No. 14-16380

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph Rudolph Wood III, Petitioner - Appellant,

vs.

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

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

PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

DEATH-PENALTY CASE

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INTRODUCTION

The panel's decision denying rehearing en banc (9th Cir. ECF No. 14, attached as Ex. A) is in error, and Petitioner-Appellant Joseph Rudolph Wood III respectfully requests rehearing or rehearing en banc from that decision.

STATEMENT OF REASONS TO GRANT REHEARING

The panel's decision denying Arizona death-row prisoner Joseph Rudolph Wood III a stay of execution in this case conflicts with a decision of the United States Supreme Court. After denying Mr. Wood's motion brought pursuant to Federal Rule of Civil Procedure 60(b)(6) (Dist. Ct. ECF No. 124), the district court granted a certificate of appealability ("COA") in this case holding that "reasonable jurists could debate its denial of Petitioner's Rule 60(b) motion" (ECF No. 126). Under *Barefoot v. Estelle*, 463 U.S. 880, 893-94 (1983), when the district court grants a COA, a stay of execution pending appeal must be granted so the issues can be given both full appellate briefing and full judicial attention. *Barefoot*, 463 U.S. at 893-94 ("[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."). 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.

FACTS RELEVANT TO REHEARING

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

In his Rule 60(b) motion in the district court, Mr. Wood raised several issues.

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 Arizona Supreme 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. However, telling a vastly different story than her trial testimony, when interviewed for a book by author Stuart Gellman, Officer Sueme told Mr. Gellman about the event as follows:

> "Put your arms behind your back" she yells. He does, and Espinoza kicks the gun toward her. **Anita picks it up, starts to remove the remaining bullets**, and then thinks, "Wait a second, somebody might be dead here, and I'm going to have to mark where the bullets are in the chamber."

(Dist. Ct. ECF No. 25 Ex. 2 (emphasis supplied).) Trial counsel had this statement in his possession. He attached it to a motion to change venue, but inexplicably failed to use it to challenge Officer Sueme's testimony. (PCR ROA at 1631.) [1]

At trial, the State's expert conceded that that any simple rotation of the cylinder could have affected his conclusion about whether Mr. Wood cocked and re-cocked the revolver. (Tr. 2/22/91 at 13-15 ("Q. Okay. How do you rotate the

[1] "PCR ROA" refers to the record in the Pima County Superior Court, Case No. CR-28449, prepared for Mr. Wood's appeal to the Arizona Supreme Court following the denial of his first state post-conviction petition.

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. *E.g., 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).

The district court held that this claim was procedurally barred because it was not presented to the state court. (Dist. Ct. ECF No. 63 at 36.) This Court agreed. *Wood v. Ryan*, 693 F.3d 1104, 1119 (9th Cir. 2012) ("We affirm the district court's dismissal of the claim because it was not fairly presented to the state courts.").

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.[2] As a result, Mr. Baker Sipe filed Mr. Wood's direct appeal brief.

In that brief, Mr. Baker Sipe kept away from a theme that trial counsel sought to develop at trial, namely that, after a break-up, Mr. Wood and Ms. Dietz had been involved in a covert relationship which she was hiding from her parents. Instead, he argued that Mr. Wood was insane, a proposition which had no basis in testimony or evidence in the record. If counsel had continued the theme regarding the covert relationship and demonstrating the victim's lack of credibility, 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. *Wood*, 881 P.2d at 1166 n.3 (noting counsel's unhelpful practice of reproducing 20 excerpts of trial

[2] Apparently, Mr. Baker Sipe stayed with the case because two days earlier, on March 23, 1992, the trial court directed the Legal Defender to deliver Ms. Dietz's file to the court for an in camera inspection and the court stated it would produce all exculpatory or mitigating material (presumably to appellate counsel) or seal the file.

testimony and generically claiming it was improper hearsay). Furthermore, in his appellate brief, Mr. Baker Sipe liberally used the phrase, "incorporated by reference." For example, the brief tells the Court that to fully understand Argument 16, it must also read arguments 14, 11, 10, 9, 8, 4, and 2. (Argument 4 is not incorporated by Argument 16 expressly, but is incorporated in Argument 10 which Argument 16 refers to.) Basically, Mr. Wood received the same review as if his counsel had not briefed the claims at all.

The claim that appellate counsel was conflicted was raised as Claim XI in the habeas petition. The district court held that the claim was defaulted. (Dist. Ct. ECF No. 63 at 40-41.) This Court reached the same conclusion. *Wood*, 693 F.3d at 1121 ("Wood did not raise this particular ineffective assistance claim on direct appeal or in his PCR proceedings, so the district court dismissed it as unexhausted and procedurally defaulted."). 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, 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. (PCR ROA 57, Ex. 1.) What she recommended, an "in-depth neuropsychological and neurological assessment" was not 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 (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. 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, because of Mr. Wood's head injuries, he provided trial counsel with a letter recommending a thorough neurologic exam including neuromapping. (PCR ROA 1808.) Trial counsel sought a neuromapping examination. The trial court did not grant the motion.

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.)

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

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.

In the federal courts Mr. Wood was repeatedly denied resources to develop a *Martinez* claim. (Dist. Ct. ECF No. 13 at 2, ECF No. 24 at 86 n.1, ECF No. 69 at 38-39, Dist. Ct. ECF No. 79 at 71-72) His motion for a *Martinez* remand in this case was denied. Only in the last three days, with recent Federal Public Defender's Office resources from attorneys appointed less than three months ago, has he obtained expert reports that indicate significant mitigation.

Neuropsychologist Dr. Kenneth Benedict evaluated Mr. Wood and found that he suffers from a number of neurocognitive deficits. He states that, at the time

of the crime, Mr. Wood suffered from brain-based difficulties with sustained attention, speed of processing information, and adaptive problem-solving under stressful and changing conditions. These were exacerbating influences on Mr. Wood's behavior at the time of the offenses. (Dist. Ct. ECF 125, Ex. 1 at 12). Clinical psychologist/certified addiction specialist, Dr. Robert Smith concluded 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 3.)

B. The Grounds for Relief.

Here, because of post-conviction counsel's ineffectiveness, *see Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the district court did not address important, substantive habeas claims that Mr. Wood raised on the merits. 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).

C. The District Court and the Panel's Decisions.

As to the barred claims in the habeas, the panel relied on the district court's decision with no independent analysis. (Ex. A at 5.) Without more analysis from this Court, the claims did not receive "the careful consideration that they deserve."

The Arizona Supreme Court admitted there was "merit" to the claim the Mr. Wood did not knowingly create a grave risk. However, the district court relied on factors, the presence of others, a witness's unsure testimony that he pointed the gun at another who yelled and a brief struggle over the gun where another witness did not fear for his life, as demonstrating the factor. The first two were all factors that the Arizona Supreme Court said were entitled to only minimal weight. The last the witness said he was merely brushed aside. The testimony of Officer Sueme was important in the finding the aggravator. The claim is not new because Mr. Wood expressly raised the challenge to Officer Sueme's testimony as a claim challenging his death sentence. (Dist. Ct. ECF No. 24 at 130-36; Dist. Ct. ECF No. 32 at 147.)

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

The district court held that this claim of denial of the neuromapping resources was not available under *Martinez* because it does not allege ineffective assistance of counsel. (Dist. Ct. ECF No. 124 at 16.) However, *Martinez* does

apply to ineffective assistance of appellate counsel. *Nguyen v. Curry*, 763 F.3d 1287 (9th Cir. 2013). There is no functional difference between this claim (that the trial court erred) and a claim that appellate counsel should have raised.

The district court and the panel held that the portion of Mr. Wood's motion challenging the effectiveness was second or successive. (Dist. Ct. ECF No. 124 at 20-21; Ex. A at 5-6.) Both Courts 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 issues. *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).

D. The Stay Should Be Granted.

Under *Barefoot*, when the district court grants a COA, a stay of execution pending appeal must be granted so the issues can be given full appellate briefing and full judicial attention. *Barefoot*, 463 U.S. at 893-94 ("[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."). This Court agrees with the significance of a COA grant, as the presence of a COA places this case in a much different posture than those cases in which a COA has been denied.

Compare Allen v. Ornoski, 435 F.3d 946, 949 (9th Cir. 2006) (denying petitioner's motion for stay of execution because he had not "demonstrated substantial grounds upon which relief may be granted"); *Gerlaugh v. Stewart*, 167 F.3d 1222, 1224 (9th Cir. 1999) (denying stay of execution based on *Barefoot* when petitioner's request for COA was denied for failing to reflect "substantial grounds upon which relief might be granted").

Respondents have not filed a motion to vacate the COA. With this concession, and yet only a summary affirmance by the panel, it is respectfully submitted that Mr. Wood's motion presents extraordinary circumstances that are worthy of full appellate review because "the issues are debatable among jurists of reason; . . . a court could resolve the issues [in a different manner]; or the questions are adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893 n.4 (internal quotation marks omitted); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Miller-El v.Cockrell*, 537 U.S. 322, 336 (2003).

CONCLUSION

Mr. Wood requests that the Court grant panel rehearing or alternatively, *en banc* review and a stay of his pending execution to allow the careful consideration of his substantial claim as required by *Barefoot* and the district court's certificate of appealability.

Respectfully submitted this 22nd day of July, 2014.

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s/Jennifer Y. Garcia
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Certificate of Compliance Pursuant to
Circuit Rules 35-4 and 40-1

I certify that pursuant to Circuit Rule 35-4 and 40-1, the attached petition for panel rehearing/petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 3,350 words.

Dated: July 22, 2014

s/ Jennifer Y. Garcia
Counsel for Petitioner-Appellant

Certificate of Service

I hereby certify that on July 22, 2014, 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. 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.

s/Robin Stoltze
Legal Assistant
Capital Habeas Unit

FILED

JUL 22 2014

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH RUDOLPH WOOD, III, Petitioner - Appellant, v. CHARLES L. RYAN; TERRY L. STEWART, Director; GEORGE HERMAN, Warden, Arizona State Prison - Eyman Complex, Respondents - Appellees.	No. 14-16380 D.C. No. 4:98-cv-00053-JGZ OPINION

Appeal from the United States District Court
for the District of Arizona
Jennifer G. Zipps, District Judge, Presiding

Submitted July 21, 2014*
San Francisco, California

Before: THOMAS, GOULD, and BYBEE, Circuit Judges.

PER CURIAM:

Joseph Wood, an Arizona state prisoner whose execution is set for July 23, 2014, appeals the district court's denial of his motion for relief from judgment

* The panel unanimously concludes this case is suitable for decision without oral argument.

pursuant to Federal Rule of Civil Procedure 60(b), his motion for a stay of execution, and his motion to amend or alter judgment pursuant to Federal Rule of Civil Procedure 59(e). We affirm.[1]

I

Wood shot and killed his estranged girlfriend, Debra Dietz, and her father, Eugene Dietz, in 1989.[2] Following a jury trial, Wood was convicted of two counts of first degree murder and two counts of aggravated assault. He was sentenced to death for each murder. The Arizona Supreme Court affirmed the convictions and sentences in 1994. *State v. Wood*, 881 P.2d 1158 (Ariz. 1994). The United States Supreme Court denied certiorari in 1995. *Wood v. Arizona*, 515 U.S. 1147 (1995).

Wood filed his first state petition for post-conviction relief under Rule 32 of the Arizona Rules of Criminal Procedure ("PCR") in 1992. The trial court stayed the petition pending the outcome of the direct appeal to the Arizona Supreme Court. He filed a new PCR petition in 1996. The trial court denied the petition on June 6, 1997. The Arizona Supreme Court denied a petition for review on November 14, 1997.

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[1] The background is taken substantially from the district court order denying Wood's Rule 60(b) motion.

[2] The factual details are described in the Arizona Supreme Court's opinion on direct appeal. *State v. Wood*, 881 P.2d 1158, 1165–66 (Ariz. 1994).

Wood filed a petition for writ of habeas corpus on February 3, 1998, and an amended petition on November 30, 1998. On March 22, 2006, the district court issued an order addressing the procedural status of Wood's claims. The court addressed the remaining claims on the merits and denied habeas relief in an order and judgment dated October 25, 2007. Wood appealed to this Court. In August 2012, Wood moved to remand the case to the district court, arguing pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), that his post-conviction counsel's ineffective performance constituted cause for the default of his ineffective assistance of counsel claims. We denied the motion. On September 10, 2012, we affirmed the district court's denial of habeas relief. *Wood v. Ryan*, 693 F.3d 1104 (9th Cir. 2012). The United States Supreme Court denied certiorari on October 7, 2013. *Wood v. Ryan*, 134 S. Ct. 239 (2013).

The State filed a motion for a warrant of execution on April 22, 2014. The warrant was granted on May 28, and execution was set for July 23, 2014.

On July 17, 2014, Wood filed in district court a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) and a motion for a stay of execution. The district court denied the motions on July 20, 2014. Wood then filed a motion to amend or alter a judgment pursuant to Federal Rule of Civil Procedure 59(e) on July 21, 2014, and requested a Certificate of Appealability as to

the prior denial of the Rule 60(b) motion. The district court denied the Rule 59(e) motion on July 21, 2014, but granted a Certificate of Appealability as to both orders.

We review the district court's denial of Rule 60(b) and 59(e) motions under the deferential abuse of discretion standard. *Phelps v. Alameida*, 569 F.3d 1120, 1131 (9th Cir. 2009) (Rule 60(b)); *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001) (Rule 59(e)).

II

The district court did not abuse its discretion in denying the Rule 60(b) motion. Rule 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b)(6) permits reopening for "any . . . reason that justifies relief" other than the more specific reasons set out in Rule 60(b)(1)–(5). Fed. R. Civ. P. 60(b)(6). The party seeking relief under Rule 60(b)(6) must show "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). Such circumstances "rarely occur in the habeas context." *Id.*

Citing *Martinez*, Wood asserts he is entitled to relief from judgment based on the ineffective assistance of his post-conviction counsel, which prevented the district court from reaching the merits of three of his claims. Wood contends that the *Martinez* decision is an extraordinary circumstance justifying relief as to his three procedurally defaulted claims. To prevail, Wood must show not only that the *Martinez* decision is an extraordinary circumstance justifying relief, but also that he can succeed under *Martinez*. *Lopez v. Ryan*, 678 F.3d 1131, 1137 (9th Cir. 2012).

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.

We also see no abuse of discretion in the district court's denial of Wood's claim regarding the denial of his motion for evidentiary development. Wood raised sentencing counsel's ineffectiveness in Claim X.C.3 of his habeas petition. The district court denied the ineffectiveness claim on the merits and also denied Wood's request for evidentiary development as to that claim. We affirmed the district court's merits decision and denial of evidentiary development. *Wood*, 693 F.3d at 1122. Wood now argues that the denial of evidentiary development is an

extraordinary circumstance justifying relief from judgment. The district court denied the Rule 60(b) motion as to this claim because it is in substance an unauthorized second or successive habeas petition, and we agree.

A Rule 60(b) motion is proper when it "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532. Wood argues that he is not challenging the substance of the district court's prior ineffectiveness ruling, but instead that he is challenging the denial of evidentiary development designed to substantiate that claim. However, a Rule 60(b) motion constitutes a second or successive petition if it "seek[s] leave to present 'newly discovered evidence' in support of a claim previously denied." *Gonzalez*, 545 U.S. at 531 (internal citation omitted); *see also Post v. Bradshaw*, 422 F.3d 419, 424–25 (6th Cir. 2005) ("all that matters is [whether petitioner] is seeking vindication of or advancing a claim by taking steps that lead inexorably to a merits-based attack on the prior dismissal of his habeas petition." (internal alterations and quotation marks omitted)). The substance of the claim Wood asserts was previously decided on the merits, and a Rule 60(b) motion that seeks leave to develop new evidence as to the claim must be denied as an unauthorized second or successive petition. *Gonzalez*, 545 U.S. at 531. Therefore, the district court was without jurisdiction to consider

it. *See Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001) ("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." (internal quotation marks omitted)); *see also Burton v. Stewart*, 549 U.S. 147, 152–53 (2007) (determining that district court lacked jurisdiction to consider second or successive habeas application).

III

The district court did not abuse its discretion in denying Wood's Rule 59(e) motion to alter or amend its judgment denying Rule 60(b) relief. In his motion, Wood reargued that the ineffectiveness of sentencing counsel issue was not an unauthorized second or successive petition. As the district court correctly observed, a Rule 59(e) motion is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). A district court may grant a Rule 59(e) motion if it "'is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law.'" *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (en banc) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). Wood's Rule 59(e)

motion merely asked the district court to reconsider the judgment it entered the previous day. The district court did not abuse its discretion in denying the motion.

IV

Wood also seeks a stay of his execution from this court. "[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts. Thus, like other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (internal citations omitted). Wood has failed to show "a significant possibility of success on the merits." Additionally, the public interest in the enforcement of the judgment and the filing of the Rule 60(b) motion on the eve of the execution both weigh against issuing a stay. *See Cook v. Ryan*, 688 F.3d 598, 612–13 (9th Cir. 2012). We must therefore deny Wood's request for a stay.

V

The district court did not abuse its discretion in denying the Rule 60(b) motion, the Rule 59(e) motion, or the motion for a stay of execution. Wood also

fails to meet the requirements for a stay of execution. The district court's judgment is affirmed. Wood's motion for a stay of execution is denied.

AFFIRMED.

Counsel

Jon M. Sands, Federal Public Defender, Dale A. Baich & Robin C. Conrad, Assistant Federal Public Defenders, District of Arizona, Phoenix Arizona, on behalf of Plaintiff-Appellant.

Thomas C. Horne, Attorney General, Jeffrey A. Zick, Chief Counsel, John Pressley Todd, Special Assistant Attorney General, Jeffrey L. Sparks & Matthew Binford, Assistant Attorneys General, State of Arizona, Phoenix, Arizona, for Defendants-Appellees.