No. 19–7627

IN THE SUPREME COURT OF THE UNITED STATES

ERNESTO SALGADO MARTINEZ,
PETITIONER,

-vs-

DAVID SHINN, et al.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW[1]

1) Should this Court grant certiorari to review the Ninth Circuit's determinations that Martinez's judicial bias claim was procedurally defaulted and his trial and appellate counsel were not ineffective for not raising a meritless claim?

2) Should this Court grant certiorari to review the Ninth Circuit's fact-bound decision to dismiss his claim appealing the denial of his request to consider a Rule 60(b) motion, where Martinez seeks only to correct perceived case-specific errors by the Ninth Circuit?

3) Should this Court grant certiorari to determine whether the Ninth Circuit was obligated to conduct a cumulative-effect analysis of Martinez's alleged *Brady* claims, where none of his claims meet the standard set forth in *Kyles v. Whitley*?

[1] For simplicity of analysis, Respondents have consolidated Petitioner's first and second questions presented.

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INTRODUCTION

Petitioner Ernesto Salgado Martinez presents no compelling reason for this Court to grant certiorari in this aging capital case. He 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." U.S. Sup. Ct. R. 10.

To the contrary, Martinez's claims are fact-intensive and the errors he alleges generally affect only his case. *See* 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. 407, 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); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.").

STATEMENT OF THE CASE

On August 15, 1995, almost 25 years ago, Ernesto Martinez shot and killed Officer Robert Martin during a traffic stop on the Beeline Highway near Phoenix, Arizona. *State v. Martinez*, 999 P.2d 795, 798 ¶ 4 (Ariz. 2000).[2] Before the murder, Martinez drove from California to Globe, Arizona, in a stolen blue Monte Carlo to visit family. *Id.* at 798, ¶ 2. After learning his parents had moved to Payson, Arizona, he met up with his friend, Oscar Fryer. *Id.* Fryer asked Martinez where he had been, to which Martinez responded he had been in California. *Id.* Martinez told Fryer that he was on probation for eight years and had a warrant out for his arrest, and then pulled out a .38 caliber handgun with a taped handle. *Id.* When Fryer asked Martinez why he had the gun, Martinez responded that it was for protection, "and if shit happens." *Id.* (internal citation omitted). Fryer asked Martinez what he would do if police stopped him and Martinez responded that "he wasn't going back to jail." *Id.* (internal citation omitted).

Eventually, Martinez left Globe and drove approximately 80 miles northwest to Payson. *Id.* at ¶ 3. There he purchased gas then headed southwest toward Phoenix on Highway 87, commonly referred to as the "Beeline Highway." *Id.* On the way, Martinez sped past witnesses Steve and Susan Ball; later they observed that a police officer pulled him over near mile-marker 195. *Id.*

After the Balls passed by, Martinez shot Officer Martin four times with the .38 caliber handgun he had shown Fryer in Payson, causing wounds to the officer's

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[2] Respondents derive their factual statement from the Arizona Supreme Court's opinion affirming Martinez's convictions and sentences on direct appeal. AEDPA directs this Court to presume these facts are correct. *See* 28 U.S.C. § 2254(d)(2), (e)(1); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Carriger v. Stewart*, 132 F.3d 463, 473 (9th Cir. 1997).

hand, neck, back, and head. *Id.* at 798, ¶ 4. A medical examiner concluded the hand and neck wounds were not fatal and the back and head wounds were. *Id.* Martinez took Officer Martin's service weapon, a .9mm Sig Sauer, and continued down the highway at speeds over 100 mph. *Id.* at 798, ¶ 5. Martinez passed the Balls shortly thereafter, which they found strange because insufficient time had elapsed for him to have received a speeding ticket. *Id.* The Balls followed Martinez, and when they saw him go through a red light, they suspected something was wrong and wrote down his license plate number. *Id.*

Martinez drove approximately 180 miles west from the murder scene and arrived in Blythe, California, at around 4:00 p.m., where he called his aunt and asked for money. *Id.* at ¶ 6. When Martinez's aunt failed to wire the money he requested, he robbed a Mini-Mart in Blythe and fatally shot the clerk. *Id.* A .9mm shell casing recovered from the Mini-Mart was consistent with the ammunition used in Officer Martin's service weapon. *Id.*

Martinez next drove to Coachella, California, near Indio. *Id.* at ¶ 7. The following day, August 16, 1995, Martinez took his cousin, David Martinez, and David's wife, Anna, to a restaurant in Indio. *Id.* David noticed that a police car began following them; he asked Martinez if the car was stolen, to which Martinez replied, "I think so." *Id.* (internal citation omitted). Martinez let David and Anna out of the car and they went to a nearby trailer compound to call for a ride. *Id.*

When they arrived at the trailer compound, David and Anna asked Tommy Acuna[3] whether they could use his phone. *Id.* at ¶ 8. Tommy refused, but did permit Anna to use the restroom. *Id.* Tommy became suspicious when Anna did not take very long, so he went inside and found a towel on the restroom floor with the .38 caliber handgun wrapped inside. *Id.* By the time Tommy walked outside with the gun, police had surrounded the compound. *Id.* Tommy told officers that he had "the murder weapon," and the gun was later identified as the weapon that fired the bullets that killed Officer Martin. *Id.* (internal citation omitted).

After Martinez let David and Anna out of the stolen Monte Carlo, he turned around on a dirt road. *Id.* at 798, ¶ 9. He saw another police car, left the Monte Carlo, and then ran into Johnny Acuna's trailer. *Id.* After a standoff with a SWAT team, Martinez eventually came out of the trailer and was taken into custody. *Id.* at ¶ 10.

While in custody, Martinez phoned a friend, Eric Moreno, and jokingly said that, "he got busted for blasting a "jura."[4] *Id.* at ¶ 11 (internal citation omitted). Martinez told Moreno that a woman on the highway might have seen what happened and that he secreted one of the guns. *Id.* Police obtained a warrant for Johnny Acuna's trailer and found Officer Martin's service weapon under a mattress. *Id.*

A jury convicted Martinez of first degree murder, a class 1 dangerous felony; theft, a class 6 felony; theft, a class 5 felony; misconduct involving weapons

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[3] Tommy Acuna's brother, Johnny Acuna, was Ernesto Martinez's friend. *Martinez*, 999 P.2d at 798, ¶ 8 n. 2.

[4] "Jura" is Spanish slang for police officer. *Id.* at 455, ¶ 11 n. 3.

(prohibited possessor), a class 4 felony; and misconduct involving weapons (defaced serial number), a class 6 felony. *Id.* at 455, ¶ 12.

The sentencing judge found two death-qualifying aggravating circumstances,[5] and found Martinez's mitigation insufficiently substantial to warrant leniency. The trial court sentenced Martinez to death for the murder conviction, and to prison terms for the noncapital offenses. *Id.*

The Arizona Supreme Court affirmed Martinez's convictions and sentences on direct appeal, and Martinez unsuccessfully sought post-conviction relief. Pet. App. J-1. Martinez thereafter filed a federal habeas petition, which the district court denied. Pet. App. C-1. The district court also denied Martinez's motion to alter or amend judgment and to expand the certificate of appealability ("COA"). Pet. App. D-1. Martinez filed a notice of appeal, and the Ninth Circuit stayed appellate proceedings and remanded the case to the district court pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012); *Townsend v. Sain*, 372 U.S. 293 (1963); and *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010). Pet. App. E-1. On remand, the district court denied Martinez's invitation to entertain a motion under Rule 60(b) and denied Martinez's motion for a COA on those claims. Pet. App. F-1, G-1.

Thereafter, Martinez filed a motion with the Ninth Circuit requesting to expand the COA. The Ninth Circuit granted a COA as to all claims it had remanded. Pet. App. A-9. The Ninth Circuit subsequently affirmed the district court's denial of a writ of habeas corpus as to Martinez's first-degree murder

[5] *See* A.R.S. 13–751(F)(2) (defendant previously convicted of serious offense), and (F)(10) (victim was an on-duty peace officer). Note, that effective January 1, 2020, the (F)(10) aggravating circumstance of murdering an on-duty peace officer was renumbered to (F)(8). For clarity and consistency, Respondents will refer to the statute as it existed at the time of Martinez's conviction.

conviction and death sentence, dismissed for lack of jurisdiction Martinez's claim appealing the district court's denial of his request to consider a Rule 60(b) motion, declined to expand the COA, and denied Martinez's motion to stay the appeal and remand for consideration of another *Brady*[6] claim. Pet. App. A-1–A-88.

REASONS FOR DENYING THE PETITION

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Sup. Ct. R. 10. Accordingly, this Court grants certiorari "only for compelling reasons." *Id.* Martinez has not established that there is a conflict among the courts on any of the issues he presents; that the Ninth Circuit decided an important issue of federal law that is not yet settled by this Court; or that the Ninth Circuit decided an important federal question in a way that conflicts with Supreme Court precedent. *Id.* For these general reasons, and the specific ones set forth below, this Court should deny Martinez's petition.

I. This Court Should Not Grant Certiorari to Review Martinez's Procedurally Defaulted Judicial Bias Claim because the Ninth Circuit Correctly Applied This Court's Law of Implied Judicial Bias.

Martinez contends that he was denied his right to effective assistance of counsel when his trial counsel failed to move for Judge Hotham's recusal at the guilt phase of the trial, and that his appellate counsel was ineffective for failing to raise this claim on direct appeal. Pet. App. A-16. Contrary to Martinez's interpretation, the Ninth Circuit did not simply reject his judicial bias argument because it "is not supported by precedent." Pet. 17. In actuality, after correctly analyzing his claim through the lens of this Court's law on implied judicial bias, the

[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

court rejected his argument as meritless and "based on unfounded speculation." Pet. App. A-17. Because the judicial bias claim was without merit, the Ninth Circuit correctly found that any ineffective assistance of counsel claims likewise fail. Pet. App. A-18.

A. Procedural Background

Martinez's case was assigned to Judge Jeffrey Hotham for trial. Before trial, the parties learned that Judge Hotham's bailiff, Ron Mills, knew Officer Martin, and his widow, Sandy Martin. Defense counsel Emmet Ronan indicated a concern about Mills' impartiality because he saw Mills embrace Mrs. Martin in the courthouse hallway and heard them exchange pleasantries. (Ninth Circuit Excerpts of Record ("ER") 150-163.) Because of counsel's concerns, the trial court held a hearing. (*Id.*) At the hearing, Ronan sought to establish what type of relationship existed between Mills and the Martins, because Mills would have frequent contact with the jury. (ER 151.)

Mills confirmed that he had worked with Officer Martin on a daily basis while he was employed with the Maricopa County Sheriff's Office, and knew Sandy Martin beginning in high school. (ER 153-54.) Martinez's counsel established that Mills and the Martins knew each other and were good friends, but that Mills did not have any contact with Mrs. Martin since the incident defense counsel witnessed in the hallway. (ER 157.)

During the State's cross examination, Mills described the oath he took as a bailiff; specifically, that he was "to take care of the jury and not to divulge the

deliberations of the verdict," and that he was not to "in any fashion influence the jurors by way of [his] personal feelings about a case." (ER 158.)

Judge Hotham denied the motion to replace Mills and informed the parties of the admonishment he gave to his bailiff, specifically:

> [T]hat any casual conversation that he has with the jurors is to omit the fact that he's ever been connected with law enforcement. He's not to officially greet or say hello or show any emotion or any kind of sympathy during the trial whatsoever, and I am confident he is going to be able to do that.

(ER 165.)

During testimony about Officer Martin's autopsy, Judge Hotham, unbeknownst to counsel at the time, excluded Mills from the courtroom "so that no one could ever later question that [his] bailiff reacted to the gory photographs in any inappropriate manner and that that would have some effect on the jury." Pet. App. A-11–A-12.

After the guilty verdicts but before sentencing, Martinez filed a motion to remove Judge Hotham for cause. Pet. App. A-8. Judge Ronald Reinstein, presiding judge of the Criminal Division, heard the motion and ultimately granted it, but stated that Martinez had demonstrated no prejudice from Judge Hotham presiding over the trial. *Id.* Judge Reinstein agreed that any appearance of impropriety should be avoided, and that in conjunction with Martinez's right to have a sentencing judge free from any *potential* bias, "...the victim's family deserves a sentencing free of any unnecessary appellate issues which might cause the case to be returned years later..." Pet. App. H-3.

Judge Reinstein noted that there was no evidence that Judge Hotham could not be fair and impartial, and that defense counsel had confirmed that Judge Hotham did not witness any of Mills' reactions after the verdicts in court or in the hallway; specifically, after the verdicts were read and Judge Hotham left the courtroom, Mills became "teary-eyed" and then a short time later, went into the hallway, hugged Mrs. Martin, and cried. (ER 1284). Judge Christopher Skelly sentenced Martinez to death.

Judge Hotham presided over Martinez's post-conviction relief ("PCR") proceedings and found Martinez's judicial bias claim precluded because he did not raise it on direct appeal. Pet. App. I-1. The district found the claim procedurally defaulted, rejected Martinez's claim that ineffective assistance of appellate counsel excused the procedural default because Martinez's ineffective assistance of counsel claims were meritless, and noted that Martinez did not argue that a fundamental miscarriage of justice would occur if his judicial bias claims were not addressed on the merits. (ER 39–40.) The Ninth Circuit affirmed. (ER 39-40); Pet. App. A-16. The Ninth Circuit also held that Martinez failed to demonstrate cause and prejudice to overcome the default of the claim. Pet. App. A-15.

The Ninth Circuit conducted a *Strickland* analysis and applied this Court's well-settled law of implied judicial bias. *Strickland v. Washington*, 466 U.S. 668 (1984). It rejected his ineffective assistance of counsel claims for both trial and appellate counsel. Pet. App. A-16–A-18.

B. The Ninth Circuit correctly applied this Court's settled law of implied judicial bias when it reviewed Martinez's ineffective assistance of trial and appellate counsel claims.

Martinez claims that the Ninth Circuit erroneously applied this Court's law of implied judicial bias, or alternatively, created its own legal standard because it did not explicitly consider all of this Court's implied judicial bias jurisprudence. Pet. 17-18. Petitioner is mistaken. In order to prevail on an implied judicial bias claim, Petitioner must demonstrate "facts sufficient to create actual impropriety or an appearance of impropriety." *Greenway v. Schriro*, 653 F.3d 790, 806 (9th Cir. 2011). Martinez failed to meet this requirement.

At oral argument, the Ninth Circuit inquired as to whether either party could cite a case where the relationship between a judge's bailiff and the victims created an appearance of impropriety, and the parties acknowledged that there is not a case directly on point. Pet. App. A-17. The Ninth Circuit correctly turned to this Court's jurisprudence where it has found an *appearance* of impropriety. Those cases are consistent with the cases Petitioner asks this Court to turn to for guidance; specifically, the Ninth Circuit cited to *Mayberry 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 the grand jury and the trier of the accused); and *Tumey v. Ohio*, 273 U.S. 510, 532-34 (1927) (judge profited from every defendant he convicted). Pet. App. A-17. The Court correctly held that none of the circumstances in those cases exist in Martinez's case.

The Ninth Circuit also cited *Withrow v. Larkin*, in which this Court held that there is a "presumption of honesty and integrity in those serving as adjudicators." 421 U.S. 35, 47 (1975). After reviewing the underlying facts in Martinez's case, the court found that "[a]t bottom, Martinez's judicial bias claim is based on unfounded

speculation," and that his "fanciful theory of bias" cannot overcome *Withrow's* presumption. Pet. App. A-17.

Although the Ninth Circuit did not reference the cases Martinez relies upon in his petition, *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017), and *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016), the Ninth Circuit's analysis in Martinez's case is consistent with both.

In *Rippo*, the defendant was convicted of first-degree murder and sentenced to death. *Id.* at 906. During Rippo's trial, he received information that the trial judge was being investigated by the Clark County District Attorney's Office—the same agency prosecuting Rippo—and moved for the judge's disqualification. *Id.* The judge refused to recuse himself and a different judge later denied Rippo's motion for a new trial. *Id.* In *Rippo*, this Court faulted the Nevada Supreme Court for failing to "ask the question our precedents require: whether, *considering all the circumstances alleged*, the risk of bias was too high to be constitutionally tolerable." *Id.* at 907 (emphasis added). In this case, the Ninth Circuit *did* consider all of the "circumstances alleged" and found Martinez's implied bias claim meritless. *Id.*; Pet. App. A-17–A-18.

In *Williams*, the then-district attorney of Philadelphia authorized pursuing the death penalty against Williams. *Id.* at 1903. The same district attorney later became the Chief Justice of the Pennsylvania Supreme Court and refused to recuse himself from the case, without explanation. *Id.* at 1904. This Court held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision

regarding the defendant's case." *Id.* at 1905. Here, Martinez's case is distinguishable from *Williams*: Judge Hotham never had a previous adversarial relationship with Martinez, and Judge Reinstein granted the motion to change judge for sentencing for the very purpose of ensuring Martinez's proceedings were fair. Pet. App. H-1.

Martinez's argument that there was at least the appearance of judicial bias fails because it is based on mere speculation regarding conversations that *may have occurred* between Mills and Judge Hotham. This is insufficient to support a claim of the appearance of bias.

> Appearance of interest or prejudice is more than the speculation suggested by the defendant. It occurs when the judge abandons his judicial role and acts in favor of one party or the other. . . . Bare allegations of bias and prejudice, unsupported by factual evidence, are insufficient to overcome the presumption of impartiality and do not require recusal.

State v. Carver, 771 P.2d 1382, 1388 (Ariz. 1989); *see also Jorgensen v. Cassiday*, 320 F.3d 906 (9th Cir. 2003) (Judge Munson's refusal to recuse himself where Jorgensen had clerked for Munson 8 years prior was not an abuse of discretion because Jorgensen's threats to use his influence to guarantee a judgment in his favor spoke "only to the conduct and statements of Jorgensen rather than to Judge Munson's possible bias"); *cf. Haines v. Liggett Group Inc.*, 975 F.2d 81, 97–98 (3d Cir. 1992) (judge removed for appearance of impartiality because of statements he made in the prologue to his opinion).

The Ninth Circuit's rejection of Martinez's claim of ineffective assistance of trial and appellate counsel, predicated upon his implied judicial bias theory, was neither contrary to nor an unreasonable application of *Strickland*. Martinez failed

to produce any evidence that Judge Hotham's relationship with Mills created an appearance of impropriety. Because Martinez's claim of implied judicial bias lacks merit, the Ninth Circuit correctly held that his trial counsel was not ineffective for not moving for Judge Hotham's recusal. Pet. App. A-16. *See Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) ("the failure to raise a meritless argument does not constitute ineffective assistance."). Similarly, appellate counsel cannot be held to have been ineffective for failing to raise a meritless claim on appeal. *See Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001).

Given the reasons above, the Ninth Circuit correctly held that Martinez's judicial bias claim was without merit and that neither his trial nor appellate counsel was ineffective. This Court should deny certiorari.

II. This Court Should Not Grant Certiorari in this AEDPA case to Review the Ninth's Circuit's Decision to Dismiss Martinez's Request to Consider a Rule 60(b) Motion.

Martinez argues that the Ninth Circuit misapplied this Court's jurisprudence in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), when it dismissed his claim appealing the district court's denial of his request to consider a Rule 60(b) motion. Pet. at 20; Pet. App. A-23. Petitioner is mistaken and seeks error correction where no error exists. The district court properly found that the Beatty *Brady* claim was a second or successive ("SOS") habeas petition and the Ninth Circuit correctly dismissed Martinez's claim for lack of jurisdiction.

A. Procedural Background

In 2008, several months after the district court denied Martinez's amended habeas petition and his motion to alter or amend the judgment, and before he filed

his opening brief in the Ninth Circuit, Martinez moved the district court for a request for an indication whether it would consider a Rule 60(b) motion. Pet. App. A-8–A-9. Martinez asserted that he had uncovered new evidence supporting his motion for evidentiary development and proving that he was not guilty of premeditated murder. Pet. App. A-9.[7] The district court summarily denied the motion. *Id.*

On March 9, 2012, after his case had been fully briefed in the Ninth Circuit, Martinez moved to stay the proceedings and remand, pursuant to *Townsend/Quezada*, based on alleged newly-discovered evidence supporting a *Brady–Napue*[8] claim. *Id.* Over Respondents' opposition, the Ninth Circuit ordered a limited remand to determine whether the district court would consider a renewed Rule 60(b) motion for reconsideration "of Claim 4 and for consideration of a possible *Brady–Napue* claim in light of newly discovered evidence." *Id.* After the parties filed supplemental briefing, the district court denied this claim finding that because Martinez's Rule 60(b) motion did not "establish a defect in the integrity of these proceedings, but rather, s[ought] to raise new substantive claims," it was "therefore a second or successive petition," and the court lacked "jurisdiction to consider the *Brady/Napue* claims absent authorization from" the Ninth Circuit under 28 U.S.C. § 2244(b)(3). (ER 94, 112.)

Martinez filed a motion requesting that the Ninth Circuit expand the certificate of appealability ("COA") and the court granted the motion as to all claims

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[7] The alleged new evidence consists primarily of a photograph of a seemingly intact ignition in the Monte Carlo. Petitioner argued that this photograph is inconsistent with Detective Beatty's trial testimony. Pet. 8, 11-14, 21-23.

[8] *Napue v. Illinois*, 360 U.S. 264 (1959).

and ordered the parties to file replacement briefs. Pet. App. A-9. The Ninth Circuit dismissed Martinez's claim appealing the denial of his request to consider a Rule 60(b) motion because that order was procedural and not a final adjudication on the merits.

B. The district court properly characterized Martinez's Beatty *Brady* claim as a second or successive habeas petition under Rule 60(b) when it denied his claim, and the Ninth Circuit correctly dismissed it.

"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." U.S. Sup. Ct. R. 10. The district court's decision here is fact-based and case-specific. The Ninth Circuit took no issue with the district court's procedural treatment of Martinez's Rule 60(b) motion and correctly concluded that it lacked jurisdiction to review the lower court's ruling. Pet. App. A-3 (citing *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 930 (9th Cir. 2000) ("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...the underlying issues raised by the 60(b) Motion are not reviewable on appeal."); *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984) ("[I]f the district court's order is construed as a denial of Scott's request to 'entertain' the motion to vacate, that denial is interlocutory in nature and not appealable.")).

Martinez claims that the Ninth Circuit erred in dismissing his claim appealing the denial of his request to consider a Rule 60(b) motion because the court mischaracterized his request and misinterpreted *Gonzalez*. Pet. at 20. Federal Rule of Civil Procedure 60(b) "allows a party to seek relief from a final judgment, and

request reopening of his case, under a limited set of circumstances." *Gonzalez*, 545 U.S. at 528. 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." *Id.* at 532. If a motion "seeks to add a new ground" for relief, however, it constitutes a second or successive petition. *Id.*; *see also Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (treating petitioner's Rule 60(b) motion as an SOS petition where the motion's factual predicate stated a claim for a successive petition).

A movant seeking relief under Rule 60(b)(6) must show "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). That is, a petitioner "must point to something that happened during that proceeding that rendered its outcome suspect." *United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011). "Such circumstances will rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535.

Here, the district court correctly concluded that the alleged suppressed ignition switch evidence did not undermine the court's ability to properly assess Martinez's other claims because it had previously found that Martinez was driving a stolen car when he was pulled over, that he had absconded from police and had a warrant for his arrest, that he shot Officer Martin not once, but four times, and that he later bragged about "blasting" a police officer. (ER 108.) Consequently, Martinez's purported newly-discovered Beatty *Brady* evidence regarding the ignition did not affect the integrity of Martinez's habeas proceedings—*i.e.*, it did not

render its outcome suspect. *Buenrostro*, 638 F.3d at 722. The district court correctly found that "additional or stronger evidence in support of Petitioner's allegation that the ignition was intact does not change" the court's previous analysis and fails to undermine the integrity of these proceedings. (ER 111.) This Court should deny certiorari.

III. The Ninth Circuit Did Not Violate the Rule of *Kyles v. Whitley* Because No *Brady* Violations Occurred. Therefore, No Aggregate Cumulative-Effect Analysis was Required.

Martinez contends that the Ninth Circuit violated this Court's decision in *Kyles v. Whitley*, 514 U.S. 419 (1995), when it did not aggregate, or collectively consider, his *Brady* violation claims. Pet. at 25. Martinez appears to argue that those claims include the alleged Oscar Fryer drug use and plea benefit claims; the Beatty claim, discussed *supra*; and a claim involving a red planner. Pet. at 25-26. Martinez misses the mark. In each alleged *Brady* violation, the evidence was either not suppressed or not favorable to the defense. Therefore, *Kyles* is not implicated and the Ninth Circuit had no obligation to aggregate meritless claims and conduct a cumulative-effect analysis.

In *Kyles*, the government suppressed a plethora of exculpatory evidence, including: contradictory physical descriptions of the suspect from eyewitnesses; inconsistent statements of the state's key witness; and evidence that the defendant's car was in fact *not* at the scene of the crime (a fact that undermined one of the state's key arguments). *Id.* at 423-28. Kyles appealed, and this Court held that "the state's disclosure obligation turns on the cumulative effect of all

suppressed evidence favorable to the defense, not on the evidence considered item by item." *Id.* at 420 (emphasis added).

Here, the three alleged *Brady* claims do not implicate a *Kyles* analysis. First, the Ninth Circuit correctly held that the prosecution did not suppress evidence that Fryer was charged with drug use in Gila County after he testified in Martinez's case (implying he was using drugs during Martinez's trial) because there was "nothing in the record that suggests the prosecution knew of Fryer's alleged drug use before the end of Martinez's trial" and "the prosecution does not have an obligation to disclose exculpatory evidence it discovers after trial." Pet. App. A-20–A-21. Martinez also contended that "the prosecution withheld evidence concerning benefits conferred on Fryer." *Id.* at A-21 (internal quotations omitted). The Ninth Circuit held that the claim was "wholly speculative" and that the facts showed that the plea agreement was disclosed to Martinez and introduced at trial. *Id.* Fryer was also impeached with that information during his testimony, therefore, "that evidence...cannot support a *Brady* violation." *Id.* at A-21–A-22. Regarding Oscar Fryer, the Ninth Circuit properly held that the state did not violate *Brady*, therefore, the claims fail to meet *Kyles'* requirements.

The Ninth Circuit correctly dismissed Martinez's underlying claim regarding the Beatty *Brady* evidence for lack of jurisdiction and was under no obligation to conduct a merits analysis, discussed *supra*. But even if this Court believes the Ninth Circuit should have considered the merits of Martinez's claim, it still fails under *Kyles*. Martinez argued that he was deprived of the opportunity to impeach Detective Beatty with a picture of an intact ignition, thereby undermining his

ability to disprove premeditated murder. Pet. at 27; Pet. App. K-1. As discussed, *supra*, the district court correctly concluded that whether the ignition was intact at the time Martinez was arrested did not undermine the integrity of his federal proceedings.

Moreover, because the evidence surrounding the ignition switch is not favorable to the Petitioner, neither *Brady* nor *Kyles* applies. Whether the ignition switch was broken or intact would not negate the fact that the owner had reported the Monte Carlo stolen, Martinez admitted to police that he had stolen the car, or that the license plate on the Monte Carlo had been stolen from another car. (ER 49.)

Finally, Martinez argues that a red weekly planner belonging to witness Mario Hernandez undermines Hernandez's trial testimony. Martinez asserts that because Hernandez testified that he received a phone call from Martinez confessing to Officer Martin's murder, a note in the planner indicating he saw Martinez's arrest on television somehow demonstrates his testimony was false. Pet. at 25. This claim is not properly before this Court because the Ninth Circuit declined to remand his claim to the district court. A-39–A-41. In any event, the claim fails because the evidence was not suppressed and is not favorable to Martinez. The search inventory listing the planner was disclosed to Martinez before his Arizona trial and the planner's contents disclosed on July 30, 2012. *Ernesto Martinez v. Charles Ryan*, 08-99009, Dkt. 141; 142-2.

The planner is not favorable to Martinez and merely aligns with Hernandez's trial testimony that he saw Martinez's arrest on television before Martinez called.

(ER 520-23.) Nothing in the planner contradicts Hernandez's statements and the Ninth Circuit correctly held that "Martinez cannot establish that the planner was material evidence." Pet. App. A-41. Because the planner was not suppressed and was immaterial, it does not trigger a *Kyles* analysis.

Therefore, because none of Martinez's alleged *Brady* claims meet the requirements of *Kyles v. Whitley*, the Ninth Circuit did not violate this Court's law and was under no obligation to conduct a cumulative-effect analysis. This Court should deny certiorari.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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