No. 14–16380

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH RUDOLPH WOOD, JR.,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, CV 98-00053-TUC-JGZ

RESPONDENTS-APPELLEES' ANSWERING BRIEF

Thomas C. Horne
Attorney General
(Firm State Bar No. 14000)

Jeffrey A. Zick
Chief Counsel

Lacey Stover Gard
Jeffrey L. Sparks
John Pressley Todd

Assistant Attorneys General
Capital Litigation Section
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686
CADocket@azag.gov
State Bar Number 027536

Attorneys for Respondents-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

QUESTIONS PRESENTED FOR REVIEW

1. Did the district court correctly dismiss Wood's motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), insofar as Wood sought to reopen Habeas Claim X(C)(3), as a second or successive habeas petition, where Wood sought to present new evidence to support a claim the district court rejected on the merits?

2. Did the district court abuse its discretion by denying Wood's motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), insofar as Wood sought to reopen Habeas Claims VI, X(C)(2), and XI(A), where Wood failed to show that *Martinez v. Ryan*, __ U.S. __, 132 S. Ct. 1309 (2012), constituted an extraordinary circumstance warranting relief from judgment?

STATEMENT OF THE CASE

In August 1989, Petitioner-Appellant Joseph Rudolph Wood shot and killed his former girlfriend, Debra Dietz, and her father, Eugene Dietz, and the trial court sentenced him to death for each murder. *State v. Wood*, 881 P.2d 1158, 1165 (Ariz. 1994) ("*Wood I*"). In the nearly 25 years since the murders, Wood has unsuccessfully challenged his convictions and sentences on multiple grounds in state and federal court.

After finding several claims procedurally defaulted in March 2006, the district court denied habeas relief on October 24, 2007. (Dist. Ct. Dkt. # 79.) Wood appealed and, after briefing and argument were complete, moved to remand the case to the district court to reconsider its resolution of his ineffective-assistance-of-counsel claims under *Martinez v. Ryan*, __ U.S __, 132 S. Ct. 1309 (2012). (Dkt. # 74.) In his motion, filed approximately 5 months after the *Martinez* decision, Wood sought a general remand to consider all ineffective-assistance claims, with no specific discussion of any particular claims or explanation why they were substantial. (*Id.*) This Court summarily denied the motion shortly before filing its Opinion affirming the district court's denial of habeas relief. (Dkt. # 77.) *Wood v. Ryan*, 693 F.3d 1104 (9th Cir. 2012) ("*Wood II*"). Wood renewed his *Martinez* argument in his petition for panel and en banc rehearing. (Dkt. # 81.) This Court likewise denied that

motion, with no judge requesting a vote on whether to hear the matter en banc. (Dkt. # 90.)

After the United States Supreme Court denied certiorari (*see* Dkt. # 98), this Court issued its mandate on October 15, 2013 (Dkt. # 99), marking the end of Wood's habeas proceeding. *See Ryan v. Schad*, __ U.S. __, 133 S. Ct. 2548, 2550 (2013) ("[O]nce [the Supreme] Court has denied a petition [for writ of certiorari], there is generally no need for further action from the lower courts."); *see generally* FRAP 41(d)(2)(D) (court of appeals must issue mandate immediately upon filing of Supreme Court order denying certiorari). On May 28, 2014, the Arizona Supreme Court issued a warrant of execution, and fixed July 23, 2014, for Wood's execution.

On April 30, 2014, the Federal Public Defender ("FPD") substituted for attorney Kevin Lerch as second-chair counsel for Wood. (Dist. Ct. Dkt. # 105.) Less than 1 week before his execution, over 2 years after the United States Supreme Court decided *Martinez*, and nearly 2 years after filing his *Martinez* motion in this Court, Wood filed in the district court a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b)(6), seeking to litigate whether, in light of *Martinez*, the court had erroneously found three claims procedurally defaulted 8 years earlier: 1) Claim VI, in which Wood alleged that the state trial court violated his Eighth and Fourteenth Amendment rights by

denying his request for funding for neurological testing; 2) Claim X(C)(2), in which Wood asserted that counsel was ineffective for failing to impeach Officer Anita Sueme with a prior statement; and 3) Claim XI(A),[1] in which Wood argued that appellate counsel labored under a conflict of interest because he had previously represented victim Debra Dietz. (Dist. Ct Dkt. # 23, at 81–88, 110–31, 148–56; 121) Wood also sought to relitigate an ineffective-assistance-at-sentencing claim that the district court had resolved on the merits, Claim X(C)(3), arguing that the court's purportedly erroneous denial of investigative funding had affected the habeas proceeding's integrity and the reliability of the court's resolution of that claim. (Dist Ct. Dkt. # 23, at 136–48; 121.)

The district court denied the motion. (Dist. Ct. Dkt. # 124.) With respect to Claims VI, X(C)(2), and XI(A), the court found that Wood had filed a valid Rule 60(b) motion that challenged the court's prior procedural—as opposed to merits—rulings, but expressed skepticism that the motion was filed within a "reasonable time" as Rule 60(b)(6) requires. (*Id.* at 11–12.) *See* Fed. R. Civ. P. 60(c)(1). But even assuming the motion was timely, the court found, Wood

[1] Midway through its Order, the district court relabeled the claims as follows: Claim VI became Claim A, Claim X(C)(2) became Claim B, Claim XI(A) became Claim C, and Claim X(C)(3) became Claim D. (Dist. Ct. Dkt. # 124, at 11, 20.) For ease of reference, and to remain consistent with Wood's numbering in the Opening Brief, Respondents use the numbering scheme presented in the habeas petition and subsequent district court filings.

failed to show extraordinary circumstances warranting relief because, on balance, the factors set forth in *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009), weighed against him. (*Id.* at 12–17.) In addition, the court found that Claims X(C)(2) and XI(A) were not substantial under *Martinez*, and that *Martinez* did not apply to Claim VI because it did not allege counsel's ineffectiveness. (*Id.* at 16–20.) The court further found that Wood had changed Claim X(C)(2)'s factual basis as presented in the habeas petition, that he could not use Rule 60(b)(6) as a vehicle to present a new claim, and that the claim was not substantial either as originally presented or as restyled in the Rule 60(b) motion. (*Id.* at 17–18.)

Insofar as Wood's Rule 60(b)(6) motion challenged Claim X(C)(3), the district court found that it was an unauthorized second or successive ("SOS") habeas petition, *see* 28 U.S.C. § 2244(b)(3), because the court had previously addressed and rejected that claim on the merits. (*Id.* at 20–22.) The court rejected Wood's argument that he was challenging the proceeding's integrity based on the purportedly erroneous denial of resources, rather than the court's merits resolution of the claim. (*Id.*) Instead, the court concluded, Wood had presented what was "in substance a second or successive petition asserting a merits-based challenge to the Court's previous ruling." (*Id.*)

Wood thereafter filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), arguing that, in denying the Rule 60(b) motion related to Claim X(C)(3), the district court had failed to consider Respondents' (erroneous[2]) concession that the motion was not an SOS petition, and asserting that his presentation of new evidence supporting Claim X(C)(3) transformed that claim into a new, procedurally-defaulted one, rendering *Martinez* applicable under *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014).[3] (Dist. Ct. Dkt. # 125.) Wood also provided two new expert affidavits to support his claim. (*Id.* at Exhs. 1 & 2.)

The district court denied the motion, finding that Wood had merely asked the court to "'rethink what it ha[d] already thought through'" in denying his

[2] Respondents initially misconstrued Wood's Rule 60(b) motion and did not perceive that he was seeking to reopen Claim X(C)(3), instead believing that he generally challenged the denial of investigative funding and sought to reopen the procedurally-defaulted Claims VI, X(C)(2), and XI(A) under *Martinez*. Accordingly, Respondents did not contest in their response that Wood had presented a valid Rule 60(b) motion. Respondents maintain that the district court correctly analyzed the issue and that Wood's challenge to Claim X(C)(3) was, in fact, an SOS petition. Respondents have not waived this argument because AEDPA's limitation on SOS petitions is jurisdictional. *See, e.g.*, *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001).

[3] Wood does not appear to renew this argument in his Opening Brief, and for good reason. A Rule 60(b) motion that presents a brand new claim is, beyond question, an SOS petition. *See Jones v. Ryan*, 733 F.3d 825, 826 (9th Cir. 2013) (Rule 60(b) cannot be used as a vehicle to bring brand-new claims). Moreover, any new claim Wood presents at this late date would be time-bared under 28 U.S.C. § 2244(d).

motion. (Dist. Ct. Dkt. # 126, at 2–3 (quoting *United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D. Ariz. 1998))). The court reaffirmed its determination that Wood had raised a substantive habeas claim that amounted to an SOS petition, regardless "whether he is raising a new, fundamentally altered claim or supporting a previous claim with new evidence." (*Id.* at 3–4.) The court granted a certificate of appealability on this issue (*id.* at 5) and, on July 21, 2014, Wood filed a timely notice of appeal from the denial of the Rule 60(b) and Rule 59(e) motions. (Dist. Ct. Dkt. # 127.)

STANDARD OF REVIEW

This Court reviews the district court's denial of a Rule 60(b)(6) motion for an abuse of discretion. *See Towery v. Ryan*, 673 F.3d 933, 940 (9th Cir. 2012); *Delay v. Gordon*, 475 F.3d 1039, 1043 (9th Cir. 2007). Relief under Rule 60(b)(6) requires the moving party to make a showing of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). "Such circumstances will rarely occur in the habeas context," and "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Id.* A "district court's conclusion that [a] 60(b) motion ha[s] to comply with the successive petition requirement of the AEDPA is an issue of law that [this Court] review[s] *de novo*." *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) ("*Thompson II*"); *see also Jones*, 733 F.3d at 833.

SUMMARY OF ARGUMENT

The district court appropriately determined that, insofar as it related to Habeas Claim X(C)(3), Wood's Rule 60(b) motion constituted an unauthorized SOS petition. Wood exhausted Claim X(C)(3) in state court and the district court denied it on the merits. Although Wood asserts that his current argument relates to the habeas proceeding's integrity because the district court denied what he considered critical investigative funding, in reality he sought to litigate anew the claim's merits. The district court properly refused these efforts.

Likewise, the district court did not abuse its discretion by denying Wood's Rule 60(b)(6) motion relating to Habeas Claims VI, X(C)2, and XI(A) because Wood failed to show that *Martinez* constituted an extraordinary circumstance warranting relief from judgment. The *Phelps* factors, on balance, tip sharply in the State's favor, where a warrant of execution has issued and where Wood failed for 2 years to pursue his remedies, filing his motion on the eve of his execution. Further, the court did not abuse its discretion by finding that *Martinez* does not apply to Claim VI, which alleges trial court error rather than counsel's ineffectiveness, or by finding that Wood had altered Claim X(C)(2)'s factual basis from that originally presented and transformed it into a new claim that he could not properly raise in a Rule 60(b)(6) motion. Further, the court did

not abuse its discretion by finding that neither Claim X(C)(2) nor Claim XI(A) was substantial under *Martinez*, as both claims fail for lack of prejudice.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED WOOD'S RULE 60(B) MOTION RELATING TO CLAIM X(C)(3) BECAUSE HIS MOTION WAS AN UNAUTHORIZED SOS PETITION. MOREOVER, THE COURT DID NOT ABUSE ITS DISCRETION BY DENYING WOOD'S RULE 60(B) MOTION RELATING TO CLAIMS VI, X(C)(2), AND XI(A) BECAUSE *MARTINEZ* IS NOT AN EXTRAORDINARY CIRCUMSTANCE WARRANTING RELIEF FROM JUDGMENT AND, IN ANY EVENT, THE CLAIMS TO WHICH *MARTINEZ* APPLIES ARE NOT "SUBSTANTIAL."

With respect to Claim X(C)(3), Wood attempted to present a substantive claim for relief under the guise of a Rule 60(b) motion. The district court properly deemed Wood's motion as an SOS petition and declined to consider it. The court further did not abuse its discretion by denying Wood's Rule 60(b) motion based on *Martinez* because 1) Wood failed to show extraordinary circumstances warranting relief, 2) *Martinez* does not apply to two of the claims, and 3) the claims are not substantial.

I. WOOD'S CHALLENGE TO CLAIM X(C)(3) WAS AN SOS PETITION THAT THE DISTRICT COURT LACKED JURISDICTION TO CONSIDER.

The Anti-terrorism and Effective Death Penalty Act ("AEDPA") significantly "restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." *Tyler v.*

Cain, 533 U.S. 656, 661 (2001), and requires a petitioner to obtain authorization from the United States Court of Appeals before filing such a petition. *See* 28 U.S.C. § 2244(b)(3)(A); Rule 9, Rules Governing § 2254 Cases; *Burton v. Stewart*, 549 U.S. 147, 152–53 (2007) (per curiam). This requirement is jurisdictional. *See Cooper*, 274 F.3d at 1274 ("'When the AEDPA is in play, the district court may not, in the absence of proper authorization from the court of appeals, consider a second or successive habeas application.'") (quoting *Libby v. Magnusson*, 177 F.3d 43, 45 (1st Cir. 1999)); *see also Burton*, 549 U.S. at 152–53 (determining that district court lacked jurisdiction to consider unauthorized successive habeas petition).

A proper Rule 60(b) motion challenges "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." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). A Rule 60(b) motion is proper if "neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction." *Id.* at 533. If a motion "seeks to add a new ground" for relief, however, it constitutes a second or successive petition. *Id.* at 532; *see also Thompson II*, 151 F.3d at 921 (treating habeas petitioner's Rule 60(b) motion as an SOS petition governed by AEDPA where the motion's factual predicate stated a claim for a successive petition).

A movant seeking relief under Rule 60(b)(6) must show "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535. "Such circumstances will rarely occur in the habeas context." *Gonzalez*, *Id.* Rule 60(b) proceedings are subject to only limited and deferential review. *Id.*; *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 263 n.7 (1978).

Here, the district court correctly determined that, because Wood's Rule 60(b) motion advanced a substantive habeas claim, it was an SOS petition that the court lacked jurisdiction to consider absent authorization from this Court under 28 U.S.C. § 2244(b)(3). Wood attempted to present an ineffective-assistance-of-counsel claim that the district court considered and rejected on the merits in 2007. (Dist. Ct. Dkt. # 79, at 45–62.) Despite his contention that he could not develop his claims due to an erroneous denial of funding, Wood's motion did not challenge a "defect in the integrity of the federal habeas proceedings," *Gonzalez*, 545 U.S. at 532, but instead asserted that he was entitled to habeas relief for substantive reasons. In fact, Wood supported his motion with two new mental-health expert reports, and argued that they changed the district court's resolution of the claim. And he cited no authority—and likewise cites none in the opening brief—holding that a district court's denial of

discretionary funding can constitute a defect in the integrity of a habeas proceeding.

The motion was therefore an SOS petition. *See, e.g., id.* at 531 ("Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts."); *Thompson v. Calderon*, 122 F.3d 28, 30 n.2 (9th Cir. 1997) ("*Thompson I*") ("[W]here a habeas petitioner tries to raise new facts or new claims not included in prior proceedings in a Rule 60(b) motion, such motion should be treated as the equivalent of a second petition for writ of habeas corpus.") (quotations omitted). And because this Court did not authorize the petition,[4] the district

---

[4] Even if Wood had requested authorization from this Court to file an SOS petition, such a request would have been properly denied. 28 U.S.C. § 2244(b)(2) permits successive petitions *only* if (1) the claim raised is based on a new, retroactively-applicable rule of constitutional law, or (2) the claim's factual predicate "could not have been discovered previously through the exercise of due diligence" and the "facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Martinez* is an equitable rule and not a new rule of constitutional law. And, for the reasons set forth in connection with the *Phelps* discussion, *infra*, Wood cannot show that his claim rests on newly-discovered evidence that he could not have discovered earlier through the exercise of due diligence. Nor can Wood show actual innocence of the offenses or an aggravating factor.

court lacked jurisdiction to consider it. *See* 28 U.S.C. § 2244(b)(3)(A); Rule 9, Rules Governing § 2254 Cases; *Burton*, 549 U.S. at 152–53; *Cooper*, 274 F.3d at 1274. The court properly dismissed the challenge to Claim X(C)(3).

II. *MARTINEZ* DOES NOT CONSTITUTE AN "EXTRAORDINARY CIRCUMSTANCE" ENTITLING WOOD TO RULE 60(b)(6) RELIEF ON CLAIMS VI, X(C)(2), AND XI(A).

Wood contends that the *Martinez* decision constitutes an extraordinary circumstance warranting habeas relief. But the district court did not abuse its discretion by finding that the *Phelps* factors, on balance, weigh against Wood, and that Wood had failed to state a substantial ineffective-assistance-of-counsel claim. This Court should affirm the district court's decision.

A. *Wood did not file his motion within a "reasonable time."*

Rule 60(b)(6) requires a party to file his motion within a "reasonable time" after judgment is entered. Here, the district court was appropriately "skeptical" that Wood met this standard, where he filed his motion more than 2 years after *Martinez*, 7 weeks after the Arizona Supreme Court issued his execution warrant, and only 3 business days before his scheduled execution. (Dist. Ct. Dkt. # 124, at 11 (citing *Kingdom v. Lamerque*, 392 Fed. Appx. 520, 521 (9th Cir. 2010) (Rule 60(b)(6) motion untimely when filed 2 years after judgment); *Ramsey v. Walker*, 304 Fed. Appx. 827, 829 (11th Cir. 2008) (Rule 60(b)(6) motion untimely when filed 6 years after denial of habeas petition and

2 years after cases on which it relied were issued); *Horton v. Sheets*, 2012 WL 3777431, at * 2 (S.D. Ohio Aug. 30, 2012) (Rule 60(b)(6) motion untimely where filed 2 years after Supreme Court issued decision on which it rested).) This Court should likewise find that Wood failed to file his motion within a reasonable time and deny relief.

B. *The Martinez decision.*

In *Martinez*, the Supreme Court recognized, for the first time, a "narrow exception" to *Coleman v. Thompson*, 501 U.S. 722 (1991)[5]: When the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 132 S. Ct. at 1315, 1317. A prisoner may show cause for a default of an ineffective-assistance-of-trial-counsel claim if he shows that initial-review-collateral-proceeding counsel was ineffective under *Strickland*, and also demonstrates that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, meaning that the claim has "some merit." 132 S. Ct. at 1318.

[5] In *Coleman*, the Court held that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Martinez*, 132 S. Ct. at 1315.

C. *The Phelps factors weigh against Rule 60(b)(6) relief.*

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

Change in the law: Wood argues that *Martinez* is a "remarkable" change in the law. (O.B. at 44.) This Court has, in fact, found that *Martinez* is "a 'remarkable—if limited—development in the Court's equitable jurisprudence' that 'weigh[s] slightly in favor of reopening the petitioner's habeas case."

Jones, 733 F.3d at 839 (quoting *Lopez (Samuel) v. Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012) (additional quotations omitted)). *But see Gonzalez*, 545 U.S. at 536–39 (finding that change in the law did not constitute an extraordinary circumstance). The district court appropriately found, based on *Lopez*, that the change-in-the-law factor weighs slightly in Wood's favor.[6]

Diligence: The change in the law presented in *Martinez* "is all the less extraordinary" in Wood's case because of his lack of diligence in pursuing a claim that ineffective assistance of post-conviction counsel was cause to overcome a procedural default. *Gonzalez*, 545 U.S. at 537. This factor weighs against Wood, as he filed the present motion over 2 years after *Martinez* was decided, and after a warrant of execution had been issued. Further, Wood did not allege post-conviction counsel's ineffectiveness as cause to excuse a procedural default in district court (*see* Dist. Ct. Dkt. # 124, at 13), instead making his first such allegation in this Court approximately 5 months after *Martinez* issued. (*See* Dkt. # 74). *See Samuel Lopez*, 678 F.3d at 1136 (diligence factor weighed against petitioner where he raised ineffective-

[6] Although bound by *Lopez*, the district court noted that three other jurisdictions have categorically found that *Martinez* does not constitute an extraordinary circumstance justifying relief under Rule 60(b)(6). (Dist. Ct. Dkt. # 124, at 13 (citing *Nash v. Hepp*, 740 F.3d 1075, 1078 (7th Cir. 2014); *Arthur v. Thomas*, 739 F.3d 611, 633 (11th Cir. 2014); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012)).

assistance-of-PCR-counsel for the first time after *Martinez*). And even then, Wood failed to present any detailed explanation how *Martinez* applied to his specific claims, or why they were substantial. (Dkt. # 74).

Wood attempts to minimize the delay by arguing that the Federal Public Defender, which possesses greater resources than prior counsel, was not appointed until approximately 3 months ago. But prior counsel could easily have filed the present motion at an earlier date, as Claims X(C)(2) and XI(A) do not depend on resources and, as discussed below, Claim VI is outside *Martinez*'s ambit. This factor weighs against granting the motion. At best, it "has little weight in either direction." *Jones*, 733 F.3d at 839 (giving diligence factor little weight despite newly-appointed counsel's argument that prior counsel was conflicted and could not raise certain claims).

Reliance/Finality: Wood's of-right legal proceedings are complete. *See Schad*, 133 S. Ct. at 2550. An execution warrant has issued. "The State's and the victim's interests in finality, especially after a warrant of execution has been obtained and an execution date set, weigh against granting post-judgment relief." *Samuel Lopez*, 678 F.3d. at 1136. This factor "weighs strongly against [Wood]." *Jones*, 733 F.3d at 840 & n.4 (considering in assessment of reliance "the likely need to restart the entire execution process" under Arizona's rules if habeas proceeding were reopened).

Delay: The United States Supreme Court denied certiorari on October 7, 2013, and the Ninth Circuit issued its mandate on October 15, 2013. (Dkt. # 98, 99.) Wood filed the present motion approximately 9 months later. Although the district court found that this factor favored neither party (Dist. Ct. Dkt. # 124, at 15), this lengthy delay should weigh against Wood. At best, as the court found, it is neutral.

Degree of connection: As previously stated, *Martinez* holds that post-conviction counsel's ineffectiveness can constitute cause to excuse the procedural default of an ineffective-assistance-of-trial counsel claim. 132 S. Ct. at 1316–18. Martinez bears no relationship to Claims VI and XI(A) because they do not allege ineffective assistance of counsel. Although *Martinez* may be related to Claim X(C)(2), which alleges ineffective assistance at trial, that relationship should not carry heavy weight.

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

were reviewed on the merits, and the judgment "did not preclude review of all of [Wood's] constitutional claims." (Dist. Ct. Dkt. # 124, at 16–17.)[7] This factor weighs against reopening the habeas proceeding.

On balance, the factors above weigh in favor of the State and against Wood. The district court did not abuse its discretion by so finding.

D. *Wood's claims are not "substantial" under Martinez.*

The district court did not abuse its discretion by determining that *Martinez* did not apply to Claim VI and that Claims X(C)(2) and XI(A) were not substantial. This Court should affirm its ruling.

[7] Wood contends that the district court's analysis contravenes *Dickens*, because that case states that presenting an ineffective-assistance-of-counsel claim in a post-conviction proceeding does not necessarily preclude a finding that post-conviction counsel was ineffective for failing to raise other claims. (O.B. at 49.) *Dickens* is inapplicable. The district court here focused on Wood's ability to have his constitutional claims evaluated in connection with its discussion of *Phelps*, which recognized "that principles of comity are not upset when an erroneous legal judgment, if left uncorrected, 'would prevent the true merits of a petitioner's constitutional claims from ever being heard.'" (Dist. Ct. Dkt. # 124, at 16 (quoting *Phelps*, 569 F.3d at 1139–40.) In *Phelps*, the court observed, the district court dismissed the entire habeas petition as untimely and precluded *any* review of the petitioner's claims. (*Id.*) Here, in contrast, the district court—consistent with governing law—dismissed several claims as procedurally defaulted but assessed the merits of several others. *Dickens* does not address this scenario.

1. *Martinez* does not apply to Claims VI or XI(A).[8]

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

Likewise, In Claim XI(A),[9] Wood contends that appellate counsel labored under a conflict of interest. Wood specifically argues that counsel's former

[8] The district court did not directly address, but appeared to implicitly reject, Respondents' argument that Wood's conflict-of-interest-claim, set forth in Claim XI(A), was not an ineffective-assistance claim.

[9] Although the district court divided Claim XI into Claims XI.A (which concerned appellate counsel's alleged conflict of interest), and Claims XI.B (which concerned appellate counsel's purportedly disorganized appellate brief), Wood refers generally to "Claim XI" in his argument. The context of Wood's (continued ...)

representation of victim Debra Dietz prevented him from reurging the trial defense theme that Wood and Debra had been "involved in a covert relationship which she was hiding from her parents" because it required him to attack her, and instead led him to present an unsupported argument that Wood was insane. (*Id.*) This is not an ineffective-assistance-of-counsel claim; it is a conflict of interest claim, and thus outside the contours of *Martinez*. *See Jones*, 733 F.3d at 840 ("*Martinez* … says nothing about conflicts of interest ….").

2. Claim X(C)(2) is not substantial.

In Claim X(C)(2), Wood alleged, in pertinent part, that counsel was ineffective for failing to impeach Officer Anita Sueme with her prior statements to an author indicating that she had unloaded the murder weapon, which would have rebutted the State's evidence of premeditation. (Dkt. # 23, at 128–132.) Wood now contends these statements would have rebutted the State's argument that Wood had cocked and recocked the gun, and would have undermined the grave risk of death aggravating factor. (Dkt. # 116, at 22–25.) As the district court determined, Wood presented a new claim in his Rule 60(b)(6) motion: as originally pleaded, Wood contended that the Sueme evidence would have

(... continued)

argument, however, makes clear that he is raising only Claim XI.A. (*Id.*) To the extent he challenges Claim XI(B), which attacks the opening brief as disorganized, that claim also fails because Wood has failed to show a reasonable probability of a different result had counsel filed a more adequate brief.

rebutted a finding of *premeditation*, not the grave risk of death factor. Wood's presentation of a new, procedurally-defaulted claim is a disguised SOS petition, and does not warrant reopening the habeas proceeding under Rule 60(b). *See Jones*, 733 F.3d at 826 (Rule 60(b) is not "a second chance to assert new claims"). Moreover, any new claim is time-barred. *See* 28 U.S.C. § 2244(d)(1).

In any event, the claim is not substantial, either as originally pleaded or as modified. Evidence suggesting that Wood may not have cocked, uncocked, and recocked the murder weapon would not negate the substantial other evidence of the grave risk of death factor. *See* A.R.S. § 13–751(F)(3) (establishing as an aggravating factor that "[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense"). In affirming this factor, the Arizona Supreme Court also relied on 1) the presence of others in the confined garage where the murders happened, 2) Wood's conduct in pointing the weapon at another employee, and 3) the fact that another employee fought with Wood for control over the gun. *Wood I*, 881 P.2d at 1175–76. Any impeachment of Sueme would not have affected this evidence, and would not have created a reasonable probability of a different result. Although Wood considers some witnesses who presented the above testimony not credible, it is not the province of this Court to evaluate witness credibility. *See Marshall v.*

Lonberger, 459 U.S. 422, 434 (1983). Likewise, the Sueme evidence would not have rebutted the abundant evidence of premeditation. (*See* Dkt. # 63, at 22–23.) *See Wood II*, 693 F.3d at 1118 (detailing the "considerable evidence of [Wood's] premeditation … introduced at trial"). This claim is not substantial.

3. Claim XI(A) is not substantial.

Assuming for the sake of argument that *Martinez* applies to this claim,[10] it is not substantial. Before filing the opening brief, Wood's appellate counsel, Barry J. Baker Sipe, moved to withdraw because the agency with which he was to begin employment, the Pima County Legal Defender's Office, had previously represented Debra Dietz. (*See* Dist. Ct. Dkt. # 63–1, at 39–40.) Pursuant to an order from the Arizona Supreme Court, the trial court held a status conference on appellate counsel's motion, at which the court suggested that the Legal Defender's Office provide the court with Debra's file for in camera inspection. (*Id.*) Nothing in the record indicates that anything further came of this procedure. Then, 2 days later, the Arizona Supreme Court granted the motion to

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

withdraw. (*Id.*) However, likely because the trial court's action resolved the issue, Baker Sipe nonetheless filed the opening brief and represented Wood in the direct appeal. *Wood I*, 881 P.2d 1158 (listing Baker Sipe of the Pima County Legal Defender as counsel for Wood). In his opening brief, Baker-Sipe asserted that no conflict of interest existed, and that Wood had consented to his representation. (*Id.*)

At trial, Wood's counsel argued to the jury that the State failed to prove premeditation because he acted impulsively. *Wood I*, 881 P.2d at 1167 ("Premeditation was the main trial issue. The defense was lack of motive to kill either victim and the act's alleged impulsiveness, which supposedly precluded the premeditation required for first degree murder."). But regardless whether counsel appellate abandoned the impulsivity defense, as the district court concluded (Dist. Ct. Dkt. # 124, at 19–20), the Arizona Supreme Court considered and rejected that defense. *Wood I*, 881 P.2d at 1169.

Wood argues that the district court erred by considering this information because *Strickland* prejudice is not necessary for a conflict-of-interest claim.[11] (O.B. at 37.) However, Wood must show that counsel had an actual conflict that adversely affected his representation, *see Cuyler v. Sullivan*, 446 U.S. 335, 348

[11] This argument illustrates why Claim XI(A) is not an ineffective-assistance claim and thus falls outside of *Martinez*'s purview.

(1988), and the above information is relevant to that question. Further, Wood's contention that Baker Sipe elected to argue that Wood was insane is in fact based on appellate counsel's argument that, because an expert report prepared for sentencing raised issues of insanity, impulsivity, and involuntary and voluntary intoxication, Wood was entitled to a new trial in which the jury had access to those findings as they related to guilt. (Opening Brief, at 39–43.) This argument did not, as Wood now contends, represent counsel's abandonment of a more viable issue, but rather his assertion that the jury should have received additional evidence supporting the lack-of-premeditation defense.

Accordingly, because Wood has failed to identify any viable alternative appellate issues that Baker Sipe failed to raise due to his office's loyalty to Debra Dietz, he cannot meet his burden of demonstrating an actual conflict, much less a substantial negative impact on the outcome of his appeal. *See Cuyler*, 446 U.S. at 348.

CONCLUSION

For the above reasons, this Court should affirm the district court's conclusion that Wood's Rule 60 motion constitutes a barred SOS petition, insofar as it relates to Claim X(C)(3). This Court should further conclude that the district court did not abuse its discretion by denying Jones' motion for relief from judgment under Rule 60(b)(6) with respect to Claims VI, X(C)(2), and XI.

Respectfully submitted,

Thomas C. Horne
Attorney General

Jeffrey A. Zick
Chief Counsel

Jeffrey L. Sparks
John Pressley Todd
Lacey Stover Gard
Assistant Attorneys General

s/ Lacey Stover Gard
Assistant Attorney General

Attorneys for Respondents-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 22, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

JON M. SANDS
Federal Public Defender
Dale Baich
Robin Konrad
Assistant Federal Public Defenders
407 W. Congress, Suite 501
Tucson, Arizona 85701

Julie Hall
779 Cody Loop
Oracle. Arizona 85623

Attorneys for APPELLANT

s/ Barbara Lindsay
Legal Secretary
Criminal Appeals/
Capital Litigation Sections
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

3896368

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 5,824 words.

s/ Lacey Stover Gard
Assistant Attorney General

No. 14–16380

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH RUDOLPH WOOD, JR., Petitioner-Appellant, –vs– CHARLES L. RYAN, et al., Respondents-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV 98–00053–TUC–JGZ **STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases.

Respectfully submitted this 22nd day of July, 2014.

Thomas C. Horne
Attorney General

Jeffrey A. Zick
Section Chief Counsel

Jeffrey L. Sparks
John Pressley Todd
Lacey Stover Gard
Assistant Attorney General

s/ Lacey Stover Gard
Assistant Attorney General
Attorneys for Respondents-Appellees