal Public Defender's Office as co-counsel.

This factor, too, favors Mr. Wood. The district court held it favors neither party. (Dist. Ct. ECF No. 124 at 15.)

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 Rule 60(b) motions because the post-conviction counsel in this case is the same person who was post-conviction counsel in *Martinez*. The district court found this factor weighs in Mr. Wood's favor. (Dist. Ct. ECF No. 124 at 16.)

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 aggravator, 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.

The district court asserted that this factor did not favor Mr. Wood because the district court addressed some claims on the merit. (Dist. Ct. ECF No. 124 at 17.) That analysis not only contradicts *Phelps*, but it also contradicts *Dickens v. Ryan*, 740 F.2d 1302 (9th Cir. 2014) (en banc). *Dickens* held that "*Martinez* contains no language limiting this 'equitable exception' simply because a petitioner brought other IAC claims that were exhausted. . . . Because courts evaluate procedural default on a claim-by-claim basis, it follows that *Martinez* would allow a petitioner to show cause, irrespective of the presence of other, separate claims." *Id.* at 3121.

In sum, the *Phelps* factors favor Mr. Wood (four to five in his favor with one or two neutral).

Conclusion

For the reasons stated, Mr. Wood requests that the Court reverse the district court and either direct it to withdraw the judgment or hold a hearing to determine whether Mr. Wood has demonstrated cause as set forth in his Rule 60(b) motion.

Respectfully submitted: July 21, 2014.

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 11,663 words, excluding the parts exempt under Fed. R. App. P. 32(a)(7)(B)(iii). It was prepared in a proportionately spaced typeface (Times New Roman, a Windows system font) of size 14 points using Word 2010.

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Certificate of Service

I certify that on July 21, 2014, I transmitted the foregoing Opening Brief using the Appellate CM/ECF system for filing and transmittal of a Notice of Docket Activity. 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.

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