No. 19-7627

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

ERNESTO SALGADO MARTINEZ,

Petitioner,

v.

DAVID SHINN, Director, Arizona Department of Corrections,

Respondent.

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. Certiorari should be granted to clarify the law of implied judicial bias within the framework of longstanding relations between a member of a trial judge's "court family" and the homicide victim and his widow.

Respondents submit that certiorari should be denied because, although the Ninth Circuit failed to consider the breadth of the Court's jurisprudence with respect to the "appearance of impropriety" or implied judicial bias, Brief in Opposition ("BIO") at 10, the Court's historical precedents relied upon by the Ninth Circuit provided sufficient guidance for the decision to deny relief on the defaulted judicial bias claim and the ineffective assistance of appellate counsel claim that would excuse that procedural default.

In *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 881-82 (2009), the Court set forth its historical view of the law of implied judicial bias then noted that the claim *sub judice* "arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed." The claim brought by Martinez similarly originates in a framework not presented in the Court's precedents but it is equally entitled to the Court's consideration. In *Caperton*, the Court was concerned with the appearance of bias manifest in the chairman of the board of a corporation making a sizeable financial contribution to the successful election campaign for a seat on the Supreme Court of Appeals of West Virginia, where the newly-elected justice would cast a deciding vote to vacate a damages award against the defendant-coal company. As the Court noted:

> Caperton contends that [Chairman] Blankenship's pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected. That temptation, Caperton claims, is as strong and inherent in human nature as was the conflict the Court confronted in *Tumey* and *Monroeville* when a mayor-judge (or the city) benefited financially from a defendant's conviction, as well as the conflict identified in *Murchison* and *Mayberry* when a judge was the object of a defendant's contempt.

Id. at 882 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971)).

After explaining that the test undertaken by a judge for actual bias is a private one in which the judge might "misread[ ] or misapprehend[ ] the real motives at work in deciding the case," the Court stated that only an objective standard would adequately insure a party's right to impartial justice:

> In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

Id. at 883-84 (quoting *Withrow v. Larkin,* 421 U.S. 35, 47 (1975)).

The debt of gratitude felt by the judge to his corporate benefactor in *Caperton* is akin to the temptation Judge Hotham would have felt to impose a sentence of death were he not ordered recused only for sentencing due to the public manifestations of his bailiff's affection for the victim's widow and the presiding criminal division judge's concern for an appearance of impropriety. The victim's widow and daughter; Maricopa County Sheriff's Detective Douglas Beatty, the case agent who sat with the prosecutors at trial; and, letters from 18 members of national law enforcement indicated to the author of the presentence report that they preferred the imposition of the death penalty. *See* Presentence Report, *State v. Martinez*, Maricopa Cty. Super. Ct. No. CR-1995-008782 (Nov. 29, 1997). Judge Hotham, when he presided at the guilt phase of Martinez's trial, necessarily anticipated that he might need to impose a sentence of death should Martinez be convicted of first degree murder or need to explain to his longtime bailiff why he spared Martinez's life.

The cases upon which Respondents rely that reject claims of implied bias are inapt. In *Jorgensen v. Cassiday,* 320 F.3d 906, 912 (9th Cir. 2003), the trial court, a United States district

judge, had no present relationship with an attorney who clerked for the judge some eight years prior, which gave rise to the unsuccessful argument that the judge should have recused himself in a civil action. In *Martinez*, Judge Hotham maintained an ongoing, daily work relationship with his bailiff and, given the closeness of that relationship, it is reasonably likely the judge would have considered, as he sat in judgment at the guilt phase, how he would explain to his bailiff a decision to spare Martinez's life if he did not impose the death penalty. While attorney Jorgensen socialized with the district judge on a single occasion, a fishing trip with other persons present, Judge Hotham's bailiff knew the victim's widow for some 30 years since high school and the victim for more than 20 years. The bailiff socialized with some frequency with the victim and his widow, and the jurisdiction he patrolled as a sheriff's deputy caused him to cross paths professionally as well with the decedent, Department of Public Safety Officer Robert Martin.

Respondents also ignore the admonishment in *Jorgensen* that "[w]here the outcome of a proceeding depends on the credibility of an acquaintance of the district court judge, the concern over the appearance of impartiality is heightened." *Id.* at 911. While Judge Hotham's bailiff was not a guilt phase witness, he testified in response to Martinez's motion to have him removed from the proceeding, and his testimony caused Judge Hotham not to remove him from trial, until the judge entered an order, only belatedly disclosed, to have his bailiff absent himself for the portion of trial when a pathologist testified to cause of death and gruesome photos were displayed. The bailiff's testimony also fueled the judge's later persistence in not recusing himself from the capital sentencing hearing, which decision was overruled by the presiding judge of the criminal division who ruled that Judge Hotham's presence at sentencing gave rise to "an appearance of impropriety." Appx. H-2-3; Pet'n for Writ of Cert. at 4.

Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992), upon which Respondents rely, is inapt because the judicial bias claim brought on a petition for writ of mandamus in a civil matter did not implicate an appearance of bias based on a judge's daily interactions and relationship with his bailiff. Here, the presiding judge in the Criminal Division of the Superior Court of Maricopa County, who ordered Judge Hotham removed at capital sentencing, equated the judge's small staff to a "court family." Rather, the district judge in *Haines* lamented in a prologue of a discovery order the general practice of American business to place its desire for prosperity above its concern for the health and safety of consumers. *Id.* at 97. The Third Circuit exercised its supervisory authority to remove the judge:

> The district judge in this case has been a distinguished member of the federal judiciary for almost 15 years and is no stranger to this court; he is well known and respected for magnificent abilities and outstanding jurisprudential and judicial temperament. On the basis of our collective experience, we would not agree that he is incapable of discharging judicial duties free from bias or prejudice. Unfortunately, that is not the test. It is not our subjective impressions of his impartiality gleaned after reviewing his decisions these many years; rather, the polestar is "[i]mpartiality and *the appearance of impartiality*."

Id. at 98 (italics in original). Of course the judge's comment impugned an entire class of potential litigants that could come before him, and the matter very nearly turned on the judge expressing an actual bias based on what he said in a written order.

Given the viability of the claim of implied bias, the Ninth Circuit's decision to reject the non-frivolous ineffective assistance of appellate counsel claim was also infirm. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000).

II. Certiorari should be granted because the district court and Ninth Circuit mischaracterized Martinez's Beatty *Brady* claim as a second or successive § 2254 petition under *Gonzalez.*

Respondents defend the district court's ruling that Martinez's Beatty *Brady* claim was a second or successive ("SOS") petition proscribed by 28 U.S.C. § 2244(b) because it failed to meet

the requirement of *Gonzalez v. Crosby*, 545 U.S. 524 (2005), that such a claim allege a defect in the integrity of the § 2254 proceeding. BIO at 13. It was inequitable to require Martinez alone among Arizona habeas petitioners to run the *Gonzalez* gauntlet where he was diligent in seeking to unearth the material exculpatory evidence suppressed not only at trial but by Respondents in the district court despite Martinez repeatedly demonstrating good cause that such evidence likely existed.

Respondents fail to reconcile the Ninth Circuit habeas appeals in which the court remanded for straight-up consideration of *Brady* claims with the procedure ordered here in which the court required Martinez to demonstrate his entitlement to relief from judgment under Federal Rule of Civil Procedure 60(b). The decision of the Ninth Circuit to "construe" Martinez's mid-appeal request for remand for consideration of the Beatty *Brady* and possible *Napue* claims under *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010),[1] as a Request for Indication Whether the District Court Would Consider a Rule 60(b) Motion, with the onerous Rule 60(b) limitations imposed on § 2254 petitioners by *Gonzalez*, conflicted with other Ninth Circuit decisions. *Compare Martinez*, Ninth Cir. Dkts. 99 (order of motions panel), 159-1 (opinion) at 22-23, *with Quezada*, 611 F.3d at 1168[2]; *Gonzalez v. Wong*, 667 F.3d 965, 980 (9th Cir. 2011)[3]; and, *Gallegos v. Ryan*, 820 F.3d 1013, 1039 (9th Cir. 2016) (Berzon, J., concurring in part in panel majority's

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

[2] *Quezada*, 611 F.3d at 1168 ("We therefore remand to the district court with instructions to conduct an evidentiary hearing to determine the admissibility, credibility, veracity and materiality of the newly discovered evidence.").

[3] *Gonzalez*, 667 F.3d at 980 ("We conclude that the appropriate course for us at this point is to remand to the district court with instructions that it stay and abey the habeas proceedings to allow Gonzales [sic] to present to state court his *Brady* claim, including the subsequently-disclosed materials . . . Once the state court has spoken to this claim Gonzales may, if necessary, return to district court and reactivate the federal proceedings.").

decision to remand to district court for consideration of *Brady* claim); *id.* at 1040 (Callahan, J., dissenting from remand to district court to consider *Brady* claim).

Moreover, and as Martinez argues in the Petition for Writ of Certiorari (at 21-22), requiring him to submit to the district court a Request for Indication Whether the District Court Would Consider a Rule 60(b) Motion is particularly unfair and inconsistent with one of the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 *et seq.*, set forth in *Gonzalez*, to wit, the finality of district court judgments. 545 U.S. at 535. Martinez sought discovery on the Beatty *Brady* Claim in the district court on April 30, 2007, and again on September 7, 2007 – before the district court denied relief – when he alleged a "theory" and good cause for discovery required by *Bracy v. Gramley*, 520 U.S. 899, 908 (1997), and Rule 6(a) of the Rules Governing Section 2254 Cases, in the District Courts in both his motion and supplemental motion for evidentiary development, after it became clear that Detective Beatty's trial testimony that Martinez drove a 1975 Monte Carlo with a punched ignition at the time of his arrest appeared to lack veracity. *See* Excerpts of Record ("ER") 2100 *et seq.*, 2508 *et seq.*, *Martinez v. Ryan*, Ninth Cir. No. 08-99009 (May 1, 2017).

The motions were opposed by Respondents on the bases they were nothing more than a "fishing expedition" (Dist. Ct. Dkt. 77 at 2) or such evidence might not even exist. ER 110. Those characterizations proved to be untrue based on the suppressed evidence that was later unearthed by Martinez after his fortuitous extradition to California in 2010 and production *inter alia* of the photograph taken by law enforcement at the impounding of the Monte Carlo in Indio, California, that clearly shows an intact ignition, *see* Appendix K, and the investigative notes of Ricci Cooksey, a California criminalist who failed to note a punched ignition when the vehicle was impounded and who noted his pretrial telephonic contact with the lead Maricopa County prosecutor. The

photograph undermined the guilt phase testimony of Detective Beatty that his pretrial inspection of the Monte Carlo revealed a punched ignition, which prosecutors used to argue motive to murder Officer Martin and premeditation – an element of first degree murder under state law.

The district court denied all Martinez's efforts at evidentiary development. ER 50. In his Replacement Opening Brief in the Ninth Circuit, Martinez renewed his request for discovery on the Beatty *Brady* claim and a potential *Napue* claim, and pleaded that the claims did not state new bases for relief because he had been diligent in attempting to obtain discovery with which to support the Beatty *Brady* Claim since 2007. *See* Replacement Opening Brief, *Martinez v. Ryan*, Ninth Cir. No. 08-99009, Dkt. 118 at 16-17, 27, 30-31 (May 1, 2017).

Thus, Martinez diligently sought to develop the Beatty *Brady* claim well before the district court denied relief. It was not a new habeas claim barred by *Gonzalez* and he is not required to satisfy the requirements for SOS petitions under § 2244(b). The Court should grant certiorari and order the Ninth Circuit to remand the *Brady* and *Napue* claims with directions for the district court to allow further evidentiary development and an opportunity for Martinez to amend his § 2254 petition.

Respondents further submit that the Court's decision in *Kyles v. Whitley*, 514 U.S. 419 (1995), is not implicated by the Ninth Circuit's failure to consider the Beatty *Brady* claim cumulatively when it disposed of the Fryer and Hernandez *Brady* claims described in Martinez's Petition for Writ of Certiorari. BIO at 17-20. Respondents argue that the Beatty *Brady* evidence was neither sufficiently material in its own right as a stand-alone claim, and it would not have tipped the balance in favor of materiality on the Fryer and Hernandez *Brady* claims.

Martinez's Beatty *Brady* claim meets the test for a violation of *Brady* set forth in *Strickler v. Greene*, 527 U.S. 263 (1999). *Strickler* requires that: 1) the evidence is favorable to the accused,

either because it is exculpatory or impeaching; 2) it was suppressed by the prosecution, either willfully or inadvertently; and, 3) it is "material," i.e., prejudice resulted such that there is a reasonable probability that the trial's outcome would have been different had the information been disclosed. *Id*. at 280-82. The suppressed photo of the intact ignition so undermine Detective Beatty's guilt phase testimony that the ignition was a "hollow cavity" that there is a reasonable probability that the jury would not have found premeditation and convicted Martinez of first degree murder. That conclusion is even more compelling when the materiality of the Beatty *Brady* evidence is viewed cumulatively with the materiality of the suppressed *Brady* material with respect to confidential informant Oscar Fryer, as it must be under *Kyles*, 514 U.S. at 436, 441.

It is clear from closing argument that the prosecution sought to prove "premeditation" largely through the admission of the testimony of Detective Beatty concerning the ignition missing from the 1975 Chevrolet Monte Carlo and the testimony of Oscar Fryer concerning statements purportedly made by Martinez at the Globe, Arizona, carwash sometime prior to the homicide, testimony Fryer has since retracted. Appx. F-21 n.2. This Court has indicated that closing argument is the best barometer of the significance the prosecution attaches to its evidence. *See Kyles*, 514 U.S. at 444. In closing, prosecutors argued the significance of Detective Beatty and Oscar Fryer's testimony:

> And so now in Globe, Arizona, we have the defendant in a stolen car with a .38 caliber revolver, black tape wrapped around the handle and serial numbers scratched off . . . A stolen car, a handgun, a warrant for his arrest, on the run, and a prior felony conviction.

ER 1205

> That August day in his mind, Ernesto Martinez had more than enough reason to kill. Bob Martin at that time represented a very real threat to Ernesto Martinez, to Ernesto Martinez's ability to do what he wanted, when he wanted, to take what he wanted. A threat to his freedom. No more cars, no more guns to play with . . . Only back to jail.

ER 1212-13.

> Motive. He's got a warrant for his arrest. He was on the run, a prior felony conviction, a stolen car. He was illegally in possession of a handgun, and he stated, "If I am stopped by police, I am not going back to jail."

ER 1222.

There is a reasonable probability that, had Detective Beatty been impeached with the photo of the intact ignition and had Fryer been impeached to the point of being virtually completely unbelievable as to Martinez's purportedly inculpatory statements in the Globe carwash, the jury would not have found premeditation beyond a reasonable doubt.

Finally, Martinez has been denied evidentiary development with which to prove the *Napue* claim, which is premised on the pretrial contact between criminalist Cookey and the lead Arizona prosecutor. In *Napue*, the Court held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U.S. at 269. The Ninth Circuit noted that a claim under *Napue* will succeed when: "(1) the testimony or evidence was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material." *Sivak v. Hardison*, 658 F.3d 908, 909 (9th Cir. 2011) (quoting *Jackson v. Brown*, 513 F.3d 1057, 1071-72 (9th Cir. 2008)). The *Sivak* Court stated that, under *Napue*, a conviction or a capital sentence is set aside whenever there is "any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." 658 F.3d at 912 (quoting *Jackson*, 513 F.3d at 1076). If it is established that the prosecution knowingly permitted the introduction of false testimony, reversal is "virtually automatic." *Jackson*, 513 F.3d at 1076. That is because "the prosecution's knowing use of perjured testimony is more likely to affect our confidence in the jury's decision, and hence more likely to violate due process than will a failure to disclose evidence favorable to the defendant." *Id.* at n. 12.

Here, the claim required that Martinez demonstrate that Detective Beatty's testimony about the punched ignition was false, the prosecution knew or should have known that Beatty's testimony was false, and there was "*any* reasonable likelihood that the false testimony *could* have affected the jury." *Sivak*, 658 F.3d at 909 (italics in original). Martinez demonstrates "good cause" for the discovery of the *Napue* claim. He has asserted, and supported with Cooksey's own suppressed notes, that Cooksey communicated with both Detective Beatty and Assistant County Attorney Shutts in advance of trial. If the ignition were intact when the Monte Carlo was processed, as Cooksey implied in his notes and stated explicitly to Martinez's California trial investigator, Randall Hecht, and he communicated to Shutts that the ignition was intact, Martinez will have stated a claim which, if the facts are fully developed, may entitle him to habeas corpus relief. *Id.* at 927 (quoting *Bracy*, 520 U.S. at 908-09). If Shutts elicited testimony from Detective Beatty that he knew was false or misleading, Martinez will have established a violation of *Napue* if he were to meet the low bar of showing "*any* reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *Id.* at 912 (quoting *Jackson*, 513 F.3d at 1076).

Had Cooksey informed the prosecutor that he failed to note a punched ignition, and the prosecutor elicited Detective Beatty's testimony nonetheless, Martinez could establish a claim that the prosecution elicited false or misleading testimony in violation of *Napue*, 360 U.S. 264. Martinez demonstrates good cause under *Bracy*, 520 U.S. at 908, and Rule 6(a) of the Rules Governing Section 2254 Cases for the discovery of the facts supporting a possible *Napue* claim.

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CONCLUSION

Martinez respectfully requests that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted this 27th day of April, 2020.

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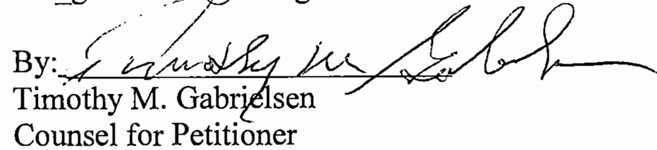
By:
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