

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

---

---

Joseph Rudolph Wood III, Petitioner,

vs.

Charles L. Ryan, et al, Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**\*\*\*CAPITAL CASE\*\*\***  
**EXECUTION SCHEDULED FOR JULY 23, 2014 AT**  
**10:00 AM (MST) / 1:00 P.M. (EST)**

**PETITION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO  
PROCEED *IN FORMA PAUPERIS***

---

---

JON M. SANDS  
Federal Public Defender  
District of Arizona

Jennifer Y. Garcia  
*Counsel of Record*  
Dale A. Baich  
850 West Adams Street, Suite 201  
Phoenix, Arizona 85007  
(602) 382-2816 voice  
(602) 889-3960 facsimile  
jennifer\_garcia@fd.org  
dale\_baich@fd.org

Julie Hall  
779 Cody Loop Road  
Oracle, Arizona 85623  
(520) 896-2890  
julieshall@hotmail.com

*Attorneys for Petitioner Wood*

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

---

---

Joseph Rudolph Wood III, Petitioner,

vs.

Charles L. Ryan, et al, Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**\*\*\*CAPITAL CASE\*\*\***  
**EXECUTION SCHEDULED FOR JULY 23, 2014 AT**  
**10:00 AM (MST) / 1:00 P.M. (EDT)**

**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

---

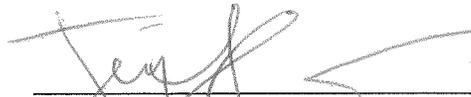
---

Pursuant to Rule 39, Rules of the Supreme Court, Petitioner Joseph Rudolph Wood III, hereby moves for leave to proceed *in forma pauperis* in the above-captioned action on the ground that he lacks sufficient funds to pay for fees and expenses. Mr. Wood is a death-row prisoner incarcerated at the Arizona State Prison Complex-Eyman. By order of February 6, 1998, the United States District Court, District of Arizona appointed counsel for Mr. Wood under 21 U.S.C. § 848(q)(4)(B) and (q)(6) and q(8), *recodified at* 18 U.S.C. § 3599 *as stated in Harbison v. Bell*, 556 U.S. 180, 190 (2009). Accordingly, Mr. Wood asks that he be permitted to proceed *in forma pauperis* in this Court.

Respectfully submitted:

July 22, 2014.

Jon M. Sands  
Federal Public Defender



---

Jennifer Garcia (Arizona Bar No. 021782)  
*Counsel of Record*

Dale Baich (Ohio Bar No. 0025070)  
850 West Adams Street, Suite 201  
Phoenix, Arizona 85007  
(602) 382-2816 (voice)  
jennifer\_garcia@fd.org  
dale\_baich@fd.org

Julie S. Hall (Arizona Bar No. 017252)  
779 Cody Loop Road  
Oracle, AZ 85623  
(520) 896-2890 (voice)  
julieshall@hotmail.com

*Attorneys for Petitioner Wood*

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

---

Joseph Rudolph Wood III, Petitioner,

vs.

Charles L. Ryan, et al, Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**\*\*\*CAPITAL CASE\*\*\***  
**EXECUTION SCHEDULED FOR JULY 23, 2014 AT**  
**10:00 AM (MST) / 1:00 P.M. (EDT)**

**PETITION FOR A WRIT OF CERTIORARI**

---

JON M. SANDS  
Federal Public Defender  
District of Arizona

Jennifer Y. Garcia  
*Counsel of Record*  
Dale A. Baich  
850 West Adams Street, Suite 201  
Phoenix, Arizona 85007  
(602) 382-2816 voice  
(602) 889-3960 facsimile  
jennifer\_garcia@fd.org  
dale\_baich@fd.org

Julie Hall  
779 Cody Loop Road  
Oracle, Arizona 85623  
(520) 896-2890  
julieshall@hotmail.com

*Attorneys for Petitioner Wood*

**\*\*CAPITAL CASE\*\***

**EXECUTION SCHEDULED FOR WEDNESDAY, JULY 23, 2014 AT 10:00  
A.M. (MST)**

**QUESTION PRESENTED**

Whether, under *Barefoot v. Estelle*, 463 U.S. 880 (1983), a stay of execution should be granted to permit full briefing and judicial attention for an execution scheduled tomorrow, when yesterday the district court issued a certificate of appealability acknowledging that “reasonable jurists could debate [the district court’s] denial of Petitioner’s Rule 60(b)(6) motion.”

## **PARTIES TO THE PROCEEDING**

The petitioner is not a corporation. The respondents throughout the federal habeas corpus proceedings have been the Director of the Arizona Department of Corrections and the Warden of the Arizona State Prison Complex—Eyman Unit, the facility where Wood is currently incarcerated.

## TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES.....	iv
DECISIONS BELOW.....	1
STATEMENT OF JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE .....	3
A. Prior Counsel.....	3
B. Mr. Wood’s 60(b)(6) Motion.....	4
1. Trial Counsel’s Failure to Impeach Officer Anita Sueme.....	4
2. Appellate Counsel’s Conflict of Interest .....	8
3. The Trial Court Prevented Trial Counsel From Obtaining Important Mitigating Evidence and Counsel’s Scant Mitigation Presentation.....	10
4. The Inadequate Mitigation Investigation by Trial Counsel .....	17
REASONS THE WRIT SHOULD BE GRANTED .....	22
ARGUMENT.....	23
I. Mr. Wood Brought a Proper 60(b) Motion. ....	23
II. The Circuit Court Did Not Give the Case the Careful Consideration it Deserved.....	23
III. The Circuit Court’s Consideration Violated <i>Barefoot</i> . ....	28
CONCLUSION.....	28
APPENDIX	

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Abdul-Kabir v. Quarterman</i> , 550 U.S. 233 (2007) .....	16
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983).....	i, 22, 23, 28
<i>Berryman v. Morton</i> , 100 F.3d 1089 (3d Cir. 1996) .....	7
<i>Clabourne v. Lewis</i> , 64 F.3d 1373 (9th Cir. 1995).....	3
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980) .....	10, 12, 13, 26
<i>Detrich v. Ryan</i> , 740 F.3d 1237 (9th Cir. 2013).....	20
<i>Dickens v. Ryan</i> , 740 F.3d 1302 (9th Cir. 2014).....	20
<i>Douglas v. California</i> , 372 U.S. 353 (1963) .....	27
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985) .....	28
<i>Gonzalez v. Crosby</i> , 545 U.S. 524 (2005) .....	23
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1955) .....	27
<i>Jefferson v. Upton</i> , 130 S. Ct. 2217 (2010) .....	16
<i>Lewis v. Mayle</i> , 391 F.3d 989 (9th Cir. 2004) .....	7
<i>Martinez v. Ryan</i> , 132 S. Ct. 1309 (2012).....	1, 3, 5, 23
<i>Mason v. Hanks</i> , 97 F.3d 887 (7th Cir. 1996).....	27
<i>Matire v. Wainwright</i> , 811 F.2d 1430 (11th Cir. 1987).....	27
<i>Mayo v. Henderson</i> , 13 F.3d 528 (2d Cir. 1994) .....	27
<i>Mickens v. Taylor</i> , 535 U.S. 168 (2002) .....	10, 26
<i>Moffett v. Kolb</i> , 930 F.2d 1156 (7th Cir. 1991) .....	7

<i>Nguyen v. Curry</i> , 763 F.3d 1287 (9th Cir. 2013) .....	26
<i>Porter v. McCallum</i> , 130 S. Ct. 447 (2009) .....	16, 21
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005) .....	16, 21
<i>Sears v. Upton</i> , 130 S. Ct. 3259 (2010) .....	16, 21
<i>Wallace v. Stewart</i> , 184 F.3d 1112 (9th Cir. 1999).....	3
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003) .....	21
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000) .....	21
<i>Wood v. Ryan</i> , 693 F.3d 1104 (9th Cir. 2012).....	1, 8, 10, 17, 19

#### STATE CASES

<i>State v. Brookover</i> , 601 P.2d 1322 (Ariz. 1979) .....	22
<i>State v. Doss</i> , 568 P.2d 1054 (Ariz. 1977) .....	22
<i>State v. Jeffers</i> , 661 P.2d 1105 (Ariz. 1983) .....	25
<i>State v. Jimenez</i> , 799 P.2d 785 (Ariz. 1990) .....	22
<i>State v. Mauro</i> , 766 P.2d 59 (Ariz. 1988).....	22
<i>State v. Smith</i> , 707 P.2d 289 (Ariz. 1985).....	25
<i>State v. Wood</i> , 881 P.2d 1158 (Ariz. 1994).....	2, 5, 6, 9, 24, 25

#### DOCKETED CASES

<i>Lopez v. Ryan</i> , No. 09-99028 (9th Cir.).....	20
<i>Martinez v. Ryan</i> , No. 08-99009 (9th Cir.) .....	20
<i>Runnigeagle v. Ryan</i> , No. 07-99026 (9th Cir.) .....	21

*Walden v. Ryan*, No. 08-99012 (9th Cir.).....20

**FEDERAL STATUTES**

28 U.S.C. § 1254(1).....2

Fed. R. Civ. P. 59(e).....1

Fed. R. Civ. P. 60(b).....1

Arizona death-row prisoner Joseph Rudolph Wood III seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit that affirmed the decision of the district court denying Mr. Wood's Motion for Relief from Judgment Pursuant to Rule 60(b)(6) and denied a stay of execution.

#### DECISIONS BELOW

The July 22, 2014 decision of the Ninth Circuit Court of Appeals in *Wood v. Ryan*, No. 14-16380 (9th Cir.), denying the appeal from his Rule 60(b) motion, is attached in the Appendix at A-3. The orders denying panel rehearing and rehearing en banc are attached at A-2 and A-1. The July 20, 2014 decision of the district court in *Wood v. Ryan*, No. CV-98-563 (D. Ariz.), denying Mr. Wood's Motion for Relief from Judgment Pursuant to Rule 60(b)(6) is attached at A-18. The July 21, 2014 decision of the district court in *Wood v. Ryan*, No. CV-98-563 (D. Ariz.), denying Mr. Wood's Motion to Amend or Alter the Judgment Pursuant to Fed. R. Civ. P. 59(e) and granting a certificate of appealability finding that "reasonable jurists could debate [the district court's] denial of Petitioners Rule 60(b)(6) motion" is attached as A-13.

The Ninth Circuit Court of Appeals opinion affirming the district court's denial of Mr. Wood's federal habeas corpus petition in *Wood v. Ryan*, No. 08-99003 (9th Cir.), is attached at A-40, and the panel's order denying his motion for remand pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), is attached at A-71. The district court's order denying Mr. Wood's habeas petition in *Wood v. Schriro*, No.

CV-98-0053 (D. Ariz.) is attached at A-72. The Arizona Supreme Court opinion in *State v. Wood*, No. CR-91-0233-AP (Ariz. Sup. Ct.), denying Mr. Wood's direct appeal is attached at A-145.

### STATEMENT OF JURISDICTION

The court of appeals issued its opinion in this case on July 22, 2014. (A-3.) This petition is timely under Supreme Court Rule 30.1. This court has jurisdiction under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Eighth Amendment to the United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment to the United States Constitution:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

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. 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.

**B. Mr. Wood's 60(b)(6) Motion.**

In his Rule 60(b) Motion Mr. Wood raised several issues. Mr. Wood sought relief on the following habeas claims that the federal courts held were barred: (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*.

**1. 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.)<sup>1</sup>

---

<sup>1</sup> “PCR ROA” refers to the record in the Pima County Superior Court, Case No. CR-28449, prepared for Mr. Wood’s appeal to the Arizona Supreme Court following the denial of his first state post-conviction petition.

At trial, 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. 02/22/91 at 13-15 ("Q. Okay. How do you rotate the cylinder? A. Well, . . . [a]nother way you could do it is to open the cylinder up and rotate it manually and close it up again.")) In his Amended Habeas Petition, Mr. Wood claimed that 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.)

In his habeas petition and in his Rule 60(b)(6) motion, Mr. Wood asserted that trial counsel was ineffective for failing to impeach Officer Sueme. *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"); 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).

During the initial habeas proceedings, 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.) The Ninth Circuit agreed in *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.”). (A-59.)

## 2. 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.<sup>2</sup> 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

---

<sup>2</sup> 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.

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

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

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

*Wood*, 881 P.2d at 1166 n.3. (A-149.) 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.) The Ninth Circuit 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.”). (A-62.)

Appellate counsel’s representation was adversely affected. Under *Mickens v. Taylor*, 535 U.S. 168, 173-74 (2002), and *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980), Mr. Wood has identified, as described above, an actual conflict, *i.e.*, an adverse effect, that the conflict had on counsel’s representation.

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

#### 4. 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.

##### a. Many other witnesses and records were available to much more fully describe Mr. Wood'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.

**b. 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.

**c. 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.)

**d. 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 Ninth Circuit Court of Appeals 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.

This claim of ineffective assistance of counsel at sentencing is a substantial one. This 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); *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).

#### REASONS THE WRIT SHOULD BE GRANTED

The opinion by the Ninth Circuit is "in conflict with the decision of another United States court of appeals on the same important matter[s]," Sup. Ct. R. 10(a), and "has decided . . . important federal question[s] in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). For these reasons, this Court should exercise its discretion and grant certiorari.

A genuine conflict exists. The Third Circuit has a local rule requiring a stay when COA has been granted. Under Third Circuit L.A.R. 111.3(b), "[i]f the district court grants the certificate of appealability . . . it must also grant a stay pending disposition of the appeal . . ."). Neither the Ninth Circuit nor the district court issued such a stay. Moreover, the Ninth Circuit's opinion conflicts with *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Barefoot* held that "a circuit court, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner

obtains a certificate of probable cause.” *Id.* at 893-94. Federal courts “need not, and should not . . . fail to give non-frivolous claims of constitutional error the careful consideration that they deserve.” *Id.* at 888.

## ARGUMENT

The district court issued a certificate of appealability in this case, stating that “it finds that reasonable jurists could debate its denial of Petitioner’s Rule 60(b) motion.” (Dist. Ct. ECF No. 126 at 5; A-17.)

### **I. Mr. Wood Brought a Proper 60(b) Motion.**

Here, because of state 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. Further, because Mr. Wood targets defaulted habeas claims and a denial of funding for habeas counsel, his claims challenge the integrity of the process and are not a successor petition. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005).

### **II. The Circuit Court Did Not Give the Case the Careful Consideration it Deserved.**

#### **A. The Defaulted Claims.**

Aside from the ineffective assistance claim at sentencing, the circuit court’s analysis was limited to two sentences. The court stated, “We have carefully reviewed the district court opinion. Under our deferential standard of review, we cannot say that the district court abused its discretion in denying the Rule 60(b)

motion substantially for the reasons stated in the district court opinion.” (9th Cir. ECF No. 14 at 5, A-7.)

There were many errors in the district court’s opinion that the Ninth Circuit did not address, firmly suggesting that the appellate court did not give the case the consideration it merits due to the short time frame.

**1. Counsel’s Failure to Cross-Examine Officer Sueme.**

Contrary to the district court’s claim that Mr. Wood was pursuing a new sentencing phase claim, 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), A-69 to A-70.) 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 at 147 (“In habeas, petitioner addresses this failure to impeach the state’s witnesses as to its impact at both trial and sentencing.”).)

Again, 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: the presence of bystanders, the equivocal testimony about the gun being pointed at one of the witnesses and a brief struggle for the gun. In its analysis, 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. (A-168.) 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. (A-168.) 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)). (A-168.)

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 to 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)). (A-168.) 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. Appellate Counsel’s Conflict.

In rejecting the claim that appellate counsel’s conflict adversely affected his representation of Mr. Wood, the district court applied the wrong standard. The district court held that it was not convinced that Mr. Baker Sipe’s performance was affected. It then cited that it did not matter that he abandoned an impulsivity defense because the Arizona Supreme Court for the proposition that “there was ‘a great deal of evidence [of] premeditation.’” (Dist. Ct. ECF No. 124 at 19.) The district court erred under the law because it was assessing the claim from the standpoint of whether Mr. Wood has shown prejudice. This is not this Court’s law. Under *Mickens v. Taylor*, 535 U.S. 168 (2002), and *Cuyler v. Sullivan*, 446 U.S. 335 (1980), prejudice is not required.

## 3. Trial Court’s Failure to Grant Request for Neurological Exam.

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, A-33.) 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 and the resulting remedy would be the same, new sentencing.

#### **B. Ineffective Assistance of Trial Counsel at Sentencing.**

The circuit court held that the portion of Mr. Wood's motion challenging the effectiveness was second or successive. (9th Cir. ECF No. 14 at 5-7, A-7 to A-9.) The Court erred because this portion of the motion targets the district court's failure to provide resources until it was almost too late. The failure to fund creates due process and equal protection violations when other petitioners were granted or provided resources. *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). As this Court stated in *Evitts v. Lucey*, "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). Deprived of resources, Mr. Wood was denied “a fair opportunity” to develop his claims. The circuit court never addressed the violations of the *Griffin*, *Douglas* and *Evitts* line of cases.

### III. The Circuit Court’s Consideration Violated *Barefoot*.

Here, the district court found that “reasonable jurists could debate its denial of Petitioner’s Rule 60(b) motion.” (Dist. Ct. ECF No. 126 at 5, A-17.) That finding has ample support in the record because the court’s analysis contained the errors described above. Although these errors were identified in Mr. Wood’s brief in the Ninth Circuit, that court affirmed in a summary fashion. With the grant of the COA district court, Mr. Wood deserved a more careful consideration from the circuit court on appeal. Federal courts “need not, and should not . . . fail to give non-frivolous claims of constitutional error the careful consideration that they deserve.” *Barefoot*, 463 U.S. at 888.

## CONCLUSION

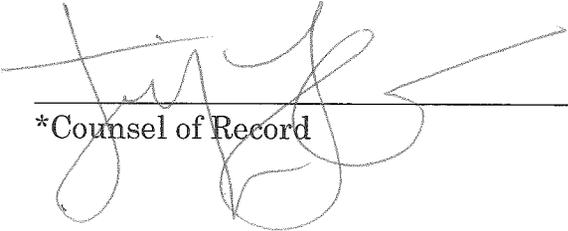
For the foregoing reasons, Mr. Wood requests that the Court grant his petition for writ of certiorari.

Respectfully submitted: July 22, 2014.

JON M. SANDS  
Federal Public Defender

\*Jennifer Y. Garcia (Arizona Bar No. 021782)  
Dale A. Baich (Ohio Bar No. 0025070)

Julie S. Hall (Arizona Bar No. 017252)



---

\*Counsel of Record