No. 14-5333

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH RUDOLPH WOOD, JR.,
PETITIONER,
-vs-

CHARLES L. RYAN, et al., Warden,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Should this Court grant certiorari to review the Ninth Circuit's opinion affirming the denial of Wood's late-filed motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), where Wood has failed to show a conflict between the Ninth Circuit's decision and this Court's precedent or that of other jurisdictions, and where his case-specific and fact-dependent claims involve the straightforward application of well-established legal principles?

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Petitioner Joseph Rudolph Wood has included, as an appendix to his petition, the relevant decisions below that pertain to his Rule 60(b) motion.

STATEMENT OF JURISDICTION

Respondent agrees that this Court has jurisdiction in this matter.

PROVISIONS INVOLVED

Federal Rule of Civil Procedure 60(b)(6) provides:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons …. any other reason that justifies relief.

28 U.S.C. § 2244(b) provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > the facts underlying the claim, if proven and viewed in light of the evidence as a whole, 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.

STATEMENT OF THE CASE

I. FACTS AND PROCEDURAL HISTORY.

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. (Appx. A–72.) 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). (Ninth Cir. 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. (Appx. A–71.) *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. (Ninth Cir. Dkt. # 81.) The court of appeals likewise denied that motion, with no judge requesting a vote on whether to hear the matter en banc. (Ninth Cir. Dkt. # 90.)

After this Court denied certiorari, *see Wood v. Ryan*, __ U.S. __, 134 S. Ct. 239 (2013) (Mem.), the Ninth Circuit issued its mandate on October 15, 2013 (Ninth Cir. 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 this Court decided *Martinez*, and nearly 2 years after filing his *Martinez* motion in the court of appeals, 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), 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. (Appx. A–18.) 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.*) *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.*) 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.*) 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.*)

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.*) 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 district court's conclusion that his motion regarding Claim X(C)(3) was an SOS petition, and presenting two new expert affidavits to support his claim. (Dist. Ct. Dkt. # 125 & 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 motion. (Appx. A–13 (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. The court granted a certificate of appealability on this issue (*id.*) 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.)

A three-judge panel of the United States Court of Appeals for the Ninth Circuit rejected Wood's claim. (Appx. A–3.) Applying the appropriate, deferential abuse-of-discretion standard of review, and adopting the district court's reasoning, the panel concluded that the district court did not abuse its discretion by denying Wood's Rule 60(b) motion relating to Claims VI, X(C)(2), and XI(A). (*Id.*) The panel further agreed with the district court that Wood's challenge to Claim X(C)(3) was an

SOS petition, not a valid Rule 60(b) motion, and concluded that the court did not abuse its discretion by denying the Rule 59(e) motion because Wood had merely asked it to reconsider its prior ruling. (*Id.*) And the panel denied Wood's request for a stay, finding that he had not shown a likelihood of succeeding on his claims' merits, and that the State's interest in finality weighed heavily against staying the execution. (*Id.*) Wood subsequently sought panel rehearing and rehearing en banc. The Ninth Circuit denied Wood's petition on July 22, 2014, with no judges voting to rehear the case en banc. (Appx. A–1 & A–2.)

REASONS FOR DENYING THE WRIT

This Court grants certiorari "only for compelling reasons." U.S. SUP. CT. R. 10. Wood has presented no such reason. Wood has not established that the Ninth Circuit Court of Appeals' decision conflicts with a decision from another United States court of appeals or a state court of last resort, that the Ninth Circuit decided an important question of federal law not yet settled by this Court, or that the Ninth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* There is no conflict between the panel's decision and this Court's precedent, and Wood's claims are not matters of nationwide importance. Instead, Wood's claims involve the straightforward application of well-established legal principles. This Court should deny certiorari.

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ARGUMENTS

I

THE PANEL DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT OR THAT OF OTHER JURISDICTIONS.

Wood contends that the panel's denial of a stay conflicts with this Court's opinion in *Barefoot v. Estelle*, 463 U.S. 880 (1983). He specifically suggests that *Barefoot* compels a Court of Appeals to grant a stay *whenever* a district court issues a certificate of appealability, so that the issues raised can be fully briefed and considered. (Petition, at 22–23, 28.) But Wood's claims received full judicial attention: after a complete round of briefing, the panel considered and rejected his arguments. The purpose of the certificate of appealability has been satisfied and no reason exists to grant a stay. Any haste in the Ninth Circuit's decision-making stems from Wood's decision to file his Rule 60(b)(6) motion less than 1 week before his execution. There is no conflict between the panel's decision and *Barefoot*.

Wood also argues that the Ninth Circuit's decision conflicts with the United States Court of Appeals for the Third Circuit's Local Rule 111.3(b). But a conflict between a court of appeals' decision and another circuit's local rules is not a compelling reason for certiorari. *See generally* U.S. SUP. CT. R. 10. And even if it were, no conflict exists here. Local Rule 111.3(b) (which, of course, does not bind the Ninth Circuit Court of Appeals) requires a district court to grant a stay "pending disposition of [an] appeal." Here, the Ninth Circuit denied Wood's request for a stay in the same order in which it considered his claims on the merits. Wood's appeal has been resolved. There was no reason to grant a stay, even under the Third Circuit's Local Rule.

II.

THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER THE ROUTINE, CASE-SPECIFIC QUESTIONS WOOD'S RULE 60(B)(6) MOTION PRESENTS.

Wood asks this Court to grant certiorari to review the Ninth Circuit's panel's decision that Wood's claims are not substantial under *Martinez*.[1,2] This is an inherently fact-bound inquiry unworthy of certiorari review. *See* U.S. SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Butler v. McKellar*, 494 U.S. 207, 429 (1990) (Brennan, J., dissenting) ("[The] Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Hence the Court generally will not grant certiorari just because the decision below may be erroneous.") (quotations omitted).

Certiorari is further unwarranted because Wood's claims are not substantial. *Martinez* does not apply to Claim VI of the habeas petition because Wood did not allege ineffective assistance of counsel in that claim. Rather, Wood argued that the trial court violated his Eighth and Fourteenth Amendment rights by denying his

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[1] In *Martinez*, this Court recognized, for the first time, a "narrow exception" to *Coleman v. Thompson*, 501 U.S. 722 (1991), which held that post-conviction counsel's ineffectiveness did not constitute cause to excuse a procedural default on habeas: 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.

[2] Wood does not challenge the Ninth Circuit's finding that he did not establish extraordinary circumstances warranting relief from judgment.

request for a neurological evaluation and brain mapping. (Dist. Ct. Dkt. # 23, at 81–88.) *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.").

Further, Claim X(C)(2) is not substantial. In that claim, 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. 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 v. Ryan*, 733 F.3d 825, 826 (9th Cir. 2013) (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. 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.

Finally, assuming for the sake of argument that *Martinez* applies to Claim XI(A),[3] 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

[3] Claim XI(A) appears to be a conflict-of-interest claim rather than an ineffective-assistance-of-counsel claim. Further, the Ninth Circuit has unreasonably 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). Respondents intend to present this issue to this Court in a certiorari petition from *Hurles*.

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. *See 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. 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.

Wood argues that the district court erred by considering this information because prejudice is not necessary for a conflict-of-interest claim.[4] (Petition, a 26.) However, Wood must show that counsel had an actual conflict that adversely affected his representation, *see Cuyler v. Sullivan*, 446 U.S. 335, 348 (1988), and the above information is relevant to that question.

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.

III

THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER WOOD'S ATTEMPT TO REOPEN HABEAS CLAIM X(C)(3) WAS AN SOS PETITION.

Wood contends that the Ninth Circuit panel erred by finding his Rule 60(b)(6) motion relating to Claim X(C)(3) to be an SOS petition. (Petition, at 27–28.) The Ninth Circuit's resolution of this claim is based on well-settled legal principles. It does not conflict with this Court's authority or that of any other circuit. This Court should therefore decline to expend resources reviewing it, especially at this late hour. *See* U.S. SUP. CT. R. 10.

Further, the Ninth Circuit correctly resolved the claim. The Anti-terrorism and Effective Death Penalty Act ("AEDPA") significantly "restricts the power of

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

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 v. Calderon, 274 F.3d 1270 (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.'") (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.

Here, the Ninth Circuit correctly determined that, because Wood's Rule 60(b) motion advanced a substantive habeas claim, it was an SOS petition that the district court lacked jurisdiction to consider absent authorization from the Ninth Circuit 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 here—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) ("[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 the court of appeals did not authorize the petition,[5] the district court lacked jurisdiction to consider it. *See* 28 U.S.C. §

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[5] Even if Wood had requested authorization from the court of appeals 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*,

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).

CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully ask this Court to deny Wood's petition for writ of certiorari.

Respectfully submitted,

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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.

NO APPENDIX