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

RESPONSE TO PETITION FOR REHEARING *EN BANC*

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I. RULE 35 STATEMENT.

A petition for rehearing *en banc* must state that either 1) the panel decision conflicts with a decision of the United States Supreme Court or this Court and that en banc consideration "is therefore necessary to secure and maintain uniformity of the court's decisions," or 2) the "proceeding involves one or more questions of exceptional importance." FRAP 35(b)(1). *En banc* rehearing "is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FRAP 35(a); *see also* Ninth Cir. R. 35–1 ("When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc."). Wood has failed to show that *en banc* rehearing is necessary to maintain uniformity of this Court's decisions, or that this proceeding involves an exceptionally important question. This Court should therefore deny his motion.

Wood presents no issue of exceptional importance, raises no question of first impression, and identifies no conflict with the panel's decision and Circuit precedent. (Dkt. # 16.) In resolving his claims, the panel merely applied well-settled law. Nonetheless, Wood argues that the panel decision conflicts with the

Supreme Court's opinion in *Barefoot v. Estelle*, 463 U.S. 880 (1983), because *Barefoot* purportedly compels this Court to grant a stay whenever the district court issues a certificate of appealability ("COA"), "so the issues can be given full appellate briefing and full appellate attention." (Dkt. # 16, at 1, 13.) But Wood's claims received full judicial attention—after a full round of briefing, the panel considered and rejected his arguments. The purpose of the COA has been satisfied and no reason exists to grant a stay.[1]

II. 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*"). Following the conclusion of Wood's habeas proceeding, the State filed a motion for a warrant of execution, and the Arizona Supreme Court issued the warrant on May 28, 2014. The court fixed July 23, 2014, for Wood's execution.

[1] Wood also chastises the State for failing to move to vacate the COA, and suggests that this failure is a "concession" that a stay should issue. (Dkt. # 16, at 14.) This argument deserves little attention. By not moving to vacate the COA, the State did not "concede" that either the COA or a stay was appropriate. And in any event, as discussed above, Wood's claims have now been evaluated and rejected by an appellate panel, fulfilling the COA's purpose and obviating any need for a stay.

Less than 1 week before his scheduled execution, Wood filed in district court a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b)(6), arguing that *Martinez v. Ryan*, __ U.S. __, 132 S. Ct. 1309 (2012),[2] constituted an extraordinary circumstance warranting reconsideration of three procedurally-defaulted habeas claims (Claims VI, alleging that the state trial court erroneously denied Wood's request for neurological testing; X(C)(2), alleging that trial counsel was ineffective for failing to impeach Officer Anita Sueme with a prior statement; and XI(A), alleging that appellate counsel labored under a conflict of interest), and one claim that had been resolved on the merits (Claim X(C)(3), alleging that counsel was ineffective at sentencing). Wood further argued that the district court's purportedly erroneous denial of investigative funding constituted an extraordinary circumstance justifying relief.

[2] In *Martinez*, the Supreme Court recognized, for the first time, a "narrow exception" to *Coleman v. Thompson*, 501 U.S. 722 (1991): 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. 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." 132 S. Ct. at 1315. Under *Martinez*, a prisoner may establish cause for the 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.

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 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.)

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), challenging the court's denial of the Rule 60(b) motion related to Claim X(C)(3), and presenting two new

expert affidavits to support his claim. (Dkt. # 125 & Exhs. 1 & 2The court reaffirmed its determination that Wood had raised a substantive habeas claim that amounted to an SOS petition. (*Id.* at 3–4.)

On appeal, the three-judge panel concluded, with respect to Wood's *Martinez* claim, that "[u]nder [its] deferential standard of review" it was unable to "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." (Dkt. # 14, at 5.) The panel further affirmed the district court's conclusion that Wood's motion relating to Claim X(C)(3) was an SOS petition because "[t]he 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." (*Id.* at 6.) The panel also affirmed the district court's denial of Wood's 59(e) motion, finding no abuse of discretion because Wood had simply "asked the district court to reconsider the judgment it entered the previous day." (*Id.* at 7–8.) Finally, the panel denied Wood's request for a stay, finding that he could not show a significant likelihood of success on the merits of his claim, and that "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." (*Id.* at 8.)

III. ARGUMENTS REGARDING REHEARING.

A. *The panel correctly determined that* Martinez *does not constitute an "extraordinary circumstance" warranting Rule 60(b)(6) relief on Claims VI, X(C)(2), and XI(A).*

Adopting the district court's reasoning, the panel correctly rejected Wood's argument that *Martinez* constituted an extraordinary circumstance warranting relief under Rule 60(b)(6). Wood does not challenge the district court's weighing of the *Phelps* factors in the present motion. Rather, he argues only that his claims are substantial under *Martinez*. Wood is incorrect.

1. Martinez does not apply to Claim VI.

Claim VI alleges trial court error, not counsel's ineffectiveness, and *Martinez* therefore does not apply to it. *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.").

2. Claims X(C)(2) and XI(A) are 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. (Dist. Ct. Dkt. # 23, at 128–132.) In his Rule 60(b) motion, Wood argued that 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.[3] *See* A.R.S. § 13–751(F)(3). (Dkt. # 116, at 22–25.) But evidence suggesting that Wood may not have cocked, uncocked, and recocked the murder weapon would not have negated the substantial other evidence of the grave risk of death factor. This evidence included 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. Likewise, the Sueme evidence would not have rebutted the abundant evidence of premeditation. (*See* Dkt. # 63, at 22–23.) *See Wood v. Ryan II*, 693 F.3d 1104, 1118 (9th Cir. 2012) ("*Wood II*") (detailing the "considerable evidence of [Wood's] premeditation … introduced at trial"). This claim is not substantial.

[3] 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 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).

Assuming for the sake of argument that *Martinez* applies to Claim XI(A),[4] it is likewise 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 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

[4] Claim XI(A) appears to be a conflict-of-interest claim, not an ineffectiveness claim governed by *Martinez*. Further, 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*.

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 appellate counsel 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.

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 v. Sullivan*, 446 U.S. 335, 348 (1980).

B. *The panel correctly found that Wood's Rule 60(b) request relating to Claim X(C)(3) was an SOS petition.*

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).

Here, Wood attempted to present an ineffective-assistance-of-counsel claim that the district court had 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.

Further, Wood cited no authority—and likewise cites none here—holding that a district court's denial of discretionary funding can constitute a defect in the integrity of a habeas proceeding. As the panel properly concluded, the motion was 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,[5] the

[5] 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. (continued ...)

district 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).

IV. THE PANEL PROPERLY DENIED WOOD'S REQUEST FOR A STAY.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* (citing cases). As the panel correctly found, and as set forth above, there is no reasonable probability Wood will succeed on his claims. And the State's interest in finality weighs heavily in the equation, especially when considered alongside conduct in filing the present motion on the eve of his execution. *See Cook v. Ryan*, 688 F.3d 598, 612–13 (9th Cir. 2012). For the reasons previously stated, the denial of a stay does not conflict with *Barefoot*. The panel appropriately denied a stay.

(... continued)

§ 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

(continued ...)

V. CONCLUSION

Respondents respectfully request this Court deny Wood's petition for rehearing and suggestion for rehearing en banc.

DATED this 22nd day of July, 2014

Respectfully submitted,

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discovered earlier through the exercise of due diligence. Nor can Wood show actual innocence of the offenses or an aggravating factor.

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.

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