No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

ERNESTO SALGADO MARTINEZ,

Petitioner,

v.

DAVID SHINN, Director, Arizona Department of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE

The questions presented for review are:

(1) Whether the Ninth Circuit misapplied this Court's law of implied judicial bias where, rather than considering the professional and social relationships of the trial court's bailiff to the victim and the victim's widow, the court rejected the claim on the basis Martinez could not demonstrate that the court held a direct pecuniary interest, was involved in a controversy with a party, or was part of the accusatory process;

(2) Whether, as a result of that misunderstanding of the law of judicial bias, the Ninth Circuit erred in denying a claim of ineffective assistance of counsel that was premised on the failure of direct appellate counsel to raise the claim;

(3) Whether the Ninth Circuit misapplied the rule of *Gonzalez v. Crosby* when it construed a request for remand for consideration of a *Brady* claim as a request for indication whether the district court would consider a rule 60(b) motion;

(4) Whether the Ninth Circuit violated the rule of *Kyles v. Whitley* by failing to aggregate the *Brady* evidence attached to a request for indication whether the district court would consider a Rule 60(b) motion, with the evidence supporting the materiality of two additional *Brady* claims.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. The petitioner is not a corporation.

RELATED PROCEEDINGS

Reporter's Transcript of Proceedings, Guilt Phase Verdict, *State v. Martinez*, CR-1995-008782 (Maricopa Cty. Super. Ct. Sept. 26, 1997).

Reporter's Transcript of Proceedings, Sentencing Verdict, *State v. Martinez*, CR-1995-008782 (Maricopa Cty. Super. Ct. Aug. 18, 1998).

Opinion (Convictions and Sentences Affirmed), *State v. Martinez*, 999 P.2d 795 (Ariz. 2000).

Order (denying Petition for a Writ of Certiorari), *Martinez v. Arizona*, 531 U.S. 934 (2000).

Order (denying post-conviction relief), *State v. Martinez*, CR-1995-008782 (Maricopa Cty. Super. Ct. Aug. 24, 2004).

Order (denying Petition for Review on denial of post-conviction relief), *State v. Martinez*, CR-04-0432-PC (Ariz. Sup. Ct. May 24, 2005), Doc. 11.

Memorandum of Decision and Order (denying relief on petition filed pursuant to 28 U.S.C. § 2254), *Martinez v. Schriro*, CV-05-1561-PHX-EHC (D. Ariz. Mar. 21, 2008), ECF No. 88.

Judgment in a Civil Case, *Martinez v. Schriro*, CV-05-1561-PHX-EHC (D. Ariz. Mar. 21, 2008), ECF No. 89.

Order (denying Motion to Alter or Amend Judgment under Rule 59(e)), *Martinez v. Schriro*, CV-05-1561-PHX-EHC (D. Ariz. Apr. 15, 2008), ECF No. 91.

Order (granting *Martinez* remand motion), *Martinez v. Schriro*, No. 08-99009 (9th Cir. July 7, 2014), ECF No. 99.

Order (denying claims remanded pursuant to *Martinez*), *Martinez v. Schriro*, CV-05-1561-PHX-ROS, (D. Ariz. Mar. 31, 2016), ECF No. 127.

Order (denying Motion to Alter or Amend Judgment Pursuant to Rule 59(e)), *Martinez v. Schriro*, CV-05-1561-PHX-ROS (D. Ariz. June 16, 2016), ECF No. 131.

Opinion, *Martinez v. Ryan*, 926 F.3d 1215 (9th Cir. 2019) (affirming denial of relief on petition filed pursuant to 28 U.S.C. § 2254; declining jurisdiction to consider denial of request for indication whether the district court would consider a Fed. R. Civ. P. 60(b) Motion; denying

request to expand the certificate of appealability; declining to stay appeal and remand for consideration of claim brought under *Brady v. Maryland*, 383 U.S. 73 (1963).

Order (denying Petition for Panel Rehearing and Rehearing En Banc), *Martinez v. Ryan*, No. 08-99009 (9th Cir. 2019), ECF No. 171.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ernesto Salgado Martinez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

Opinion, *Martinez v. Ryan*, 926 F.3d 1215 (9th Cir. 2019) (affirming denial of relief on petition filed pursuant to 28 U.S.C. § 2254; declining jurisdiction to consider denial of request for indication whether the district court would consider a Fed. R. Civ. P. 60(b) Motion; denying request to expand the certificate of appealability; declining to stay appeal and remand for consideration of claim brought under *Brady v. Maryland*, 383 U.S. 73 (1963).

Order (denying Petition for Panel Rehearing and Rehearing En Banc), *Martinez v. Ryan*, No. 08-99009 (9th Cir. Sept. 10, 2019), ECF No. 171.

Memorandum of Decision and Order (denying relief on petition filed pursuant to 28 U.S.C. § 2254 and evidentiary development), *Martinez v. Schriro*, CV-05-1561-PHX-EHC (D. Ariz. Mar. 21, 2008), ECF No. 88.

Order (denying Motion to Alter or Amend Judgment under Rule 59(e)), *Martinez v. Schriro*, CV-05-1561-PHX-EHC (D. Ariz. Apr. 15, 2008), ECF No. 91.

Order (granting *Martinez* remand motion), *Martinez v. Schriro*, No. 08-99009 (9th Cir. July 7, 2014), ECF No. 99.

Order (denying claims remanded pursuant to *Martinez*), *Martinez v. Schriro*, CV-05-1561-PHX-ROS, (D. Ariz. Mar. 31, 2016), ECF No. 127.

Order (denying Motion to Alter or Amend Judgment Pursuant to Rule 59(e)), *Martinez v. Schriro*, CV-05-1561-PHX-ROS (D. Ariz. June 16, 2016), ECF No. 131.

JURISDICTION

The Ninth Circuit filed an Opinion on June 18, 2019, in which it affirmed the denial of federal habeas corpus relief. The Court denied panel and en banc rehearing in an order of September 10, 2019. On November 27, 2019, this Court granted Martinez an extension of time of 60 days to and including February 7, 2020, within which to file this Petition for Writ of Certiorari. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

U.S. Const. Amend. XIV, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

The claims were brought by Martinez in his petition for a writ of habeas corpus brought under 28 U.S.C. § 2254.

I. Statement of facts material to consideration of the Questions Presented.[1]

Ernesto Martinez was convicted by a jury of the first degree murder of Arizona Department of Public Safety ("DPS") Officer Robert Martin and other felonies for events that occurred on the Beeline Highway in Maricopa County, Arizona, on August 15, 1995. Appx. I-3. After the presiding judge of the Criminal Division of the Superior Court of Maricopa County removed the original trial judge for cause due to the relationship of his long-time bailiff with the victim and his widow, the court sentenced Martinez to death. *Id.*

A. State court judicial assignments.

Judge Jeffrey Hotham presided at the guilt stage of trial. At a pretrial hearing on September 2, 1997, Judge Hotham indicated that he was notified by Martinez's lead counsel, Emmet Ronan, that counsel had concerns about the impartiality of the judge's longtime bailiff, Ron Mills, and

[1] The Statement includes citations to Martinez's Excerpts of Record filed in the United States Court of Appeals for the Ninth Circuit. The Appendix attached pursuant to Rule 14(1)(i) contains opinions and court orders, and pleadings relevant to the Court's consideration of this Petition.

whether Mills should serve during Martinez's trial because of his long relationship with Officer Martin and his widow. ER 150. In an offer of proof, Ronan stated that at a prior hearing, Mills and Officer Martin's widow hugged each other in the courtroom. ER 151. Ronan was concerned about a potential conflict due to the amount of contact Mills would have with Martinez's jury. *Id*.

Mills testified that he worked for Judge Hotham for five years after retiring from the Sheriff's Office, and that he and Mrs. Martin had gone to high school together and knew each other for 30 years. ER 152-53. He further testified that he knew Officer Martin for 20 years. ER 154. Mills agreed that he put his arm around Mrs. Martin after a hearing and exchanged pleasantries. ER 155. Mills considered the Martins to be good friends. ER 157. On September 3, 1997, Judge Hotham denied the defense request to remove the bailiff. ER 165-66.

At trial on September 23, 1997, without notice to counsel, Judge Hotham ordered Mills not to attend that portion of the trial because he feared an inappropriate reaction to the "gory photographs" admitted during the pathologist's testimony. ER 1106-07. The judge later announced at a recess his removal of Mills. The jurors returned a guilty verdict on September 26, 1997. ER 1266-67.

On October 6, 1997, the defense filed a Motion for Change of Judge for Cause. ER 1272, 1286. Judge Ronald Reinstein, the presiding judge of the Criminal Division, heard the motion on November 21, 1997, ER 1291, and ordered Judge Hotham removed in a minute entry dated December 4, 1997:

> Mills testified at the hearing to exclude him as bailiff that he was a good friend of Officer Martin's wife. Following pretrial motions on 2/21/97, Mills hugged Officer Martin's wife and spoke with her during trial. Judge Hotham asked Mills to remain outside the courtroom when the medical examiner was to testify about the autopsy on the victim and evidently was to demonstrate his testimony with autopsy photographs that might be upsetting to Mills. On the day the verdict was returned after trial, Mills was seen crying in the courtroom and in the hallway outside where he was consoled by Mrs. Martin and others in the family.

* * *

> If a member of a judge's family was close to a victim or a victim's family, there is no question but that the court should recuse itself from the case. The state argues that the bailiff's relationship however with the victim is too tenuous. But a judge's staff is tantamount to his court "family." They work daily in a relatively small area.
>
> Therefore, the issue revolves around the "appearance" of impropriety, be it to the public, the defendant, or the victim, in a particular case as spelled out in Canons 2 and 3 of the Code of Judicial Conduct. Rule 81, Rules of Supreme Court.

Appx. H at 2-3. The court found Judge Hotham to be disqualified under Canon 2A of the Code of Judicial Conduct, Rule 81 of the Arizona Supreme Court Rules. *Id.* at 3. The court ordered that the sentencing be performed by Judge Christopher Skelly, *id.* at 4, who imposed a sentence of death on August 18, 1998. ER 1726.

B. Evidence admitted at the guilt phase of trial.

Oscar Fryer testified that he sat in a blue Monte Carlo with Martinez at a car wash in Globe, Arizona, sometime prior to the shooting on the Beeline Highway. ER 217.[2] Martinez said a warrant was issued for his arrest related to his probation. *Id*. Evidence showed Martinez had been convicted of a felony in Gila County, ER 971, and an arrest warrant issued for him on April 13, 1995. ER 1144. Martinez showed Fryer a .38 handgun with a brown handle that bore black tape on the handle. ER 222-23. Martinez said he had the gun "[f]or protection and in case shit happens." ER 223. Fryer testified that, after a squad car passed them at the carwash, Fryer asked what Martinez would do if he were stopped by police, to which Martinez "said he wasn't going back to jail." ER 225.

Fryer testified he had two prior felony convictions for escape. ER 214. On cross-examination, Fryer acknowledged that he left Gila County without authorization of his probation officer, and there were warrants issued for his arrest for that violation and new felony charges filed

[2] The suppression by prosecutors of impeachment evidence with respect to confidential informant Fryer gave rise to a *Brady* claim in Martinez's § 2254 petition.

that included assault of a police officer, escape and resisting arrest, and domestic battery. ER 228, 231. He pleaded to a single count of misdemeanor assault, and he was restored to the original probation. ER 232-37. The Gila County Attorney negotiated Fryer's plea, and Fryer later turned himself in to Gila County Attorney Investigator Abraham Castaneda. ER 228-42.

Elizabeth Martin testified she saw Martinez in Globe a few days before Officer Martin's death and he drove a blue Monte Carlo with a white top with California license plates. ER 191-92. On the day Officer Martin was shot, Ms. Martin spoke by phone with Martinez's mother, a friend, who indicated that her son was returning to Indio, California. ER 189, 199.

There was no eyewitness to the shooting. Michelle Miller testified that she and Martinez each purchased gasoline at a Circle K in Payson, Arizona, that morning. ER 250. Prosecution witnesses testified to having seen Martinez or someone resembling him and the Monte Carlo on the morning of August 15, 1995, on the Beeline Highway between Payson and Phoenix. ER 268, 272, 287, 289, 364-67, 374, 393-94. Susan and Steve Ball, whom the Monte Carlo passed, later noticed the car on the side of the road with a police car. ER 290, 326. Thomas Pantera, who was also passed by the Monte Carlo, later saw a police car and a body on the side of the Beeline Highway. ER 273. Maricopa County Sheriff's Detective Douglas Beatty testified that a 911 call was received reporting the officer down at 12:36 p.m. ER 1127, 1145. The Balls later saw the Monte Carlo at the traffic light, and Mrs. Ball wrote down the license plate number, 1 CUK 259. ER 298, 308, 338. Douglas Chidester came to Officer Martin's assistance and radioed for help from Martin's vehicle. ER 405, 407. Off-duty DPS Officer Hiram Renfro heard the radio call and responded to the scene. ER 427. Robert Newcomer and Renfro testified that Martin's service revolver was missing. ER 371, 430-31. DPS Officer Steven Page identified Exhibit 152 as the registration for Officer Martin's Sig Sauer service revolver. ER 449.

Maricopa County Chief Medical Examiner Phillip Keen, M.D., who did not perform the autopsy, testified to its results at trial, including that Officer Martin was shot in the right hand, neck, back and right cheek. ER 1002, 1004-05. Dr. Keen testified that the last and fatal shot was to the head and may have occurred while Officer Martin was prone which, he acknowledged, contradicted the opinion he offered in a pretrial interview in which he said the last shot fired was to Officer Martin's back and occurred while he was standing. ER 1013-15, 1021.

Esther Martinez, Ernesto's aunt, testified that Martinez called her from Blythe, California, twice on August 15, 1995, asking that she wire him money. ER 570, 573. She failed to do so. Anna Martinez and her husband David, a cousin of Martinez, testified that Martinez spent the night at their residence in Indio, California, and accompanied them to a restaurant the next day. ER 593, 622. A community service officer spotted the blue Monte Carlo in Indio after 4 p.m. and saw two adults and a child exit the vehicle. ER 547, 553. An officer allowed them to approach a residence to use a phone. ER 601-02, 624-27. Tommy Acuna testified that Anna used the restroom in his residence, where he later found a handgun with black tape on the handle, which he identified as Trial Ex. 133. ER 676. Acuna retrieved the gun and gave it to police. ER 677. Maricopa County Sheriff's criminalists testified that one of the two bullets recovered from Officer Martin at autopsy was fired from Trial Ex. 133, a .38 revolver with black tape on the handle, ER 924-43, and Martinez's fingerprint was found on the black tape removed from the .38. ER 951. Indio Police Officer Humberto Alvarez observed the Monte Carlo stop and a Mexican male exit the vehicle and run south before jumping a fence into a compound of trailers. ER 558, 563, 566. Later, Martinez exited one of the trailers and was arrested. ER 763, 1084.

Blythe Police Officers Jeffrey Wade and Robert Whitney responded to the report of a shooting and theft at a mini-mart in Blythe on August 15, 1995. ER 721, 844. The officers were

at the mini-mart at 8 p.m. on August 15, 1995, but found no shell casing and were notified at 2 p.m. the following day that employee Melina Garcia had found a casing. ER 721-724. Wade determined that the casing was consistent with the ammunition used by the Maricopa County Sheriff's Office in their handguns. ER 725. On August 17, 1995, Wade and Whitney participated in the search of the trailer where Martinez was arrested, and found a .9mm Sig Sauer handgun, Trial Ex. 130, with a serial number Wade was told matched the one issued to Officer Martin. ER 728-29, 733-37, 846-47. California DOJ Criminalist Philip Pelzel testified that the shell casing from the mini-mart was fired by the Sig Sauer retrieved from the Indio trailer. ER 919-20.

DPS Officer Benjamin Quezada testified that he interviewed Eric Moreno concerning a phone call Martinez purportedly made to Moreno after his arrest in which Martinez said he blasted a "placa," a slang term for a police officer. ER 1095-97. Moreno, his brother, Mario Hernandez, and his mother, Patricia Baker, testified that Martinez resided with them in Indio for several months prior to Martinez's arrest. ER 459, 461, 521, 527. Hernandez testified that he took a call from Martinez around midnight on August 16, 1995, and passed the phone to Moreno. ER 522-524.[3] Moreno testified that Martinez told him that he blasted a "jura," or police officer. ER 466. Moreno testified that Martinez said he had passed through Blythe before being apprehended in Indio and that he had two handguns, including a ".9," at the time of his arrest. ER 472, 475.

On August 16, 1995, the car was secured by Indio Police Officer Raymond Elias, who identified the license plate and VIN, which matched a plate reported stolen in Indio and the VIN

[3] The suppression by prosecutors of Hernandez's red weekly planner, which came to be called the "Hernandez *Brady* Claim," was unearthed in 2017 during the pendency of Martinez's appeal. It appeared to show that those in the Baker residence learned of Martinez's arrest from TV news accounts that occurred at 2:30 a.m. on August 17, 1995, later than the purported phone call from Martinez. Martinez's motion to stay the appeal and remand to the district court was denied in the Ninth Circuit opinion. Appx. A-39-41.

of a Monte Carlo reported stolen in Cathedral City, California, on July 29, 1995. ER 837-840, ER 540-43, 889-91. Riverside County Sheriff's Department Investigators David Ortloff and Thomas Fisher photographed and lifted fingerprints from the Monte Carlo. ER 873-75, 883, 903-914. Analyst Kelly Donaldson testified that Martinez's prints were not found on the license plate, but many of Martinez's prints were found on the Monte Carlo. ER 989, 953-57. Criminalist Lucian Haag testified that two chemical tests confirmed the presence of gunshot residue inside the driver's door. ER 898-901.

Prosecutor Robert Shutts asked Detective Beatty whether he tested keys found in the glove box in the Monte Carlo's ignition after Martinez's arrest. ER 1185. Beatty testified:

> Well, I took the keys out of evidence out of our property room and I went to the Monte Carlo, and actually there was really no need because the ignition switch to the Monte Carlo was missing. It is a hollow cavity in there, and then you can stick some kind of instrument in there, and then turn what would have been the ignition without a key.

ER 1185. The prosecution failed to introduce a photo of the missing ignition.[4]

C. The verdict and capital sentencing.

On September 26, 1997, the jury returned verdicts finding Martinez guilty of first degree murder. ER 1266-67. Judge Ronald Reinstein, the presiding judge of the Criminal Division,

[4] A photograph of an intact ignition at the time of Martinez's arrest and the impounding of the Monte Carlo was produced by a Riverside County district attorney in 2012 after Martinez's extradition. *See* Appx. K. Martinez earlier moved for a remand for consideration of what came to be called the "Beatty *Brady Claim*." *See* Appellant's Motion to Stay Appeal and for Remand Pursuant to *Townsend v. Sain*, 372 U.S. 293 (1963), and *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010), Ninth Cir. No. 08-99009 (Mar. 9, 2012), Dkt. 67-1 ("*Quezada* remand motion"). It is the *Quezada* remand motion that the Ninth Circuit granted but "construed" to be a Request for Indication Whether the District Court Would Consider a Rule 60(b) Motion ("Rule 60(b) request"). *See* Order, Ninth Cir. Dkt. 99 (Jul. 7, 2014), at 2-3. Prior to the remand order, Ninth Cir. Dkt. 73-1 (Apr. 17, 2012), Martinez attached the photo in support of a Motion for Leave to Supplement Motion to Stay Appeal and for Remand Pursuant to *Townsend* and *Quezada* with Newly-Discovered Exculpatory Photographic Evidence, Ninth Cir. Dkt. 87 (Feb. 11, 2013).

ordered Judge Hotham removed for cause on December 4, 1997, and assigned the capital sentencing hearing to Judge Christopher Skelly, ER 1309, who imposed a sentence of death. ER 1724-26.

II. Direct appeal and state post-conviction proceedings.

Martinez's convictions and sentence of death were affirmed on direct appeal. Appx. I-13. When the matter proceeded to state post-conviction proceedings, then-presiding judge of the Criminal Division, Thomas O'Toole, in a minute entry dated February 11, 2002, and filed on February 19, 2002, assigned the matter to Judge Michael Wilkinson "for all further proceedings, as Judge Skelly is no longer on the bench." ER 1757. On February 20, 2002, Judge O'Toole filed a minute entry that stated: "IT IS ORDERED *nunc pro tunc* as of February 11, 2002 correcting the minute entry of that date to reflect the post-conviction relief proceedings are assigned to the Honorable Jeffrey A. Hotham and not the Honorable Michael O. Wilkinson." ER 1758 (caps, italics and underlining in original).

On June 20, 2003, appointed post-conviction relief ("PCR") counsel filed a state collateral petition that raised *inter alia* claims that Martinez was denied due process because there was both actual bias and an appearance of bias at the guilt phase on the part of Judge Hotham, and that trial and appellate counsel rendered ineffective assistance for failing to move for his recusal at trial and failing to raise the judicial bias claim on direct appeal, respectively. ER 1856-61.

On August 24, 2004, Judge Hotham denied the petition. Appx. J. Judge Hotham ruled that the judicial bias claim was waived for failure to raise it on direct appeal, *id.* at 4, and appellate counsel was not ineffective for failing to raise the IAC of trial counsel claim on direct appeal because there was no judicial bias. *Id.* at 5. The Arizona Supreme Court summarily denied

discretionary review on May 24, 2005. Order, *State v. Martinez*, CR-04-0432-PC (Ariz. Sup. Ct. May 24, 2005), Doc. 11.

III. The judicial bias and *Brady* Claims in the district court proceedings.

On May 23, 2006, Martinez filed an Amended Writ of Habeas Corpus under 28 U.S.C. § 2254 in which he raised *inter alia* the claims of judicial bias, ineffective assistance of appellate counsel for failing to raise the judicial bias claim on direct appeal, and the Fryer *Brady* Claim. *See* Amended Writ, CV-05-01561-PHX-EHC, Dkt. 30 at 7-15, 61-67. He also raised a Confrontation Clause Claim based on the admission of hearsay evidence to prove that the Monte Carlo impounded at the time of his arrest and its license plate were stolen. *Id.* at 34-40.

A. The judicial bias claim.

The district court found the judicial bias claim procedurally defaulted because it was not raised on direct appeal, and denied relief on the merits of the claim that appellate counsel failed to raise the judicial bias claim on direct appeal. Appx. C-15-18. The court granted a COA on whether it correctly ruled Martinez not to have established cause and prejudice to excuse the procedural default of the judicial bias claim and the merits of the IAC of appellate counsel claim. *Id.* at 59.

B. The Fryer *Brady* Claim.

Evidence unearthed by federal habeas counsel supported the claim that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing material exculpatory impeachment evidence from the Gila County Attorney's Office, an office allied with the Maricopa County Attorney's Office in the investigation, which would have impeached Oscar Fryer. Martinez pleaded in the Motion for Evidentiary Development that Maricopa County prosecutors failed to disclose evidence that: 1) Fryer tested positive in Gila County for use of methamphetamine and marijuana before and after his trial testimony; 2) Gila County failed to

move to revoke an earlier probation or charge him with crimes based on the positive drug tests; and, 3) Gila County charged Fryer with felony theft for stealing $900 from a restaurant and participating in a counterfeiting scheme after Martinez's trial but Detective Beatty testified to a summary of Fryer's trial testimony at capital sentencing. ER 2128-32, 2265-67, 2273, 1341-42.

Globe police detailed their investigation of Fryer's property crimes. ER 2288-2361. According to Martinez's trial lawyers, Maricopa County prosecutors failed to disclose these events or reports, and failed to disclose that Fryer cut himself another deal to dispose of charges related to all of those acts. ER 2362-67, 2368-73. The court ruled the Fryer *Brady* Claim to be procedurally defaulted and Martinez could not show cause to excuse the default, ER 58-64, but the court granted a COA on the claim. ER 81-82.

C. The Beatty *Brady* Claim.

Martinez's investigation of the Confrontation Clause Claim evolved into a "theory" under *Bracy v. Gramley*, 520 U.S. 899, 908 (1997), that the Maricopa County Attorney's Office suppressed material exculpatory evidence in violation of Martinez's due process rights under *Brady*, 373 U.S. 83. Prosecutors did so by suppressing exculpatory evidence that would have undermined Detective Beatty's guilt phase testimony that the Monte Carlo's ignition was a "hollow cavity." ER 1185. That Martinez punched the ignition, prosecutors later argued to the jury, was evidence of the car's theft and gave Martinez motive to kill Officer Martin; it established premeditation, an element of first degree murder. ER 1222. Martinez pleaded that *Brady* theory under this Court's decision in *Bracy* in his first Motion for Evidentiary Development on April 30, 2007. ER 2124.

FPD Investigator John Castro found the ignition's cylinder and chrome bezel under the Monte Carlo's front passenger seat during an inspection on the Maricopa County Sheriff's Office's

impound lot on June 8, 2007. ER 2525 ¶ 4. Castro executed a declaration to that effect and his photos of the ignition cylinder and bezel were appended to the motion. ER 2525-28, 2537-45.

The FPD's discovery of ignition parts on the floor of the Monte Carlo in June 2007, despite their omission from all three law enforcement inventories performed on the Monte Carlo after Martinez's arrest, ER 2547-59, which included one executed by California Criminalist Ricci Cooksey, ER 2547, supported the Supplemental Motion for Evidentiary Development Martinez filed on September 7, 2007. ER 2508. Martinez again sought discovery with which to prove a freestanding *Brady* claim. ER 2518. While the district court denied evidentiary development as to Claim Four in its Memorandum of Decision and Order of March 21, 2008, Appx. C at 27, it failed even to acknowledge that Martinez was seeking evidentiary development of a freestanding *Brady* claim for which he alleged a "theory" under *Bracy*, 520 U.S. at 908.

IV. Remand litigation in the Ninth Circuit.

While Martinez's appeal pended in the Ninth Circuit, Martinez' was extradited to California in 2010 to stand trial for a Blythe convenient store homicide Martinez was alleged to have committed on August 15, 1995. California prosecutors obtained from the Maricopa County Attorney the handwritten notes of Criminalist Cooksey who, in processing the Monte Carlo, omitted any reference to a punched ignition or ignition parts on the floor. The notes were produced to Martinez's Arizona counsel, who attached them in support of the *Quezada* remand motion filed on March 9, 2012, Ninth Cir. Dkt. 67-1, 67-2 at 8-17. Cooksey included in his notes the Phoenix phone numbers of lead prosecutor Robert Shutts and Detective Beatty, including a message left for Shutts on February 13, 1997, which suggest contact between Cooksey and the Maricopa County prosecutor and case agent well prior to trial. *Id.* at 16. Martinez proffered another theory, to wit, that Cooksey's notes, which implied an intact ignition, suggested that prosecutors may have

violated *Napue v. Illinois*, 360 U.S. 264 (1959), by eliciting false or misleading testimony from Detective Beatty that the Monte Carlo's ignition was punched by Martinez prior to his arrest.

Riverside County prosecutors also obtained from the Maricopa County Attorney and produced to Martinez the photo of the intact ignition taken in California after the car was impounded, *see* Appx. K, which, Martinez alleged, eliminated any need to draw an inference that the ignition was intact. Martinez attached the photo of the intact ignition to the Motion for Leave to Supplement Motion to Stay Appeal and for Remand Pursuant to *Townsend* and *Quezada* with Newly-Discovered Exculpatory Photographic Evidence. *See* Ninth Cir. Dkt. 87.

In granting Martinez's *Quezada* remand motion, the Ninth Circuit "construed" it to be "a motion for leave to file in the district court a renewed Request for Indication Whether District Court Would Consider a Rule 60(b) Motion." Appx. E-2-3.

V. Beatty *Brady* claim on remand to the district court.

Martinez presented the Beatty *Brady* Claim, attaching *inter alia* the photo of the intact Monte Carlo ignition, Appx. K, and Cooksey's handwritten notes. ER 2620-25 (summary of claim); 2648-54 (narrative of the unearthing of evidence during superior court discovery in California); and, 2712-23 (Cooksey's handwritten notes). Additional evidence in support of the claim included: the Declaration of California Investigator Randall Hecht, who averred that Cooksey stated "conclusively" to him in an interview that the Monte Carlo ignition was intact or he would have noted the missing ignition in his notes and report (ER 2876 ¶ 11); and the Declarations of lead defense counsel at trial, Emmet Ronan, now a retired judge of the Superior Court of Maricopa County, and his co-counsel, Todd Coolidge, to the effect that they had no recollection of ever having seen the photo of the intact ignition and would have introduced it to impeach Detective Beatty if it had been produced at trial. ER 2792 ¶ 10; ER 2796-97 ¶ 10.

Appointed PCR counsel and an FPD records custodian averred that the photo of the intact ignition was not found in trial counsel's files. ER 2755 ¶ 8; ER 2800 ¶¶ 3, 4.

The district court stated that it "considers the new evidence [Martinez] proffers in support of his Rule 60(b) motion and *Brady* and *Napue* claims for purposes of making this determination." Appx. F-11. It further "assum[ed] for purposes of analysis that the evidence proffered by [Martinez] establishes conclusively that the Maricopa County Attorney suppressed evidence which would have established that the ignition was intact at the time of [Martinez's] arrest." *Id.* at 20. The court concluded that "Petitioner's *Brady* and possible *Napue* claims are properly characterized as second or successive claims because Petitioner is asserting new bases for relief from the underlying convictions," citing *Gonzalez v. Crosby*, 545 U.S. 524 (2005), and, because Martinez failed to obtain authorization to file an SOS petition from the Ninth Circuit, *see* 28 U.S.C. § 2244(a), the court could not consider the claims. *Id.* The court further concluded that Martinez failed to establish a defect in the integrity of the proceedings that would have rendered its outcome suspect. *Id*. (citing *United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011)).

VI. The post-remand appeal to the Ninth Circuit.

In 2017, after the matter had been briefed but before oral argument, the Riverside County district attorney disclosed to Martinez a red weekly planner that had been seized from Mario Hernandez's bedroom during the search of his mother's residence in 1995. Martinez requested a stay of the appeal and remand for consideration of a "third" *Brady* claim because the planner suggested that Hernandez may have learned of Martinez's arrest based on a TV news broadcast, rather than the phone call to which he testified, thereby undermining the testimony of his brother, Eric Moreno, who testified that Martinez confessed the murder. *See* Ninth Cir. No. 08-99009, Dkt.

141-1, 141-2 at 2-3. In its opinion, after denying habeas relief, the court addressed the motion, found the planner not to be material for *Brady* purposes, and declined to remand. Appx. A-41.

While the Ninth Circuit granted a COA as to the denial of the Rule 60(b) request, Ninth Cir. Dkt. 109 at 1, it nonetheless ruled that it lacked jurisdiction to review the district court's denial that request. The court noted that a "district court order declining to entertain or grant a Rule 60(b) Motion is a procedural ruling and not a final determination on the merits. Because there is no final judgment on the merits, the underlying issues raised by the Rule 60(b) Motion are not reviewable on appeal." A-23. As such, the district court's decision to decline to consider the claim constituted a non-final, non-appealable interlocutory order. *Id.*

The Ninth Circuit denied relief on the judicial bias claim on the basis that the state PCR court found the claim defaulted for failure to raise it on direct appeal, and Martinez could not establish cause and prejudice to excuse the default. Appx. A-14-16. The court denied the ineffective assistance of direct appellate counsel claim because the claim of bias predicated on the trial court's bailiff's relationship with the victim and his widow does not constitute the type of impropriety for which the Court historically recognized an appearance of bias. Appx. A-17. The court denied relief on four claims that served to undermine proof of premeditation, an element of first degree murder. The court ruled the Fryer *Brady* Claim procedurally defaulted and that Martinez could not establish cause to excuse the default. Appx. A-18-22. The court denied relief on the merits of a faulty premeditation jury instruction claim, Appx. A-23-26. The court denied relief on an IATC claim premised on the failure to retain an independent pathologist to refute the trial testimony of the prosecution's medical examiner as to the sequence of shots fired and cause of death. Appx. A-26-29.

REASONS FOR GRANTING THE WRIT

I. The judicial bias and ineffective assistance claims.

A. Judge Hotham's relationships with the victim and his widow.

At all times during the pre-trial and guilt phases of Martinez's trial, the trial court, the Honorable Jeffrey Hotham, understood that he would have ultimate responsibility for sentencing Martinez should he be convicted of the first degree murder of Officer Martin. Prior to *Ring v. Arizona*, 536 U.S. 584 (2002), that responsibility included the possibility under Arizona law that Judge Hotham might sentence Martinez, who was 19 years old at the time of the offense, to death due to his having murdered a peace officer. *See* A.R.S. § 13-703(F)(10). The relationship of Judge Hotham's bailiff to the victim, with whom the bailiff had at one time shared both a professional and social relationship, and to the victim's widow, with whom the bailiff attended high school 30 years earlier and remained "good friends," would have remained concealed but for the fortuitousness of defense counsel observing the bailiff and widow embrace in the courtroom during a pretrial hearing. ER 151. Although Judge Hotham heard the bailiff testify to his relationships with Officer and Mrs. Martin, he denied the request for the removal of his bailiff at trial.

At trial on September 23, 1997, and without first notifying counsel, Judge Hotham ordered the bailiff not to attend the portion of the trial because he feared an inappropriate reaction to the "gory photographs" admitted during the medical examiner's testimony. ER 1106-07. Judge Hotham later placed on the record his having removed his bailiff from the courtroom. ER 1266-67.

After the jury returned its guilty verdict on September 26, 1997, defense counsel moved to have Judge Hotham recuse himself from the capital sentencing hearing because, as lead defense counsel averred, he saw the bailiff demonstrate emotion and hug the widow. ER 1272, 1285. In

the supporting memorandum, defense counsel argued that the defense was concerned with whether the judge's impartiality might reasonably be questioned "because of his close connection to his bailiff and the bailiff's close, long standing friendship with the victim and the victim's family." ER 1279.

The matter was referred to the presiding judge of the criminal division, the Honorable Ronald Reinstein, who heard argument on November 21, 1997, ER 1291, and agreed. In his minute entry, Judge Reinstein noted that "[i]f a member of the judge's family was close to a victim or a victim's family, there is no question that the court should recuse itself from the case," and that "a judge's staff is tantamount to his court 'family.'" Appx. H-2. As the judge noted, "[t]here are but four staff at most. They work in a relatively small area." Judge Reinstein cited Canons 2 and 3 of the Code of Judicial Conduct, Rule 81, Rules of the Arizona Supreme Court, noted that they guard against even the appearance of bias, further noted that Martinez was entitled to be sentenced by "a judge who is completely free of any improper emotion or bias which might potentially be there," and granted Martinez's motion for Judge Hotham's removal. Appx. H-4.

In the Ninth Circuit, Martinez raised the claim of judicial bias at the guilt phase of trial, which had been ruled procedurally defaulted by the district court for failure to raise it on direct appeal, and the related claim that direct appellate counsel rendered ineffective assistance for failing to raise the clam. Both claims were certified for appeal by the district court. Appx. C-59.

The Ninth Circuit rejected Martinez's contention "that Judge Hotham's bailiff's relationship with Officer Martin's widow created an appearance of impropriety" on the basis that the argument "is not supported by precedent." Appx. A-17. The court noted:

> The Supreme Court, for its part, has recognized an appearance of impropriety in only a few cases in which the judge had a direct pecuniary interest in the case, was involved in a controversy with a litigant, or was part of the accusatory process. *See, e.g., Mayberrry v. Pennsylvania*, 400 U.S 455, 465-66 (1971) (judge whom the

> defendant had insulted presided over contempt proceedings); *In re Murchison*, 349 U.S. 133, 137 (1955) (judge acted as both grand jury and trier of the accused); *Tumey v. Ohio*, 273 U.S. 510, 532-34 (1927) (judge profited from every defendant he convicted). None of those circumstances exist here.

Appx. A-17. The court rejected Martinez's argument that Judge Hotham's secret order to remove his bailiff "was merely the first manifestation of how deep his bailiff's feelings actually ran and the judge's sympathy for his bailiff and his concern that the bailiff's feelings might spill over inappropriately." *Id.*

B. Certiorari should be granted to clarify the Court's decisions with respect to implied judicial bias.

Contrary to the Ninth Circuit's ruling, circumstances giving rise to a finding of judicial bias are *not* limited to where the judge has a direct pecuniary interest, is involved in a controversy with a party, or is part of the accusatory process. In *Withrow v. Larkin*, 421 U.S. 37, 47 (1975), the Court stated that "the Constitution requires recusal where the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." In subsequent decisions, the Court has applied *Withrow* in circumstances other than the limited ones described in *Mayberry*, *Murchison*, and *Tumey*. For example, this Court granted relief on state PCR appeal on an implied judicial bias claim based on the *Withrow* standard in a Nevada death penalty case, *Rippo v. Baker*, 137 S. Ct. 905 (2017), where the Clark County District Attorney's Office, the same office that prosecuted Rippo, had investigated the state trial judge as part of a federal bribery probe. The Court stated:

> Recusal is required when, objectively speaking, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L.Ed.2d 712 (1975); see *Williams v. Pennsylvania*, 579 U.S. ——, ——, 136 S. Ct. 1899, 1905, 195 L.Ed.2d 132 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias" (internal quotation marks omitted)).

Id. at 907. The Court found the probability of bias in *Rippo* to be constitutionally intolerable. *See also Echavarria v. Filson*, 896 F.3d 1118 (9th Cir. 2018), *cert. den. sub nom. Gittere v. Echavarria*, 139 S. Ct. 2613 (2019) (conviction reversed on basis of implied judicial bias where FBI agent whose death served as the predicate for the petitioner's conviction for murder and imposition of the death penalty had investigated the judge for corruption, fraud and bribery prior to his ascension to the state court bench and the judge failed to disclose the facts of that investigation prior to trial).

In *Williams*, the Court applied the *Withrow* standard to vacate a conviction and death sentence in the appeal of the denial of state post-conviction relief. 136 S. Ct. at 1903. There the district attorney had approved a capital prosecution against a defendant but later, after the district attorney had become a state supreme court justice, failed to recuse himself from the consideration of the appeal of that same defendant's PCR appeal.

The Court would not have granted relief in *Rippo* or *Williams* had the determination of implied judicial bias been limited as it was here. Those relationships do not meet the requirements of *Mayberry*, *Murchison*, or *Tumey* for a finding of implied judicial bias that would offend the Fourteenth Amendment. Thus the consideration of "circumstances and relationships," *see Murchison*, 349 U.S. at 136, necessarily extends beyond the three limited circumstances upon which the Ninth Circuit relied to deny relief to Martinez. Had Judge Hotham not been ordered removed for cause for capital sentencing, he would have been confronted with the situation where he would have imposed the death penalty or been required to explain to his bailiff of five years, a virtual family member who enjoyed long-term professional and social relationships with the victim and his widow, why he had chosen to spare Martinez's life. The risk of judicial bias was intolerable.

Because the erroneous application of the Court's implied judicial bias jurisprudence skewed the Ninth Circuit's decision to deny relief on the IAC of direct appellate counsel claim, the claim was non-frivolous and may have rendered appellate counsel's representation ineffective. *See Smith v. Robbins*, 528 U.S. 259, 285 (2001). Certiorari should be granted and the matter remanded.

II. Certiorari should be granted to determine whether the Ninth Circuit misconstrued the Beatty *Brady* Claim as a Request for Indication Whether the District Court Would Consider a Rule 60(b) Motion.

Martinez has been deprived of the opportunity to appeal the denial of a critical claim that undermines the jury's finding of premeditation and, thus, the element of premeditation required to be proved beyond a reasonable doubt to establish his guilt of first degree murder. That opportunity has been lost where the claim for which the Ninth Circuit ruled it lacked appellate jurisdiction was diligently investigated by Martinez since he first moved for discovery in the district court in 2007, but an unrelated late stage *Brady* claim that was only unearthed due to the conscientious production of evidence exculpatory of the Maricopa County murder for which Martinez was sentenced to death in 1998, by a California prosecutor after Martinez's extradition in 2017, received merits consideration from the Ninth Circuit. That anomalous result is not compelled by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2241 *et seq.* ("AEDPA"). Martinez has been denied the "one free-standing collateral attack" on his judgement to which the AEDPA entitled him by imposing the restrictions of § 2244(b) before Martinez fully and fairly litigated his first habeas application. *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) (citation omitted). [5]

[5] The Court has before it a habeas corpus appeal that questions whether the Fifth Circuit has gone too far in applying the SOS restrictions of 28 U.S.C. § 2244(b) and *Gonzalez v. Crosby*, 545 U.S. 524 (2005), to limit consideration of claims already pending in proceedings brought pursuant to 28 U.S.C. § 2254. See *Bannister v. Davis*, No. 18-6943 *Bannister* concerns the propriety of characterizing a motion to alter or amend a habeas judgment under Fed. R. Civ. P. 59(e) as a SOS petition. The Court heard argument on December 4, 2019. The forthcoming

A. The rule of *Gonzalez.*

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Court distinguished authentic motions for relief from judgment under Rule 60(b), Federal Rules of Civil Procedure, from what are, in effect, successive applications for habeas corpus relief that are circumscribed under 28 U.S.C. § 2244(b). As the Court noted, if a claim raised in a second or successive ("SOS") habeas application has been raised in a prior habeas application, it must be dismissed. *Id.* at 529-30 (citing § 2244(b)(2)). If not, the claim must rely on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence. *Id.* (citing § 2244(b)(3)). The court of appeals must determine whether a SOS petition has been raised previously and, if not, that it meets the new rule or actual innocence provisions. *Id.*

The Court further stated that if a Rule 60(b) motion seeks to add a new ground for relief, or if it attacks the federal court's resolution of the claim on the merits, each is said to bring a claim and must meet the requirements of § 2244(b). The Court ruled that "[a] habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a "habeas corpus application," at least similar enough that failing to subject it to the same requirements would be "inconsistent with the statute." *Id.* at 531. "That is not the case, however, when a Rule 60(b) motion 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." *Id.*at 532.

B. The application of *Gonzalez* here.

In understanding the Court's application of *Gonzalez*, it is critical to recall that the petitioner in that case filed a Rule 60(b)(6) motion some 16 months after the denial of relief on an

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decision could limit the reach of *Gonzalez* to circumstances where, unlike here, a petitioner has been accorded one full opportunity to litigate his habeas claim.

initial habeas petition became final. *See id.* at 527. The district court denied relief and a certificate of appealability ("COA"), and the petitioner "did not file for rehearing or review of that decision." *Id.* Martinez, on the other hand sought to develop the Beatty *Brady* Claim well before the district court denied relief, and without the court's even addressing the requests for evidentiary development that might have allowed him to develop that claim and amend his § 2254 petition with it. The Court should grant certiorari and order that the Ninth Circuit consider the Beatty *Brady* Claim on the basis that it was error for that court to construe his request for remand as a Rule 60(b) request.

Martinez's Beatty *Brady* Claim was undeveloped when he initially moved for discovery on a Confrontation Clause claim on April 30, 2007. *See* ER 2124 ("No evidence admitted at trial supports Beatty's trial testimony that the ignition switch was missing and that a screwdriver could have been used to start the car" and Oscar Fryer told law enforcement in a videotaped interview that "the keys were in it" when he sat in it with Martinez in the car wash). Martinez pleaded neither "a new ground for relief" nor "attack[ed] the federal court's previous resolution of a claim on the merits." *Gonzalez*, 545 U.S. at 532. That motion alleged that Martinez demonstrated "a theory" and good cause under Rule 6(a) of the Rules Governing Section 2254 Cases, which was all that was required under *Bracy*, 520 U.S. at 908, for the district court to order discovery. *Id.* at 2100. That was also true after Martinez's FPD investigator found ignition parts on the floor of the Monte Carlo during an inspection of the Monte Carlo at the Maricopa County Sheriff's impound lot on June 8, 2007 – after receiving permission from Detective Beatty - and the investigator's declaration (ER 2525) and photos of the ignition cylinder and chrome bezel (ER 2539) were attached to Martinez's Supplemental Motion for Evidentiary Development filed on September 7, 2007. ER 2508.

After relief was denied in the district court, Appx. C, and notice of appeal was filed, Martinez filed in the Ninth Circuit on March 9, 2010, a Motion to Stay Appeal and for Remand Pursuant to *Townsend v. Sain*, 372 U.S. 293 (1963), and *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010), Ninth Cir. Dkt. 67-1 (Mar. 9, 2012), Dkt. 67-1, for consideration of the Beatty *Brady* Claim and potential *Napue* Claim - to which he attached the handwritten notes of Criminalist Cooksey of his inspection of the Monte Carlo after Martinez's arrest in Indio, California, in which he failed to note a punched ignition. Ninth Cir. Dkt. 67-2 at 2-17. Given the command of *Kyles v. Whitley*, 514 U.S. 419 (1995), that all suppressed *Brady* evidence be considered cumulatively, Martinez argued that the *Brady*/*Napue* claim needed to be viewed cumulatively with the Fryer *Brady* claim. *Id.* at 14. Consistent with the procedure the Ninth Circuit ordered in *Quezada*, 611 F.3d at 1165, and this Court's decision in *Townsend*, 372 U.S. at 293, Martinez sought a remand and evidentiary development. Ninth Cir. Dkt. 67-1 at 19.

While the *Quezada* remand motion pended, the last item of material exculpatory evidence that undermined Detective Beatty's testimony was unearthed after Martinez's extradition to California. A Riverside County district attorney produced to Martinez a photograph of an intact Monte Carlo ignition previously suppressed by Martinez's Maricopa County prosecutors. *See* Appx. K. The photograph simply cannot be reconciled with Beatty's trial testimony that there was a "hollow cavity" where the ignition had been, which the prosecution argued showed Martinez had stolen the Monte Carlo and possessed motive for, and thus premeditated, the murder. Martinez attached the photo to his Motion for Leave to Supplement Motion to Stay Appeal and for Remand Pursuant to *Townsend* and *Quezada* with Newly-Discovered Exculpatory Photographic Evidence, which he filed on February 11, 2103. Ninth Cir. Dkt. 87-1.

Although the *Quezada* remand motion requested a stay of the appeal and remand for a straight-up consideration of the *Brady* and potential *Napue* motions, consistent with the practice followed in *Quezada*, the Ninth Circuit construed the motion to be a Request for Indication Whether the District Court Would Consider a Rule 60(b) Motion. Appx. E. Yet, contrary to *Gonzalez*, Martinez neither advanced a claim that had already been decided in a prior application or sought to raise a new claim not contemplated by him while his § 2254 petition pended in the district court. As such, the directions imposed by *Gonzalez* as to when a Rule 60(b) motion should be considered to be a disguised SOS petition under § 2244(b) did not apply here. Martinez was entitled to evidentiary development of the potential claim for which he established good cause under Rule 6(a) and *Bracy*, to amend his not-yet-decided petition to include his Beatty *Brady*/*Napue* Claims, and obtain a merits ruling. Moreover, the Ninth Circuit granted a COA, which would have allowed Martinez to appeal an adverse judgment were the district court to have denied relief on the straight-up *Brady*/*Napue* claims, Ninth Cir. Dkt. 109 at 1, as opposed to entering what the Ninth Circuit characterized as a non-final, non-appealable interlocutory order. Appx. A-22-23.

C. Absence of the Beatty *Brady* evidence from the materiality determinations on the Hernandez and Fryer *Brady* Claims.

Premeditation is an element of first degree murder under Arizona law that the prosecution was required to prove beyond a reasonable doubt. Martinez challenged the prosecution's proof of that element in the three *Brady* claims, in the faulty premeditation jury instruction claim, and in the claim remanded pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), that trial counsel rendered ineffective assistance for failure to retain an independent pathologist to challenge the prosecution medical examiner whose opinion changed materially with respect to sequence of shots fired between and pretrial interview and his trial testimony. *See* Appx. A-18-29, 39-41.

The Ninth Circuit determined that "even if the prosecution failed to disclose [Hernandez's red weekly] planner to Martinez, the withheld evidence did not prejudice Martinez. As we have concluded, overwhelming evidence supported the prosecution's argument that Martinez acted with premeditation." Appx. A-50. After outlining additional trial evidence or argument, beside the notation in the planner that suggested that Hernandez may have learned of Martinez's participation in the homicide from TV news accounts rather than from having received a call from Martinez, the Ninth Circuit stated that "[a]dmission of the journal may have helped Martinez further undermine the evidence of his phone call, but it wouldn't have added much." *Id.* The court ultimately concluded that "Martinez cannot establish that the planner was material evidence," and, for that reason, it refused to remand the claim. Appx. A-41.

Martinez's ability to demonstrate sufficient materiality under *Brady* to gain relief on the Hernandez *Brady* Claim was itself prejudiced by the Ninth Circuit's failure to consider collectively with the Hernandez *Brady* Claim, as required by *Kyles*, 514 U.S. at 436, the prejudice accruing from the Beatty *Brady* Claim. While the court failed to address the merits of the Beatty *Brady* Claim because the district court's order was procedural and not on the merits and, as such, it did not constitute a final, appealable order, there was no bar to the Ninth Circuit's consideration of the Beatty *Brady* Claim's materiality as to the Hernandez *Brady* Claim's materiality. The opinion is unclear as to why the Ninth Circuit did so.

Martinez was further denied the cumulative consideration of material exculpatory evidence where the Ninth Circuit ruled that the Maricopa County prosecutors had no duty to know that Fryer ingested amphetamine or methamphetamine at the time of Martinez's trial and that he was not charged with drug use until after Martinez's trial. Appx. A-18-20 (*Banks v. Dretke*, 540 U.S. 668,

691 (2004)). Both assertions are wrong, the first as a matter of law and the second as a factual matter.

Kyles undermines the assertion that the Maricopa County prosecutors had no duty to learn what law enforcement in Gila County knew about Oscar Fryer's drug use at the time of Martinez's trial. *Kyles* holds that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437. The Gila County officers were allied with the Maricopa County prosecutors in the investigation, including with primary responsibility for interviewing Oscar Fryer and keeping him out of jail amid his myriad and growing list of legal problems. They knew of Fryer's drug consumption at the time of Martinez's trial, and the Maricopa County prosecutors indeed had a duty to learn of that clearly exculpatory evidence regarding their primary witness on premeditation from their Gila County counterparts and produce it to the defense.

The materiality calculus was further skewed by the Ninth Circuit's erroneous determination that Fryer was not charged with drug use until February 5, 1997, after Martinez's trial ended on September 256, 1997. Appx. A-18-21. Indeed the guilt phase ended in September 1997 but the matter did not proceed to capital sentencing until July 9, 1998, when Detective Beatty testified to a hearsay account of Fryer's trial testimony. ER 1341. The sentencing court was entitled to consider impeachment of Fryer's guilt phase testimony with his later drug use and benefits that were not bestowed until after the guilt phase concluded.

There exists other compelling circuit court authority with parallels to this case that supports Martinez's argument that his Beatty *Brady* Claim is not SOS. In *In re Pickard,* 681 F.3d 1201, 1205 (10th Cir. 2012), the Tenth Circuit treated as a true Rule 60(b) motion the petitioner's claim that prosecutorial misconduct occurred at trial and in the § 2255 proceedings where the prosecution

failed to disclose prior to trial the identities of agencies other than the DEA that investigated a government witness in a drug case and, in response to a motion filed in the § 2255 proceeding, the prosecutors indicated to the habeas court and the petitioners that no other agencies were involved. In fact, evidence discovered by the defense after the Government denied the participation of other agencies revealed that the IRS and FBI were also involved in the investigation. The court rejected the government's argument that the *Brady* claim was required to be raised as a second or successive § 2255 petition, stating that it could not "accept the proposition that the government has a free pass to deceive a habeas court into denying discovery just because it similarly deceived the trial court," which would "compound a substantial injustice to the Defendants." *Id*. at 1207. *See Douglas v. Workman*, 560 F.3d 1156, 1192 (10th Cir. 2009) (government may not "profit from its own egregious conduct" by requiring petitioner to bring a *Brady* claim in a second or successive petition where the prosecution affirmatively concealed tacit agreement with witness made in exchange for trial testimony).

Here, Respondents labeled Martinez's supplemental discovery motion, which was filed after he found ignition parts on the floor of the Monte Carlo in 2007, a "fishing expedition." Dist. Ct. Dkt. 77 at 2. Respondents' suggestion in response to Martinez's initial discovery motion that the evidence "might not even exist," ER 110, is akin to the *Brady* material for which respondents gave deceptive answers in *Pickard* and *Douglas*. Had the evidence been produced in the district court, Martinez could have moved to amend his § 2254 petition under Fed. R. Civ. P. 15(a)(2).

Martinez's Rule 60(b) request did not attack the district court's prior resolution of a claim on the merits or seek to raise a new claim. Martinez was unable to raise the Beatty *Brady* Claim because, until his extradition and the subsequent disclosure of material exculpatory evidence in Riverside County, Martinez lacked support to plead or prove the claim. Early on, Martinez posited

a "theory" in the district court that his Fourteenth Amendment right to due process under *Brady* was violated and he sought discovery under Rule 6 of the Rules Governing Section 2254 Cases and *Bracy*, 520 U.S. 899. ER 2484, 2518. The prosecution's suppression of the Beatty *Brady* evidence at trial and Respondents' continued suppression since then should not be seen as relegating Martinez to the status of needing to meet the requirements of § 2244(b) to file his claim.

CONCLUSION

For the foregoing reasons, Ernesto Salgado Martinez respectfully requests that the Court grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit with respect to the four questions presented.

Respectfully submitted this 7th day of February, 2020.

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