No. 14-16380

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph Rudolph Wood, III, Petitioner-Appellant,

vs.

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

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

Respondents overlook many important arguments in Mr. Wood's opening brief. They do not address important language in the Arizona Supreme Court's decision that Mr. Wood's argument has "merit" regarding the claim that counsel was ineffective for failing to impeach Officer Sueme. They do not address the fact that this Court has already held that the conflict of appellate counsel issue is an ineffective assistance of counsel issue. They do not address the logical argument that the denial of the neurological exam by the trial court is akin to an ineffective assistance of counsel claim. They do not dispute that Mr. Wood was denied resources in the federal courts for years to develop his claim that counsel was ineffective during sentencing. And they do not address the U.S. Supreme Court law that the grant of a COA indicates that Mr. Wood has raised substantial claims pursuant to *Martinez*.

1. Counsel's Ineffectiveness for Failing to Impeach Officer Sueme, Habeas Claim X.C.2.

Trial counsel failed to impeach an important witness whose testimony was used as key testimony that Mr. Wood cocked and uncocked the gun two times to find the grave risk aggravator that Mr. Wood "knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense." Respondents fail to acknowledge that the Arizona Supreme Court found this to be a close question and that Mr. Wood's arguments had "merit." *State v. Wood*, 881 P.2d 1158, 1174 (Ariz. 1994).

The factors Respondents rely on to claim insubstantiality are all diminished by the Arizona Supreme Court or by the record. The Arizona Supreme Court noted that "the mere presence of bystanders" is not sufficient to trigger the factor. The Arizona Supreme Court acknowledged that quieting a witness is not sufficient to trigger the rule. *Id.* Finally, Donald Dietz's testimony indicated that there was no attempt on his life as he said Mr. Wood merely "threw me aside." (Tr. 2/20/91 at 183.)

It is not a new claim. Respondents fail to acknowledge that in his habeas petition Mr. Wood expressly challenged his death sentence because of counsel's failure to cross-examine the witness. The claim in the habeas petition specifically mentions that the Arizona Supreme Court relied on Officer Sueme's testimony when it affirmed the death sentence. (Dist. Ct. ECF No. 24 at 130 (citing *Wood*, 881 P.2d at 1175).) Mr. Wood asserted that impeaching the witnesses, including Officer Sueme, would have led to a different sentence. (Dist. Ct. ECF No. 24 at 136; *see also* ECF No. 32 (Mr. Wood's Traverse) at 147 ("In habeas, petitioner addresses this failure to impeach the state's witnesses as to its impact at both trial and sentencing.").)

2. Direct Appeal Counsel's conflict of interest. Habeas Claim XI.

Respondents fail to acknowledge that this Court has already held that Claim XI is an ineffective assistance of counsel claim. *Wood v. Ryan*, 693 F.3d 1104, 1121

(9th Cir. 2012) ("The district court correctly denied Wood's claim that he was denied effective assistance of counsel because one of his appellate attorneys had an alleged conflict of interest. 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."). Mr. Wood's 60(b) Motion targets all of Claim XI.

Mr. Wood did identify other viable arguments appellate counsel could have made. Counsel could have argued that the victim and Mr. Wood had a covert relationship even when a restraining order was in place and focusing on her lack of credibility to urge the Arizona Supreme Court not to credit the many hearsay statements the State attributed to her.

3. The Trial Court Prevented Trial Counsel From Obtaining Important Mitigating Evidence and Counsel's Scant Mitigation Presentation.

Without the neurological study and neuromapping that the trial court denied, Mr. Wood was denied important mitigating evidence. 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. (ECF No. 125, Exh. 1, at 12). This is important and it was not presented at trial.

Respondents do not respond to Mr. Wood's argument that this claim of trial court error is akin to an ineffective assistance of appellate counsel claim. In *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013), this court held that ineffective assistance of appellate counsel claims are subject to *Martinez*. For the same reasons, this claim is, too.

4. Failure to Investigate, Develop and Present Mitigating Evidence.

It is undisputed that the federal courts for years deprived Mr. Wood of the resources to develop the claim that his trial counsel was ineffective at sentencing. As a result, he was deprived of important mitigating evidence at the trial sentencing proceeding. He was deprived of evidence of the extensive history of mental illness and substance abuse and addiction in his family and extended family. He was deprived of key evidence from mental health professionals that, at the time of the offense, he had brain-based difficulties with sustained attention, speed of processing information, and adaptive problem-solving under stressful and changing conditions. He was deprived of other key evidence that he met the criteria for the (G)(1) aggravator.

When assessing whether this claim is a successive petition, the Court should take into consideration Respondents' concession that it was not (which they now

attempt to disavow.) Finally, neither Respondents nor the district court (even when asked again) have addressed the claim that the denial of resources in the federal courts was improper under *Douglas*, *Griffin* and *Evitts*.

5. The *Phelps* Factors Favor Mr. Wood.

a. Everyone agrees that *Martinez* is remarkable.

b. Diligence. Respondents do not dispute that the Federal Public Defender's Office entered the case less than three months ago and that the U.S. Supreme Court does not favor piecemeal litigation. It would have been foolish for Mr. Wood to file a Rule 60(b) motion less than three months ago right when the Federal Public Defender's Office was appointed. He would not have had the benefit of what appellees admit are the "greater resources" of the Federal Public Defender's Office.

c. Finality. Respondents do not dispute the irreversible finality of death.

d. Time between cert. denial and motion. The district court held this was neutral.

e. Degree of connection. The district court found this to favor Mr. Wood.

f. Comity. Mr. Wood is challenging defaulted claims and the denial of resources that led to the partial default of a claim. Under these circumstances, *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), recognizes that Mr. Wood is not upsetting comity interests.

CONCLUSION

For the reasons discussed in the opening brief and here, Mr. Wood respectfully requests that the Court respectfully requests that this Court reverse the district court's order denying Rule 60(b) motion and remand the case to the district court with orders to reopen the federal habeas corpus proceedings. In the event this Court concludes that factual issues relevant to the issues addressed herein remain unresolved, Mr. Wood requests that the case be remanded to the district court for discovery and an evidentiary hearing.

Respectfully submitted: July 22, 2014.

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 1,229 words, excluding the parts exempt under Fed. R. App. P. 32(a)(7)(B)(iii). It was prepared in a proportionately spaced typeface (Times New Roman, a Windows system font) of size 14 points using Word 2010.

s/Jennifer Y. Garcia
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Certificate of Service

I certify that on July 22, 2014, I transmitted the foregoing Reply Brief using the Appellate CM/ECF system for filing and transmittal of a Notice of Docket Activity. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ ECF system.

s/Robin Stoltze
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