No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERMONT COX,

Petitioner,

v.

COMMISSIONER, PA. DEPT. OF CORRECTIONS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

APPENDIX

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October 30, 2020

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-3739**

JERMONT COX, Appellant

VS.

COMMISSIONER PENNSYLVANIA DEPARTMENT OF CORRECTIONS; ET AL.

(E.D. Pa. Civ. No. 2-00-cv-05188)

Present: AMBRO, GREENAWAY, Jr., and BIBAS, Circuit Judges

Submitted are:

(1) Appellant's unopposed motion for leave to file application for certificate of appealability that exceeds length limitation

(2) Appellant's application for a certificate of appealability

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's unopposed motion for leave to exceed the page limitation for his application for a certificate of appealability (COA) is granted. His application for a COA is denied because reasonable jurists would not debate whether the District Court abused its discretion in denying his motions pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. See Slack v. McDaniel, 529 U.S. 473, 484 (2000); Buck v. Davis, 137 S. Ct. 759, 777 (2017). In particular, jurists of reason would agree that Appellant failed to demonstrate that his procedurally defaulted ineffective assistance of trial counsel claims are "substantial," i.e., that they have "some merit." Martinez v. Ryan, 566 U.S. 1, 14 (2012). Jurists of reason would also agree that Appellant failed to demonstrate that the

other factors we identified in his prior appeal counsel in favor of reopening the habeas proceedings. See Cox v. Horn, 757 F.3d 113, 124-26 (3d Cir. 2014).

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: June 5, 2020
PDB/cc: All Counsel of Record

2018 WL 4094963
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Jermont COX, Petitioner,
v.
Martin HORN, Connor Blaine, The District Attorney of the County of Philadelphia, and the Attorney General of the State of Pennsylvania, Respondents.

CIVIL ACTION NO. 00-5188
|
Signed 08/28/2018

Attorneys and Law Firms

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MEMORANDUM OPINION

EDWARD G. SMITH, District Judge

***1** In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court of the United States held that error by post-conviction counsel can constitute cause to overcome the procedural default of substantial ineffective assistance of trial counsel claims. The petitioner here, convicted of first-degree murder in 1993, moved for relief pursuant to Federal Rule of Civil Procedure 60(b)(6) on the heels of *Martinez* in 2012. He argued that *Martinez* permitted the district court to consider the merits of ineffective assistance of trial counsel claims the court previously deemed procedurally defaulted during the court's initial consideration of his section 2254 habeas corpus petition in 2004. While the district court denied the Rule 60(b)(6) motion, the Third Circuit vacated and remanded, holding that while *Martinez* alone cannot entitle a petitioner to 60(b)(6) relief, the combination of *Martinez* and additional factors, not considered by the district court, could.

Roughly concurrent with the petitioner's *Martinez* motion, the Commonwealth of Pennsylvania reexamined ballistics evidence from his 1993 trial. Although the ballistics evidence at trial was inconclusive as to whether the two bullets recovered from the murder victim originated from the same gun, the new ballistics report in 2013 concluded that they did not. The petitioner therefore filed a second Rule 60(b)(6) motion, arguing that the new ballistics report is an extraordinary circumstance permitting relief from the court's previous denial of habeas relief.

Currently before the court are the petitioner's two Rule 60(b)(6) motions—the first on remand from the Third Circuit, and the second based on the ballistics evidence. Following a stay of federal habeas proceedings to allow the petitioner to exhaust state remedies, the parties filed supplemental memoranda on the motions. As explained below, the court finds that it lacks jurisdiction over the petitioner's Rule 60(b)(6) ballistics motion because that motion is a second or successive petition lacking appellate authorization. Additionally, even if the motion was not an unauthorized second or successive petition, it is untimely and lacks merit because the new ballistics report is consistent with the petitioner's own admission that he fired two shots, belying his defense of accident. As for his motion based on *Martinez*, although the petitioner's murder conviction in this case served as an aggravating factor towards a death sentence in a subsequent murder case, and although the petitioner has diligently pursued his defaulted ineffective assistance of trial counsel claims, those claims are neither meritorious nor substantial, as required by *Martinez*. Accordingly, the court will deny the petitioner's Rule 60(b)(6) motions.

I. PROCEDURAL HISTORY

In recounting the 25-year procedural history of this case, the court borrows liberally from the Third Circuit's relatively recent procedural recitation, beginning with the 1993 trial of the petitioner, Jermont Cox ("Cox").

> On October 28, 1993, following a bench trial before the Hon. Carolyn Engel Temin of the Court of Common Pleas of Philadelphia County, Cox was convicted of first-degree murder, criminal conspiracy, and possession of an instrument of crime in connection with the July 19, 1992 shooting death of Lawrence Davis, and was sentenced to life imprisonment.

***2** In a statement he gave to the police at the time of his arrest, Cox confessed to shooting Davis, but said that the shooting had been accidental. He and a friend, Larry Lee, he said, had gone to a drug house operated by Lee. While they were outside drinking, Lee got into a dispute with Davis that escalated into a physical altercation. At some point, Lee handed Cox a gun that was already cocked. Cox shot twice, hitting Davis, and then handed the gun back to Lee. According to Cox, he later told family members that the shooting had been an accident. [1]

To prove at trial that Cox had the requisite intent for first-degree murder, the Commonwealth presented the testimony of Kimberly Little, an eyewitness. Little testified that Cox and Lee worked for a drug organization that was run out of an apartment in her building: Cox was a "lookout" and Lee supplied the operation's drugs. On the night of Davis' death, Little saw from her window an argument erupt between Davis and Lee. According to Little, Cox then exited a local bar with a six-pack of beer, approached the two men, placed the six-pack on the hood of Lee's nearby car, retrieved a gun from the car, walked to within four feet of Davis, and shot him three times. Cox stopped to drink a beer, and he and Lee left in Lee's car.

The Commonwealth's other witnesses were Kimberly Little's sister, Mary Little; the medical examiner; and a ballistics expert. Mary Little confirmed that Cox and Lee were neighborhood drug dealers and that she saw them drive off together after the shooting. The medical examiner asserted that Davis had four wounds caused by at least three bullets, [2] and the ballistics expert explained that it was unlikely the shooting was accidental given the number of shots fired. [3]

Trial counsel filed post-verdict motions on Cox's behalf. Cox also filed a motion pro se alleging trial counsel's ineffectiveness and requesting the appointment of new counsel. In February of 1994, Judge Temin held a hearing on the post-verdict motions. At the hearing, Cox testified in support of his pro se motion and outlined trial counsel's alleged failings: trial counsel (1) failed to present testimony from various character witnesses; (2) failed to find a witness, identified by Cox, who would have testified that "guys from the neighborhood" forced Kimberly Little to give a false statement to the police; (3) failed to review paperwork that Cox provided him; and (4) dissuaded Cox from taking the stand in his own defense. In response, trial counsel stated that he found himself in "a very untenable position" and asked that he be permitted to withdraw. Judge Temin denied the request as well as the pro se motion, finding Cox's claims of ineffectiveness to lack merit. She later denied the counseled post-verdict motions.

Cox, still represented by trial counsel, appealed his conviction, challenging the sufficiency of the evidence and the admission of evidence relating to uncharged drug activity. In June of 1995, the Pennsylvania Superior Court affirmed the judgment of sentence. Cox then filed a pro se petition for allocatur in the Pennsylvania Supreme Court, raising claims of trial counsel's ineffective assistance at the trial and on appeal. New counsel was appointed for Cox and submitted a supplemental allocatur petition. The Supreme Court denied allocatur in April of 1996.... [4]

The following month, Cox filed a pro se petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541–9546. The attorney who had represented Cox in his petition to the Pennsylvania Supreme Court was again appointed to represent Cox in his collateral review proceeding under PCRA. Counsel filed an amended PCRA petition asserting claims of ineffective assistance of trial counsel.... [5] Judge Temin, sitting as the PCRA court, held a hearing at which PCRA counsel chose to proceed on only one of the multiple claims of trial counsel's ineffectiveness: failure to impeach the with their criminal records and motive to curry favor with the Commonwealth to gain leniency in their own cases.

***3** On August 28, 1998, Judge Temin denied postconviction relief, finding that Cox had not been prejudiced by trial counsel's failure to impeach Kimberly and Mary Little with their criminal records because evidence aside from their testimony established his guilt. The Superior Court affirmed in July of 1999 and the Supreme Court denied allocatur in December of that year. Cox filed a second PCRA petition pro se, alleging ineffective assistance claims against trial and PCRA counsel. Judge Temin dismissed the petition as untimely, and the Superior Court affirmed after Cox failed to file a brief.

In October of 2000, Cox, now represented by the Federal Defender, filed a petition for a writ of habeas corpus in the U.S. District Court. The petition raised eight grounds for relief: (1) six claims of ineffective assistance of trial counsel; (2) one violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) a claim of cumulative error.

App. 4

In July of 2003, a magistrate judge issued a report and recommendation ("R & R") in which he determined that the ineffective assistance claims abandoned by PCRA counsel before the PCRA court, as well as the Brady and cumulative error claims, were procedurally defaulted. He reviewed the remaining claim of ineffective assistance—trial counsel's failure to impeach the Littles with their criminal records—and concluded that the Superior Court's decision rejecting that claim was neither "contrary to" nor an "unreasonable application" of established federal law. [*See* 28 U.S.C. § 2254(d)(1).] Cox filed objections to the R & R, arguing that PCRA counsel's unilateral decision to abandon claims constituted cause to overcome the procedural default bar. In August of 2004, the District Court rejected Cox's objections, adopted the R & R, and dismissed the habeas petition.... We affirmed on appeal. *Cox v. Horn*, 174 F. App'x 84 (3d Cir. 2006) [("*Cox I*")].

Six years later, on June 20, 2012, Cox filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(6) seeking relief from the District Court's order of dismissal due to the intervening change in procedural law occasioned by the March 20, 2012 decision of the Supreme Court of the United States in *Martinez v. Ryan.* The Court held in *Martinez* that, under certain circumstances, error by post-conviction counsel can constitute cause to overcome the procedural default of claims alleging trial counsel's ineffective assistance. Cox argued that it was only due to PCRA counsel's ineffective assistance at the initial PCRA proceeding that his claims of ineffectiveness against trial counsel had been abandoned and were now procedurally defaulted.

On May 23, 2013, the District Court denied Cox's motion, finding that "Martinez's change of law, without more," was not cause for relief. In a separate July 2, 2013 order, the District Court issued a certificate of appealability on the "legal question" of "whether the change in law resulting from Martinez constitutes extraordinary circumstances that would warrant relief" under Rule 60(b)(6).

Cox II, 757 F.3d at 116–18 (internal citations to appellate record omitted and case citations altered). On appeal, the *Cox II* court held that Rule 60(b)(6) relief requires "much more" "than the concededly important change of law wrought by *Martinez*." *Id.* at 115 (internal quotation marks omitted). However, in reaffirming a "flexible, multifactor approach to Rule 60(b)(6) motions," the court vacated the district court's May 23, 2013 order and remanded for a determination of whether, with supplemental briefing, the petitioner could demonstrate "much more" than just *Martinez*. *Id.* at 115, 122, 126.

1 The relevant portions of Cox's statement are as follows:

> When I got to where Larry was, he handed me the gun. He took it from his waist and handed it to me. It was silver, .357 or .38, a pretty big gun. I was really not sure which.
>
> When I got the gun, it was already cocked. That's when I fired two shots. When I fired the shots, I was [approximately two feet from the victim].
>
> After the two shots, I saw that he was hit and I [sic] fell to the ground. Larry then took the gun and we left.

Trial Tr. Oct. 27, 1993, at 104. After being asked whether he ever talked to Larry Lee about the shooting, Cox replied, "He just said[,] 'What's done is done. The police aren't going to look on it as an accident.' " *Id.* at 106–07. Finally, Cox stated that he had told his uncle and mother about the murder, explaining to them that "Larry had a scuffle[,] and I shot someone accidentally." *Id.* at 107.

Testifying at his suppression hearing, Cox referred to the shooting as "accidental," and appears to offer contradicting information about the location of the murder weapon at the time of the shooting: "In this statement it says this weapon was handed to me by a male which [sic] was fighting the deceased. That makes it seem a little bit worse than what it is." *Id.* at 44, 48.

2 The medical examiner also opined that "all the shots are coming from the right side and are pretty much horizontal and proceeding leftward." Trial Tr. Oct. 28, 1993, at 94.

3 Specifically, the ballistics expert's testimony as to an accidental shooting is as follows:

> [C]ertainly firearms can be accidentally fired, and I'm talking about not the firearm being the cause, but an accidental or unintentional trigger pull. There can be malfunctions in the firearm.
>
> With three shots being fired, it kind of like multiplies that possibility unlikely [sic]. One shot, especially without having the firearm,

> we can't tell whether it was defective, I have no firearm submitted, I don't know if it was accidentally discharged by the shooter, but once you have two shots, and then three shots, especially if it's a revolver, you have to pull a double action trigger and/or cock the hammer every time you are going to fire that particular shot.

Trial Tr. Oct. 28, 1993, at 57–58. The ballistics expert also explained that he could not determine whether the two bullets recovered from Davis's body originated from the same firearm:

> There are insufficient microscopic characteristics to permit a positive identification between the two bullet specimens, one bullet specimen being mutilated and gouged, the other projectile being constructed of the copper alloy jacket. There were [sic] a lack of markings to identify them as both being fired from the same firearm.

Id. at 55. Lastly, the ballistics expert opined that the two recovered .38 special caliber bullets likely originated from a revolver:

> The vast majority of firearms in that caliber are revolvers. However, there are semiautomatic pistols also in that caliber. Due to the lack of no fired cartridge cases submitted to our unit, that would be an indicator that it is a revolver, but it doesn't rule it out, that it's not a semiautomatic.

Id. at 54, 56.

4 The Third Circuit noted that by this time,

> Cox had also been convicted of the 1992 first-degree murders of Roosevelt Watson and Terence Stewart, both of whom he aided Lee in killing. Cox was sentenced to life imprisonment for the murder of Watson and death for the murder of Stewart. His conviction for murdering Davis was found to be an aggravating factor in support of his capital sentence. *See* *Commonwealth v. Cox*, 983 A.2d 666, 673–75 (2009).

Cox v. Horn, 757 F.3d 113, 117 n.1 (3d Cir. 2014) ("*Cox II*") (citation altered).

5 The Third Circuit noted that Cox's counseled PCRA petition raised the following ineffective assistance of trial counsel claims:

> The counseled PCRA petition claimed that trial counsel had provided constitutionally deficient representation when he failed to impeach the Little sisters with (1) the fact that they had charges pending against them when they first gave statements to the police, were eventually convicted of lesser charges, and were on probation at the time of trial; (2) their alleged familial relationship to the murder victim, Davis; and (3) a prior inconsistent statement by Kimberly Little. Trial counsel was also allegedly deficient for failing to present evidence of Cox's lawful employment.

Cox II, 757 F.3d at 117 n.2.

***4** Before filing his June 20, 2012 Rule 60(b)(6) motion, Cox also moved for discovery of ballistics evidence and examination records in the federal habeas proceedings associated with the Watson and Stewart murders. *See* Civil Action No. 00-5289, Doc. No. 32; Civil Action No. 10-2673, Doc. No. 12. The Honorable Anita B. Brody granted Cox's discovery motion on February 7, 2012, which apparently spurred the Commonwealth to reexamine the ballistics evidence in the Davis murder. *See* Civil Action No. 00-5289, Doc. No. 40; Civil Action No. 10-2673, Doc. No. 17. The officers conducting the reexamination, dated April 23, 2013, concluded that the two bullets recovered from Davis's body, "when compared against each other, were NOT fired from the same firearm." Suppl. Mem. Supp. Pet'r's Mot. Relief Final J. Pursuant Fed. R. Civ. P. 60(b)(6) ("Pet'r's Suppl. Mem."), Ex. A at 3, Doc. No. 95-1. The officers noted that their examination and the previous examination were not in complete agreement. *See id.* Arguing that the ballistics reexamination undermines the district court's and Third Circuit's rationale in denying habeas relief, Cox filed another Rule 60(b)(6) motion on August 5, 2013. *See* Pet'r's Mot. Relief Final J. Pursuant Fed. R. Civ. P. 60(b)(6) at 1, Doc. No. 82.

Then-Chief Judge Petrese B. Tucker reassigned the instant case from Judge Brody's calendar to the undersigned's calendar on June 10, 2014. *See* Doc. No. 83. At the request of counsel, the court stayed each of Cox's three federal habeas cases due to pending PCRA petitions in state court challenging the three murder convictions on the basis of the new ballistics evidence. *See* Order at 1–2, Doc. No. 90; *see also* Civil Action No. 00-5289, Doc. No. 64, Civil Action No. 10-2673, Doc. No. 43. After exhausting state court remedies,

Cox filed a counseled supplemental memorandum in support of his August 5, 2013 Rule 60(b)(6) motion. Doc. Nos. 91, 95. The respondents filed a response to the motion on November 27, 2017. Doc. No. 105. Finally, Cox filed a counseled reply on February 9, 2018. Doc. No. 110. Cox's June 20, 2012 Rule 60(b)(6) motion, on remand from the Third Circuit, and August 5, 2013 Rule 60(b)(6) motion are now ripe for review.

II. DISCUSSION

A. Standards Of Review

1. Rule 60(b)(6)

Rule 60(b) of the Federal Rules of Civil Procedure provides that a party may file a motion seeking relief from "a final judgment, order, or proceeding" for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). "A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1).

A Rule 60(b)(6) movant must show "extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur." *Cox II*, 757 F.3d at 115 (quoting *Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140 (3d Cir. 1993)). Courts in this circuit employ

> a flexible, multifactor approach to Rule 60(b)(6) motions, including those built upon a post-judgment change in the law, that takes into account all the particulars of a movant's case. *See Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 274 (3d Cir. 2002) (noting, in the context of a 60(b)(6) analysis, the propriety of "explicit[ly]" considering "equitable factors" in addition to a change in law); *Lasky v. Cont'l Prods. Corp.*, 804 F.2d 250, 256 (3d Cir. 1986) (citing multiple factors a district court may consider in assessing a motion under 60(b)(6)). The fundamental point of 60(b) is that it provides "a grand reservoir of equitable power to do justice in a particular case." *Hall v. Cmty. Mental Health Ctr.*, 772 F.2d 42, 46 (3d Cir. 1985) (internal quotation marks omitted).

***5** *Id.* at 122 (footnote omitted).

2. The Relationship Between Rule 60(b) Motions and Second or Successive Habeas Corpus Applications

"When a motion is filed in a habeas case under a Rule 60(b) ... label, the district court must initially determine whether the motion is actually a 'second or successive' habeas petition within the meaning of [28 U.S.C.] § 2244(b)." *Davenport v. Brooks*, Civil Action No. 06-5070, 2014 WL 1413943, at *3 (E.D. Pa. Apr. 14, 2014). Pursuant to section 2244(b),

> [a] claim presented in a second or successive habeas corpus application under [28 U.S.C. § 2254] that was not presented in a prior application shall be dismissed unless ...
>
> **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). "Before a second or successive application ... is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." § 2244(b)(3)(A). Failure to seek appellate authorization before filing a successive petition acts as a jurisdictional bar. *See* *Blystone v. Horn*, 664 F.3d 397, 412 (3d Cir. 2011) ("A petitioner's failure to seek such authorization from the appropriate appellate court before filing a second or successive habeas petition 'acts as a jurisdictional bar.' " (quoting *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000))).

If a petitioner in a section 2254 habeas proceeding files a motion containing a "claim," even if he labels it as a Rule 60(b) motion for relief, the motion is in substance a second or successive habeas corpus application. *See* *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005) (concluding that Rule 60(b) motions containing "claims," "is in substance a successive habeas petition"). Accordingly, the motion is subject to section 2244(b)'s aforementioned requirements, including appellate authorization. *Id.* A "claim" under section 2244(b), is "an asserted federal basis for relief from a state court's judgment of conviction." *Id.* at 530. A Rule 60(b) motion does not assert a claim when it "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. Examples of non-merits rulings include those denying habeas relief for failure to exhaust, procedural default, or a statute-of-limitations bar. *Id.* at 532 n.4. However, a Rule 60(b) motion asserts a claim

> ***6** if it attacks the federal court's previous resolution of a claim *on the merits*, ... since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.

Id. at 532 (emphasis in original).

3. Ineffective Assistance of Counsel

With regard to claims of ineffective assistance of counsel, a petitioner must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the petitioner must show that counsel's representation was deficient because it was not "within the range of competence demanded of attorneys in criminal cases." *Id.* at 688. That is, the petitioner must demonstrate that counsel's representation fell below an "objective standard of reasonableness" based on the facts and circumstances present at the time of counsel's allegedly deficient conduct. *Id.* In attempting to satisfy this burden, a petitioner has to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689.

As for the second element of the *Strickland* test, a petitioner must demonstrate prejudice. *Id.* at 687. To demonstrate prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

B. Analysis

In vacating the May 23, 2013 order denying Cox's June 20, 2012 Rule 60(b)(6) motion and remanding to this court, the *Cox II* court offered instructions for further review of Cox's motion. 757 F.3d at 124. First, as discussed above, the court held that "the jurisprudential change rendered by *Martinez*, without more, does not entitle

a habeas petitioner to Rule 60(b)(6) relief." *Id.* Second, because the *Martinez* exception to procedural default requires a "substantial" underlying ineffective assistance of trial counsel ("IATC") claim, the court may assess the merits of Cox's procedurally defaulted IATC claims. *Id.* at 124–25. Third, in the habeas context, Rule 60(b)(6) relief must be "rare," the principle of comity weighs against disturbing a state's criminal judgment via a Rule 60(b) motion, and "[c]onsiderations of repose and finality become stronger the longer a decision has been settled." *Id.* at 125 (citations omitted). Fourth, "[a] movant's diligence in pursuing review of his [IATC] claims is also an important factor." *Id.* at 126. Finally, the fact that Cox's conviction in the Davis murder case served as an aggravating factor for his receiving a death sentence in the Stewart murder case is "significant." *Id.*

Cox presents another factor that he argues weighs towards a finding of "extraordinary circumstances" that was not before the Third Circuit when that court issued the aforementioned guidance: the new ballistics report. Before considering the Third Circuit's instructed factors, the court first analyzes the importance of the new ballistics report as it is a prerequisite to a complete discussion of the *Cox II* factors.

1. The New Ballistics Report as an Extraordinary Circumstance

***7** Rather than providing a substantive ground for habeas relief, Cox argues that the new ballistics report is an extraordinary circumstance undermining the prosecution's evidence, thereby permitting a merits consideration of his defaulted IATC claims. Pet'r's Reply Supp. Mot. Relief Final J. Pursuant Fed. R. Civ. P. 60(b)(6) ("Pet'r's Reply") at 3, Doc. No. 110. The court cannot agree because (1) his motion, to the extent it is based on the new ballistics report, is a second or successive habeas corpus petition requiring appellate authorization; (2) his motion, again to the extent it is based on the new ballistics report, is untimely whether construed under Rules 60(b)(2) or 60(b)(6); and (3) regardless of non-merits defects, the report does not undermine Cox's conviction.

a. Second or Successive Petition

Cox's Rule 60(b) motion requesting relief based on the new ballistics report is a second or successive habeas petition because the report attacks the merits of his conviction, not the court's prior refusal to consider procedurally defaulted IATC claims.

As an initial matter, courts have repeatedly held that new evidence presented in a Rule 60(b) motion, such as the new ballistics report, constitutes a "claim" under *Gonzalez*. *See Blystone*, 664 F.3d at 413 ("[A] motion that seeks to present newly discovered evidence in support of a claim previously denied presents a claim." (citing *Gonzalez*, 545 U.S. at 532)); *United States v. Jones*, Crim. Action No. 06-367, 2015 WL 525184, at *8 (E.D. Pa. Feb. 9, 2015) ("A Rule 60(b) motion that brings a new claim for relief or new evidence in support of a claim is in substance a successive habeas petition and should be treated accordingly." (citing *Gonzalez*, 545 U.S. at 531)).

Cox's own mismatched reasons for raising the ballistics report further demonstrate that presentation of the report constitutes a claim under *Gonzalez*. On the one hand, he rejects the idea that the new ballistics report raises a new claim, and reaffirms that he only raises procedurally defaulted IATC claims in his Rule 60(b)(6) motion. Pet'r's Reply at 2–3. On the other hand, he calls the ballistics report "an extraordinary circumstance that calls into question the accuracy and reliability of the prosecution's evidence against [him]." *Id.* at 3 (citing *Cox I* for its reliance on "ballistics evidence presented at trial to conclude that Petitioner was not prejudiced by trial counsel's deficient performance"). Thus, according to Cox, for the report to have any bearing on this court's determination as to whether extraordinary circumstances exist, thereby permitting consideration of the procedurally defaulted IATC claims, the court must first determine whether the report does indeed "call[ ] into question the accuracy and reliability of the prosecution's evidence."

Unfortunately, determining the accuracy and reliability of the prosecution's evidence is a fundamentally merits-based analysis and goes beyond the purview of a Rule 60(b)(6) motion, as delineated by *Gonzalez*. Cox fails to demonstrate how the new ballistics report, unlike his *Martinez* claim, has any bearing on the order from which he seeks relief, at least to the extent that the order denied habeas relief on

procedural default grounds. Cox does not wield the new ballistics report to attack "some defect in the integrity" of that order's conclusion that all but one of his IATC claims were procedurally defaulted. *Gonzalez*, 545 U.S. at 532. Instead, by his own admission, the new ballistics report demonstrates flaws in trial evidence, and therefore amounts to a claim under *Gonzalez—i.e.* "an asserted federal basis for relief from a state court's judgment of conviction." *Id.* at 530. In other words, he "seek[s] to challenge the underlying criminal proceedings and not this Court's decision denying habeas relief. In this regard, the motion ... is properly construed as a second or successive habeas petition." *Box v. Petsock*, Civ. Action No. 3:86-CV-1704, 2014 WL 4093248, at *15 (M.D. Pa. Aug. 18, 2014) (holding that petitioner's allegations of fraud perpetrated on state courts and claims of new evidence, including alleged "sham" arrest warrant, constituted second or successive petition, even though joined to Rule 60(b) motion for relief based on *Martinez* as an extraordinary circumstance).

***8** Cox's citation to *Cox I* only supports the conclusion that his Rule 60(b) motion, to the extent it presents the new ballistics report, is a second or successive petition. He cites that case to demonstrate that the new report undermines the Third Circuit's reliance on purportedly outdated ballistics evidence in its analysis of the one IATC claim considered on its merits. But the ostensible purpose of Cox's Rule 60(b)(6) motion is not to relitigate the merits of his one IATC claim that was not procedurally defaulted. Rather, he seeks a merits-based consideration of IATC claims previously rejected for a non-merits reason: procedural default. If Cox were to use the new ballistics report to challenge his one IATC claim that was not procedurally defaulted, that would constitute an attack of "the federal court's previous resolution of a claim *on the merits*." *Gonzalez*, 545 U.S. at 532 (emphasis in original). Such a challenge would amount to a second or successive petition.

Finally, the court does not interpret *Cox II* as an invitation for Cox to present new evidence, new IATC claims, or any other arguments irrelevant to the propriety of reopening his procedurally defaulted claims—the narrow basis under which the Third Circuit remanded to this court for review. Rule 60(b)(6)'s requirement that the movant demonstrate "extraordinary circumstances" in the habeas context does not unlock for the court's consideration any of a petitioner's conceivable disagreements with his conviction or collateral proceedings. In short, Cox's Rule 60(b) attacks must be tailored to the order from which he seeks relief, and he has not explained how the new ballistics report demonstrates that this court erred in declining to review his procedurally defaulted IATC claims. Therefore, his Rule 60(b)(6) motion for relief based on the new ballistics report is a second or successive petition, and because he did not first seek authorization from the Third Circuit, this court lacks jurisdiction over that claim. [6]

6 Cox also urges the court to consider additional IATC claims separate from those raised in his federal habeas petition as extraordinary circumstances that support *Martinez* relief: trial counsel's failure to retain a ballistics expert, call witnesses whose statements to police implicated others in the crime, and cross-examine the Little sisters on inconsistencies in their testimony. For the same reasons that Cox's presentation of the new ballistics report constitutes a second or successive petition, these purported extraordinary circumstances are also second or successive claims.

b. Timeliness of the New Ballistics Report

Gonzalez concerns aside, Cox's motion for relief based on the new ballistics report is also untimely, whether the court construes his motion as requesting relief under Rule 60(b)(2) or 60(b)(6). [7] The court analyzes timeliness under each rule in turn.

7 Cox's Rule 60(b)(6) motion is only untimely to the extent it requests relief based on the new ballistics report. As the *Cox II* court noted, his Rule 60(b)(6) motion is timely to the extent it requests relief pursuant to *Martinez* and consideration of his procedurally defaulted IATC claims. *Cox II*, 757 F.3d at 116.

i. Rule 60(b)(2)

Rule 60(b)(2) permits relief from a final judgment, order, or proceeding based on "newly discovered evidence that,

with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b) ....” Fed. R. Civ. P. 60(b)(2). Under this Rule, “the phrase newly discovered evidence refers to evidence of facts in existence at the time of trial of which the aggrieved party was excusably ignorant.” *United States v. 27.93 Acres of Land, More or Less, Situate in Cumberland Cty., Com. of Pa. Tract No. 364-07*, 924 F.2d 506, 516 (3d Cir. 1991) (internal brackets omitted). Relief under Rule 60(b)(2) and Rule 60(b)(6) is mutually exclusive; that is, if relief is available under Rule 60(b)(2), it is unavailable under Rule 60(b)(6). *See S.E.C. v. Fin. Warfare Club, Inc.*, 425 F. App'x 85, 87 (3d Cir. 2011) (per curiam) (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)). Accordingly, “Rule 60(b)(6) cannot be used as a means by which the [one-year] time limitations of 60(b)(1–3) may be circumvented.” *Salley v. Dragovich*, 594 F. App'x 56, 58 (3d Cir. 2014) (per curiam) (internal quotation marks omitted). Thus, in *Financial Warfare Club, Inc.*, the Third Circuit foreclosed Rule 60(b)(6) relief because the appellant presented newly discovered evidence that the appellee committed fraud, making Rule 60(b)(2) or (3) relief available. *See* 425 F. App'x at 87. This was so even though the appellant did not specifically file his motion for relief under Rules 60(b)(2) or (3). *See id.* at 86–87.

***9** The *Financial Warfare Club, Inc.* logic and application of precedent applies similarly to this case. By Cox's own telling, the new ballistics report presents factual evidence that existed at the time of trial in 1993 that he could not discover with reasonable diligence, and for which he was excusably ignorant, because the respondents always maintained exclusive control of ballistics evidence:

> [T]he delay in bringing this motion is the result of Respondent's exclusive possession of the ballistics evidence at issue. Respondent has always maintained complete control of the disputed ballistics evidence. Respondent only re-analyzed the evidence and produced a new and materially different report after Respondent was ordered to allow Petitioner access to the ballistics evidence. The grand reservoir of equitable power to do justice in a particular case under [R]ule 60(b) counsels against now punishing Mr. Cox for a delay that was of the Respondent's making.

Pet'r's Reply at 4 (citation and quotation marks omitted). Because the new ballistics report constitutes newly discovered evidence, Rule 60(b)(2) relief is available, subject to Rule 60(c)(1)’s one-year deadline. Judge Brody denied Cox's petition for a writ of habeas corpus on August 11, 2004, and Cox did not file his motion for relief based on the new ballistics evidence until August 5, 2013, far past the one-year deadline. Therefore, Cox's motion for relief, to the extent the new ballistics report is the basis for that relief, is untimely.

ii. Rule 60(b)(6)

Even if the court could consider Cox's motion under Rule 60(b)(6), the result is no different because his lack of diligence in seeking ballistics evidence belies his filing the motion within a reasonable time. A Rule 60(b)(6) motion “must be made within a reasonable time,” Fed. R. Civ. P. 60(c)(1), and, here, Cox did not move for Rule 60(b)(6) relief “within a reasonable time” because he did not diligently seek ballistics evidence, contrary to his assertion above. The Supreme Court of Pennsylvania considered this very issue in 2016 upon review of Cox's PCRA petition based on the new ballistics report. *See* *Commonwealth v. Cox*, 146 A.3d 221, 231 (Pa. 2016). Although that PCRA petition was based on the Watson and Stewart murders, the Court's analysis is relevant to the Davis murder as well:

> [T]here is no question that Cox knew that more testing could be performed on the ballistics evidence at the time of trial [for the Watson and Stewart murders] in 1995. It was not until six years later, in 2001,

> that Cox first attempted to obtain the ballistics evidence through his first PCRA petition.... By raising this claim in his first PCRA petition, Cox has effectively conceded that the testing could have been done at the time of trial. Moreover, Cox admitted to committing the Davis murder, and so Cox always knew that more than one firearm was used in the perpetration of that crime. Nevertheless, Cox has never explained why he did not seek independent ballistics testing at the time of trial or on direct appeal. Importantly, our review of the record reveals that Cox has never alleged that he asked trial counsel to seek independent ballistics testing or that his counsel refused such a request. Were that the situation, there could be a basis upon which to conclude that he attempted to act diligently, but that his efforts were thwarted by trial counsel. However, this is simply not the case here. Cox acknowledges that the testing could have been done at the time of trial, but offers no explanation as to why he did not seek such testing at that time. Instead, he took no action to obtain the additional testing for six years.... It is this lengthy, unexplained delay that defeats the possibility of a conclusion that Cox acted with reasonable effort to obtain ballistics testing.... Cox's failure to act, and failure to explain his lack of action, precludes a finding of due diligence.

***10** *Id.* (citation omitted). The Court also clarified in a footnote that

> [t]here is no allegation here that a newly developed technology or newly discovered source led to the new fact. Cox makes no claim that Officers Walker and Cruz[, the examiners for the new ballistics report,] employed new testing methods or techniques, nor does he claim that they tested anything beyond what Officer O'Hara[, the examiner for the old ballistics report,] tested in connection with his report. This further weakens any attempt to claim that the fact was not ascertainable prior to the issuance of the second ballistics report.

Id. at 231 n.15. None of the relevant factors that the Court discussed is materially different in this case. Moreover, the Court's reasoning applies even more forcefully here because the Davis murder trial occurred two years before the Watson and Stewart murder trial. Therefore, eight years, rather than six years, separate Cox's trial in this case and his first attempt to obtain ballistics evidence in any of the three cases.

Cox's argument that the Commonwealth has always been in sole possession of the ballistics evidence is only superficially persuasive. As the Court discussed, Cox was admittedly present for Davis's murder, and therefore, assuming the accuracy of the new ballistics report's conclusion, he has always known that the bullets recovered from Davis originated from two (or more) guns. Despite that knowledge, there is no evidence he insisted that his trial or PCRA counsel pursue a theory based on multiple firearms, which surely would have involved seeking another ballistics analysis. Without such diligence, the court refuses to find that he filed his Rule 60(b)(6) motion based on the new ballistics report within a reasonable time.

c. Whether the New Ballistics Report's Conclusion is Extraordinary

Even disregarding *Gonzalez*, timeliness, and diligence concerns, the new ballistics report does not undermine the reliability of Cox's conviction because he admitted to firing two shoots that were almost certainly not accidental. Therefore, the report is not an extraordinary circumstance.

Most importantly, while the new ballistics report, if accurate, undermines the conclusion that Cox was the only shooter, it does not undermine the conclusion that he nevertheless shot intentionally. Regardless of whether the bullets recovered from Davis originated from one or two guns, Cox admitted to

firing two shots in his statement. Because at least three bullets struck Davis, the new ballistics report is still consistent with Cox firing two shots with at least one other shot originating from a different shooter. Concededly, Cox firing only two shots is more suggestive of an accident than firing three or more shots. But only marginally so: The ballistics expert testified that two shots were sufficient to all but negate the possibility of an accident. Specifically, the ballistics expert at trial testified that two or more shots required the shooter to cock the hammer and/or pull a double action trigger for each shot. The ballistics expert also testified that these actions between each shot were especially necessary given the likelihood that the bullets recovered from Davis originated from a revolver. Thus, even if Cox only fired twice, instead of three or more times, he still would have had to undertake the intentional action of preparing the gun for the second shot. The combination of these three pieces of evidence—Cox's admission, evidence that at least three bullets struck Davis, and the ballistics testimony—demonstrate the extreme unlikelihood that Cox accidentally shot Davis.

***11** According to Cox, as a result of the new ballistics report, his "partially-inculpatory statement is called into doubt and the portion of his statement explaining that the shooting was accidental is supported." Pet'r's Reply at 9. The court disagrees for several reasons, each contributing to the court's conclusion that the new ballistics report is not an extraordinary circumstance. First, the new ballistics report does not impeach the medical examiner's testimony that Davis had four wounds caused by at least three bullets. Therefore, assuming *arguendo* that the conclusion of the new ballistics report is correct, the report is consistent with Cox's admission that he fired two shots, and that there was at least one shot from a different firearm. Second, he never explains why he should not be held responsible for his own admission, given that the new report is consistent with two (or more) shots originating from his own firearm. [8] Third, it is unclear whether Cox even argued the shooting was an accident in his admission. In recollecting the moment of the shooting, the only indication of an accident is his reference to Lee handing him a cocked gun, after which he twice states that he fired two shots. But as explained, even if Lee handed him a cocked gun, Cox would have still had to cock the gun for the second shot. Outside of that moment, Cox only states that he told his family he shot someone accidentally and quotes Lee stating that the police would not look at the shooting as an accident.

8 Before trial, Cox moved to suppress his statement based on a purported unawareness that he could face the death penalty for confessing—not, for example, involuntariness or coercion. In denying the motion, the trial judge, finding that the statement was not involuntary, explained, "I find there's absolutely no evidence nor has the defendant presented any argument on the issue of psychological coercion." Trial Tr. Oct. 27, 1993, at 63.

Fourth, to the extent the new ballistics report demonstrates that Cox's statement omitted a complete description of Davis's death, Cox alone is responsible for that omission, further undermining his attempt to paint the shooting as an accident. Cox was present at the time of Davis's shooting, and the medical examiner testified that all bullets entered from the same approximate angle. Cox would therefore know if somebody else fired shots. Nevertheless, he never suggested the involvement of a second shooter. Assuming the accuracy of the new report, the court is unwilling to find credible Cox's claims of accident thereby rewarding him for hiding the full truth of the shooting. And finally, Cox ignores the fact that the first ballistics report was merely inconclusive as to whether the bullets recovered from Davis originated from the same firearm. Thus, Cox's conviction was not necessarily premised upon him firing all shots, belying his argument that the new report is a game-changer that materially strengthens his assertion that he shot accidentally.

Cox is correct that the new report offers a different interpretation of the proceedings and evidence at trial, as well as collateral proceedings. For example, the court agrees with Cox that the report "places both the prosecution and defense theories in a different light." "Pet'r's Suppl. Mem." at 10, 13 (citing Trial Tr. Oct. 28, 1993, at 116 (reciting trial counsel's statement during closing that "I don't know that we could say firing a gun three times ... would be consistent with an accident"), 124 (reciting prosecutor's closing statement that trial "[c]ounsel has conceded ... there is one shooter and that shooter is the defendant, and that defendant is responsible for all the bullets that entered the body of the deceased")). Additionally, both the 2003 R & R and *Cox I* do not appear to contemplate the possibility of a second firearm or shooter in determining that trial counsel's deficient performance did not prejudice Cox. For example, Magistrate Judge Jacob Hart wrote in the 2003 R & R, "Since Dr. Lieberman concluded that the wounds were caused by at least three bullets, even if the weapon was cocked when Cox got it, he would have had to cock the weapon two other times to fire three shots." R & R at 19, Doc. No. 31. Likewise, the *Cox I* court explained:

> According to Cox, the Superior Court disregarded the importance of Kimberly Little's testimony to the prosecution's case and gave too much weight to other, wholly circumstantial, evidence presented at trial. However, even without Kimberly Little's testimony, the verdict was supported by circumstantial evidence. For example, Cox admitted to police that he shot the victim from a distance of two feet, and the victim sustained three gun shot wounds to vital parts of the body, specifically the neck and chest. In addition, the ballistics expert explained that the likelihood of an accidental shooting was diminished by the number of shots fired. It is true that the ballistics expert testified that he could not exclude the possibility of an accidental shooting without examining the weapon; nonetheless, the expert's testimony about the likelihood of an accidental shooting weighs against Cox's claim that he shot the victim accidentally.

***12** 174 F. App'x at 88. And finally, the report's conclusion contradicts Kimberly Little's eyewitness testimony which omits any reference to a second shooter or firearm.

Even if the new ballistics report offers this new interpretation of trial and collateral proceedings, it does not necessarily follow that the outcome of those proceedings is faulty. First, closing statements suggesting that Cox fired three shots and fired them alone are immaterial because, as explained above, the admitted two shots sufficiently established intent, and the presence of a second shooter is irrelevant to that intent. And again, these arguments ignore the fact that the first ballistics report was only inconclusive as to whether both bullets originated from the same gun. Second, although Judge Hart relied on Cox having to cock the gun two other times to establish that trial counsel's deficient performance did not prejudice Cox, just one cock of the gun demonstrates the same point with near equal force, as explained by the ballistics expert. The same goes for the *Cox I* reasoning: One fewer shot than that presumed by the court still demonstrates Cox's intent because he still had to cock the gun for the second shot to which he confessed. Lastly, although the new ballistics report's conclusion contradicts Kimberly Little's account of the shooting, her testimony is unnecessary to maintain confidence in the outcome of Cox's trial, as the Third Circuit determined, even assuming Cox fired only two shots rather than three or more.

In all, even overlooking Cox's improper presentation of the new ballistics report in a Rule 60(b)(6) motion and the untimeliness of the motion, the report is not an extraordinary circumstance because (1) the existing evidence —Cox's admission that he shot twice, medical testimony that at least three bullets struck Davis, and ballistics testimony that shooting twice all but forecloses an accident—sufficiently justifies his conviction; (2) Cox fails to explain why he is not responsible for his own inculpatory statement that he shot twice, how his original statement demonstrates he thought the shooting was an accident, why he has kept silent about the possibility of a second shooter despite his presence during the shooting, and why the new report materially changes the integrity of the trial when the ballistics evidence at trial was merely inconclusive as to the number of firearms; and (3) although Cox is correct that the new report undercuts presuppositions during and after trial that he was responsible for all shots, the new report nevertheless does not undercut the *outcomes* of trial and collateral proceedings.

2. Merit and Substantiality of the Procedurally Defaulted IATC Claims

Because the *Martinez* exception to procedural default requires a "substantial" underlying IATC claim, the *Cox II* court permitted an assessment of the merits of Cox's defaulted IATC claims on remand. The defaulted IATC claims are four-fold: (1) failure to introduce evidence that the Little sisters were related to Davis; (2) failure to impeach Kimberly Little with prior inconsistent statements; (3) failure to refute the Commonwealth's assertion that Cox worked as a drug lookout; and (4) failure to present an adequate defense to first-degree murder and properly advise Cox of his right to testify. *See* R & R at 3, 9–13; Pet'r's Suppl. Mem. at 14. The court discusses the merit of each in turn and finds that Cox fails to prove any of his IATC claims.

a. Failure to Introduce Evidence that the Little Sisters were Related to Davis

***13** Cox argues that trial counsel possessed a statement from Mary Little's husband, Keith Harris ("Harris"), indicating that Harris was Davis's cousin by marriage, thereby making the Little sisters cousins of Davis; however, trial counsel failed to question the biases of the Littles based on that familial relationship. Pet'r's Suppl. Mem. at 19. The court disagrees that trial counsel's performance was deficient or that the alleged deficiency prejudices Cox.

Under the first part of the *Strickland* test, trial counsel's performance was not deficient because Harris's statement is ambiguous as to the familial relationship between Davis and the Littles. Harris stated he was related to Davis as a "cousin by marriage." Pet'r's Suppl. Mem., Ex. B at 2, Doc. No. 95-2. As the respondents argue, while the Littles may be cousins of Davis, Davis may also have been married to Harris's cousin. Resp. Suppl. Mem. Supp. Pet'r's Mot. Relief Final J. Pursuant Fed. R. Civ. P. 60(b)(6) ("Resp't's Resp.") at 28, Doc. No. 105. Cox fails to respond with any evidence of a relevant familial relationship, and without clarity on that question, trial counsel's performance did not fall below an objective standard of reasonableness.

Nor would any deficiency be prejudicial, under the second part of the *Strickland* test. As the Third Circuit explained in *Cox I*, sufficient evidence outside of the Little sisters' testimony existed to convict Cox, and as explained above, even if considering the new ballistics report is proper, the report does not materially alter the *Cox I* reasoning. Therefore, there is not a reasonable probability that trial counsel's failure to elicit testimony from the Littles on a possible familial relationship to Davis prejudiced Cox.

b. Failure to Impeach Kimberly Little with Prior Inconsistent Statements

Cox alleges that trial counsel failed to highlight two prior inconsistent statements of Kimberly Little. First, Cox argues that a passage in Harris's statement demonstrates that Kimberly Little did not see the shooting, contrary to her testimony that she witnessed the shooting from her apartment window. Pet'r's Suppl. Mem. at 18; Pet'r's Reply at 14. The complete relevant portion of Harris's statement is as follows:

> Q. Did anyone else tell you that they had seen the shooting?
>
> A. Kim said that she was ac[ ]ross the street and after she heard the shots she went to the corner and seen them ... pulling off."
>
> Q. Anyone else?
>
> A. That was it.

Pet'r's Suppl. Mem., Ex. B at 3–4. According to Cox,

> [t]he key part of this statement ... is that Ms. Little did not see the incident. Instead, she only *heard* the shots. Moreover, Mr. Harris stated that he was in the apartment building, where both he and Ms. Little lived, when the shooting happened. There is a reasonable inference that Mr. Harris would not have said his sister-in-law was "across the street" if she was inside the apartment building that they both lived in. By calling Mr. Harris as a witness, counsel could have proved that Kimberly Little was not where she claimed to be when the shooting occurred and did not see Petitioner shoot anyone.

Pet'r's Reply at 14 (emphasis in original).

Cox's argument takes advantage of two ambiguities in Harris's statement. First, while Harris's answer responds to the question of whether anyone else told him that they had "seen the shooting," suggesting that Kimberly Little saw the shooting, he also says that she had "seen them" "after she heard the shots," suggesting that the first time that she saw the perpetrators was after the shooting. Second, although Harris and Kimberly Little lived in the same building, and Kimberly Little testified that she viewed the shooting from her building, he said she was "across the street" at the time of the shooting, which could either mean she was across the street from Harris, an inconsistency, or across the street from the shooting, a consistency.

***14** While neither interpretation of Harris's statement strikes the court as more likely than the other, effective counsel would have nonetheless further investigated Harris's meaning. However, Cox does not allege a failure to investigate; rather, from this sole ambiguous statement, he faults trial counsel for failing to use the statement to impeach Kimberly Little at trial. Without more evidence of deficiency —for example, that trial counsel failed to use the statement either after neglecting to investigate or after an investigation affirmed Cox's interpretation of Harris's statement—the court cannot find that trial counsel's failure to impeach Kimberly Little with Harris's statement was objectively unsound trial strategy.

The second inconsistency Cox alleges is as follows: Kimberly Little told police that she had known Cox for a week, and yet she testified that he was a lookout for a drug operation that was open every day except Sunday. Pet'r's Suppl. Mem. at 18. Additionally, trial counsel failed to question Little about the source of her drug operation information. Neither alleged failure demonstrates that trial counsel's representation fell below an objective standard of reasonableness. Kimberly Little's familiarity with the weekly schedule of a local drug operation is consistent with only knowing one of the drug operation's participants for one week. Additionally, questioning Little about the source of her information may have only elicited further unfavorable testimony about Cox's involvement. Therefore, Cox cannot overcome the strong presumption that trial counsel's omissions during his cross-examination of Kimberly Little were sound trial strategy. Trial counsel's performance was not deficient on either alleged prior inconsistent statement.

As for the prejudice prong of *Strickland*, because Cox argues in this IATC claim that trial counsel missed an opportunity to impeach Kimberly Little, the same analysis from the first claim applies: Kimberly Little's testimony was unnecessary to support Cox's conviction, and therefore, the failure to impeach her did not prejudice him.

c. Failure to Refute the Commonwealth's Assertion that Cox Worked as a Drug Lookout

In his third defaulted IATC claim, Cox argues that trial counsel failed to conduct an adequate investigation and interview and produce exculpatory witnesses to defend him from the accusation that he worked as a drug lookout. For example, trial counsel had an available witness willing to testify about Cox's lawful employment. Under the first prong of *Strickland*, evidence of Cox's lawful employment is of marginal probative value because lawful and unlawful employment are not mutually exclusive. That probative value is small enough that it was not objectively unreasonable for trial counsel to decline to elicit testimony of lawful employment. It is true that trial counsel "wasn't really ... anticipating" that the Commonwealth would produce testimony from Kimberly Little as to Cox's drug work. Trial Tr. Oct. 28, 1993, at 5. However, Cox fails to offer any specifics, other than evidence of lawful employment, as to what trial counsel should have done differently at trial to contradict Kimberly Little's testimony of Cox's work as a drug lookout. Therefore, Cox has failed to demonstrate that trial counsel's performance was deficient on this issue.

Turning to the prejudice prong of *Strickland*, evidence that Cox worked as a drug lookout was unnecessary for the reasons discussed in the above analysis of the new ballistics evidence. Regardless of his alleged work as a drug lookout, Cox confessed to shooting Davis twice, the ballistics examiner testified as to the extreme unlikelihood that two shots could be accidental, and the medical examiner testified that Davis died from at least three gunshot wounds. Therefore, trial counsel's failure to refute the assertion that Cox worked as a drug lookout did not prejudice him.

d. Failure to Present an Adequate Defense to First-Degree Murder and Properly Advise Cox of His Right to Testify

***15** On the final procedurally defaulted IATC claim, Cox argues that trial counsel failed to (1) present any evidence that he shot accidentally and (2) properly advise him of his right to testify. As to the first alleged deficiency, trial counsel proceeded at trial under a theory that Cox had "buckshot fever," [9] and Cox repeatedly criticizes this decision in his submissions. *See, e.g.*, Pet'r's Suppl. Mem. at 2, 16 (referring to theory as "ill-conceived" and "irrational"). The court sees this IATC claim differently: Trial counsel pursued the buckshot fever theory because Cox's inculpatory admission that he shot twice left him without winning options. While admittedly lacking in plausibility, the buckshot fever theory provided a tidy explanation for how Cox could have fired two or more shots without the intent to kill. Once again, Cox does not specify which theory trial counsel should have instead pursued, which arguably further demonstrates the difficulty of framing two or more shots as an accident.

9 As described by trial counsel, buckshot fever is "a collective term describing various individual incidents of strange and relatively unexplainable behavior ... in hunters, shooting into the ground, shooting more shots than they ever realized, having an empty weapon, [and] thinking they only shot once ... [.]" Trial Tr. Oct. 28, 1993, at 65.

Worse, and turning to the second alleged deficiency, Cox's only support for the argument that trial counsel failed to properly advise him of his right to testify is a misleadingly decontextualized quote from trial counsel during a PCRA hearing. Cox argues:

> At the PCRA hearing, trial counsel testified that "there were many factors that led me to believe [the statement] could have been coerced." NT 2/04/98 at 5. Given counsel's admission that he did not believe the statement, he was ineffective for failing to advise Mr. Cox of his right to testify ....

Pet'r's Reply at 17 (alteration in original). In fact, trial counsel's fully contextualized quote from the PCRA hearing is as follows:

> Q. Would you agree that Mr. Cox's statement, in your view, did not make out first degree murder?
>
> A. That's correct. I knew the Commonwealth would be using his statement, and I did not attempt to suppress it. First of all, it was not suppressible in the sense that there were many factors that led me to believe it could have been coerced, but having the statement in, knowing full well that the statement was going to be brought into evidence, my strategy was to attempt to use the good points of that statement to greatest advantage.

Hr'g Tr., Feb. 4, 1998, at 6. In other words, trial counsel's testimony was the opposite of that suggested by Cox, which deflates any argument that trial counsel should have encouraged him to testify to combat a coerced statement. Therefore, Cox has failed to prove that trial counsel's first-degree murder defense and right-to-testify advisement were deficient.

On this claim, the court declines to consider the prejudice prong of *Strickland* because Cox fails to offer alternatives to trial counsel's strategy that would permit the court to contemplate the consequences of those alternatives. *See* *Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one.").

e. Cumulative Effect and Consequence of Unsuccessful Claims under *Martinez*

Because Cox has failed to demonstrate that any of his claims are meritorious, the aggregate of his claims do not amount to a more favorable outcome. Additionally, to round out the application of Cox's case to the *Martinez* rule, the fact that his defaulted IATC claims are not meritorious, let alone "substantial," PCRA counsel was not deficient for abandoning those claims; nor did the abandonment prejudice Cox. Because *Martinez* served as the foundation of Cox's argument for relief, the rejection of his defaulted IATC claims is sufficient to dispose of his Rule 60(b)(6) motion. Nevertheless, the court completes its analysis by discussing the remaining *Cox II* considerations and any additional factors that Cox presents.

3. Rarity of Rule 60(b)(6) Relief and Principles of Comity and Finality

***16** The rarity of Rule 60(b)(6) relief, comity, and finality all weigh against finding that extraordinary circumstances exist here, such that without relief, Cox would suffer an extreme and unexpected hardship. Given the lack of merit of his defaulted IATC claims and the fact that *Martinez* alone does not constitute extraordinary circumstances, granting Cox's motion would conflict with mandatory authority requiring only rare grants of Rule 60(b)(6) relief. Principles of comity and finality also weigh against granting relief because the state court convicted Cox 25 years ago, and, as the *Cox II* court indicated, the district court initially dismissed his federal habeas petition in 2004, 14 years ago and eight years before *Martinez*. Therefore, considerations of repose and finality, which strengthen over time, weigh against granting Cox relief.

4. Cox's Diligence in Pursuing His Defaulted IATC Claims

Unlike the previous discussion of Cox's diligence in pursuing ballistics evidence, the focus here is on Cox's diligence in pursuing review of his defaulted IATC claims. Cox summarizes his long-running pursuit of the defaulted IATC claims as follows:

> [Cox] initially raised these claims in a *pro se* Allocatur Petition filed on June 30, 1995. After allocatur was denied, Petitioner raised the claims in a *pro se* PCRA petition. At the evidentiary hearing, Mr. Cox did not consent to waive the claims that his post-conviction counsel abandoned. In fact, he submitted a second *pro se* PCRA petition to raise these claims after the first PCRA petition was denied. In sum, Mr. Cox tried unsuccessfully to present the claims in a *pro se* petition for allowance of appeal in his direct appeal, in a counseled PCRA petition, and in a *pro se* PCRA petition.

Pet'r's Suppl. Mem. at 23. The respondents appear to concede that Cox has diligently pursued his procedurally defaulted IATC claims. *See* Resp't's Resp. at 32 (listing defaulted claims and acknowledging that "petitioner was diligent in pursuing these claims"). The court agrees that Cox has diligently pursued his defaulted IATC claims, and his diligence would weigh towards granting relief if the underlying claims had substantial merit.

5. Cox's Conviction Serving as an Aggravating Factor Towards His Death Sentence

More than any other consideration, the fact that Cox's conviction in the Davis murder case contributed towards his death sentence in the Stewart murder case weighs towards finding that extraordinary circumstances exist to permit *Martinez* relief. While the *Cox II* court thought the capital aspect of this case is "significant," the court refrained from circumscribing the extent to which this court should weigh Cox's death sentence. *See* *Cox II*, 757 F.3d at 124, 126 (remanding for a determination of "how, if at all, the capital aspect of this case ... figure[s] into [a] 60(b)(6) analysis"). In this court's judgment, if a defaulted IATC claim is both meritorious and substantial, and PCRA counsel was ineffective in abandoning that claim, as required by *Martinez*, a death sentence may very well tip the balance of equitable factors towards granting relief. This is because limiting Rule 60(b)(6) *Martinez* relief to cases implicating the death penalty ensures that such relief will be, as required by that Rule, rare and based on extraordinary circumstances, given that the penalty is "the most severe sanction available to society." *Saffle v. Parks*, 494 U.S. 484, 514 (1990). But this is not that case. It is this court's "duty to search for constitutional error with painstaking care ... in a capital case," but the court has found none rooted in Cox's *Martinez* claim. *Burger v. Kemp,* 483 U.S. 776, 785 (1987).

III. CONCLUSION

To summarize, Cox filed two Rule 60(b)(6) motions for this court's consideration, which collectively request relief based on the new rule of law articulated by *Martinez*. Consideration of the new ballistics report, which concluded that the two bullets recovered from Davis originated from different firearms, at this stage is improper. Cox's presentation of the new ballistics report constitutes a claim, requiring appellate authorization of his second or successive petition. His presentation of the report is also untimely under either Rule 60(b)(2) or 60(b)(6). Out of an abundance of caution, the court nevertheless considered in the alternative the merits of the ballistics evidence. In short, the new ballistics report does not materially undermine Cox's conviction because he admitted to shooting Davis twice, and, according to unimpeached ballistics testimony from trial, the possibility that Cox fired twice accidentally is remote. Whether considered with or without the aid of the new ballistics report, none of Cox's procedurally defaulted IATC claims have merit on either element of the *Strickland* test. And although Cox's diligence and his death sentence weigh towards granting relief, such relief must be rooted in substantially meritorious, procedurally defaulted IATC claims. Accordingly, the court denies Cox's two Rule 60(b)(6) motions.

***17** A separate order follows.

All Citations

Not Reported in Fed. Supp., 2018 WL 4094963

757 F.3d 113
United States Court of Appeals,
Third Circuit.

Jermont COX, Appellant
v.
Martin HORN; Connor Blaine; The District Attorney of the County of Philadelphia; The Attorney General of the State of Pennsylvania.

No. 13–2982.
|
Argued: June 12, 2014.
|
Opinion Filed: Aug. 7, 2014.

Synopsis

Background: Following affirmance of his convictions for first-degree murder, criminal conspiracy, and possession of instrument of crime, 445 Pa.Super. 624, 664 A.2d 1054, state inmate filed petition for writ of habeas corpus. The United States District Court for the Eastern District of Pennsylvania, Anita B. Brody, J., denied petition, and petitioner appealed. The Court of Appeals, 174 Fed.Appx. 84, affirmed. The United States District Court for the Eastern District of Pennsylvania, Anita B. Brody, J., denied petitioner's motion for relief from judgment, and petitioner appealed.

[Holding:] The Court of Appeals, Barry, Circuit Judge, held that district court abused its discretion in failing to consider how, if at all, capital aspect of petitioner's case or any other factor would figure into its analysis.

Vacated and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (8)

[1] **Federal Courts** Altering, amending, modifying, or vacating judgment or order; proceedings after judgment

Court of Appeals reviews for abuse of discretion district court's denial of motion for relief from judgment. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

48 Cases that cite this headnote

[2] **Habeas Corpus** Cause and prejudice in general

Habeas petitioner may obtain federal review of procedurally defaulted claim if he demonstrates cause for default and prejudice arising from violation of federal law.

36 Cases that cite this headnote

[3] **Habeas Corpus** Ineffectiveness or want of counsel

Where state law requires prisoner to raise claims of ineffective assistance of trial counsel in collateral proceeding, rather than on direct review, procedural default of those claims will not bar their review by federal habeas court if (1) default was caused by ineffective assistance of post-conviction counsel or absence of counsel (2) in initial-review collateral proceeding (i.e., first collateral proceeding in which claim could be heard), and (3) underlying claim of trial counsel ineffectiveness is "substantial," meaning claim has some merit, analogous to substantiality requirement for certificate of appealability. U.S.C.A. Const.Amend. 6.

157 Cases that cite this headnote

[4] **Federal Civil Procedure** Extraordinary remedy; motion not favored

Federal Civil Procedure Burden of proof; presumptions

Party seeking relief from final judgment bears burden of establishing entitlement to equitable relief, which will be granted only under extraordinary circumstances. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

97 Cases that cite this headnote

[5] **Federal Civil Procedure** Change in law or facts in general

Habeas Corpus Relief from judgment; revocation or modification

Change in decisional law, even in habeas context, may be adequate, either standing alone or in tandem with other factors, to invoke relief from final judgment. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

16 Cases that cite this headnote

[6] **Habeas Corpus** Relief from judgment; revocation or modification

District court abused its discretion, in denying petitioner's motion for relief from judgment dismissing his habeas petition on basis of Supreme Court's subsequent decision in *Martinez v. Ryan*, which permitted post-conviction counsel's failure to raise ineffective assistance of trial counsel claims to excuse procedural default of those claims in some circumstances, in failing to consider how, if at all, capital aspect of petitioner's case or any other factor highlighted by parties would figure into its analysis. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

106 Cases that cite this headnote

[7] **Habeas Corpus** Relief from judgment; revocation or modification

Jurisprudential change rendered by Supreme Court's decision in *Martinez v. Ryan*, which permitted post-conviction counsel's failure to raise ineffective assistance of trial counsel claims to excuse procedural default of those claims in some circumstances, without more, does not entitle habeas petitioner to relief from final judgment dismissing his petition. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

137 Cases that cite this headnote

[8] **Federal Civil Procedure** Grounds and Factors

Where movant has not exhausted available avenues of review, court may deny relief from final judgment. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

20 Cases that cite this headnote

Attorneys and Law Firms

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Molly S. Lorber, Esq. (argued), Thomas W. Dolgenos, Esq., Helen Kane, Esq., Philadelphia County Office of District Attorney, Philadelphia, PA, for Appellees.

Before: AMBRO and BARRY, Circuit Judges, and RESTANI, * Judge.

* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

OPINION OF THE COURT

BARRY, Circuit Judge.

More than twenty years ago, Jermont Cox was convicted in the Court of Common Pleas of Philadelphia County of first-degree murder and related charges. In 2000, he filed a petition in the U.S. District Court for a writ of habeas corpus. The District Court dismissed the petition in 2004, finding that all but one of Cox's claims were procedurally defaulted due to counsel's failure to pursue them in Cox's initial-review post-conviction proceeding in state court and that the one preserved claim lacked merit. We affirmed. In 2012, the Supreme Court of the United States decided *Martinez v. Ryan,* ——U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), which announced an exception to longstanding precedent and found that, under certain circumstances, and for purposes of habeas review, post-conviction counsel's failure to raise ineffective assistance of trial counsel claims could excuse a procedural default of those claims. Within three months

of that decision, Cox filed a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure for relief from the 2004 order dismissing his habeas petition. The District Court denied the motion, finding that the intervening change in law occasioned by *Martinez,* "without more," did not provide cause for relief.

We agree that, for relief to be granted under Rule 60(b)(6), "more" than the concededly important change of law wrought by *Martinez* is required—indeed, much "more" is required. Ultimately, as with any motion for 60(b)(6) relief, what must be shown are "extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur." *Sawka v. Healtheast, Inc.,* 989 F.2d 138, 140 (3d Cir.1993); *accord Budget Blinds, Inc. v. White,* 536 F.3d 244, 255 (3d Cir.2008). But what those extraordinary circumstances would—or could—be in the context of *Martinez* was neither offered to the District Court by the parties nor discussed by the Court, although, to be sure, at that point there had been little post-*Martinez* case law to inform any such discussion.

We will vacate the order of the District Court and remand to provide the Court the opportunity to consider Cox's Rule 60(b)(6) motion with the benefit of whatever guidance it may glean from this Opinion and from any additional briefing it may order. We note at the outset that one of the critical factors in the equitable and case-dependent nature of the 60(b)(6) analysis on which we now embark is whether the 60(b)(6) motion under review was ***116** brought within a reasonable time of the *Martinez* decision. *See* Fed.R.Civ.P. 60(c)(1). It is not disputed that the timing of the 60(b)(6) motion before us—filed, as it was, roughly ninety days after *Martinez*—is close enough to that decision to be deemed reasonable. Still, though not an issue before us, it is important that we acknowledge—and, indeed, we warn—that, unless a petitioner's motion for 60(b)(6) relief based on *Martinez* was brought within a reasonable time of that decision, the motion will fail.

I. *PROCEDURAL HISTORY*

Recognizing that more than twenty years of procedural history has brought us to this point, it is, nonetheless, important that that history be recounted. We will attempt to be succinct, if not laserlike, in our recitation.

On October 28, 1993, following a bench trial before the Hon. Carolyn Engel Temin of the Court of Common Pleas of Philadelphia County, Cox was convicted of first-degree murder, criminal conspiracy, and possession of an instrument of crime in connection with the July 19, 1992 shooting death of Lawrence Davis, and was sentenced to life imprisonment.

In a statement he gave to the police at the time of his arrest, Cox confessed to shooting Davis, but said that the shooting had been accidental. He and a friend, Larry Lee, he said, had gone to a drug house operated by Lee. While they were outside drinking, Lee got into a dispute with Davis that escalated into a physical altercation. At some point, Lee handed Cox a gun that was already cocked. Cox shot twice, hitting Davis, and then handed the gun back to Lee. According to Cox, he later told family members that the shooting had been an accident.

To prove at trial that Cox had the requisite intent for first-degree murder, the Commonwealth presented the testimony of Kimberly Little, an eyewitness. Little testified that Cox and Lee worked for a drug organization that was run out of an apartment in her building: Cox was a "lookout" and Lee supplied the operation's drugs. (A.31.) On the night of Davis' death, Little saw from her window an argument erupt between Davis and Lee. According to Little, Cox then exited a local bar with a six-pack of beer, approached the two men, placed the six-pack on the hood of Lee's nearby car, retrieved a gun from the car, walked to within four feet of Davis, and shot him three times. Cox stopped to drink a beer, and he and Lee left in Lee's car.

The Commonwealth's other witnesses were Kimberly Little's sister, Mary Little; the medical examiner; and a ballistics expert. Mary Little confirmed that Cox and Lee were neighborhood drug dealers and that she saw them drive off together after the shooting. The medical examiner asserted that Davis had four wounds caused by at least three bullets, and the ballistics expert explained that it was unlikely the shooting was accidental given the number of shots fired.

Trial counsel filed post-verdict motions on Cox's behalf. Cox also filed a motion pro se alleging trial counsel's ineffectiveness and requesting the appointment of new counsel. In February of 1994, Judge Temin held a hearing on the post-verdict motions. At the hearing, Cox testified in support of his pro se motion and outlined trial counsel's alleged failings: trial counsel (1) failed to present testimony

from various character witnesses; (2) failed to find a witness, identified by Cox, who would have testified that "guys from the neighborhood" forced Kimberly Little to give a false statement to the police, (S.A.47); (3) failed to review paperwork ***117** that Cox provided him; and (4) dissuaded Cox from taking the stand in his own defense. In response, trial counsel stated that he found himself in "a very untenable position" and asked that he be permitted to withdraw. (S.A.59.) Judge Temin denied the request as well as the pro se motion, finding Cox's claims of ineffectiveness to lack merit. She later denied the counseled post-verdict motions.

Cox, still represented by trial counsel, appealed his conviction, challenging the sufficiency of the evidence and the admission of evidence relating to uncharged drug activity. In June of 1995, the Pennsylvania Superior Court affirmed the judgment of sentence. Cox then filed a pro se petition for allocatur in the Pennsylvania Supreme Court, raising claims of trial counsel's ineffective assistance at the trial and on appeal. New counsel was appointed for Cox and submitted a supplemental allocatur petition. The Supreme Court denied allocatur in April of 1996. [1]

1 By that time, Cox had also been convicted of the 1992 first-degree murders of Roosevelt Watson and Terence Stewart, both of whom he aided Lee in killing. Cox was sentenced to life imprisonment for the murder of Watson and death for the murder of Stewart. His conviction for murdering Davis was found to be an aggravating factor in support of his capital sentence. *See* *Commonwealth v. Cox,* 603 Pa. 223, 983 A.2d 666, 673–75 (2009). Those convictions have spawned federal habeas proceedings that are before the District Court, and Cox has filed new PCRA petitions challenging his convictions on all three murders on the basis of new ballistics evidence. His habeas petitions relating to the Watson and Stewart cases have been stayed pending those PCRA proceedings.

The following month, Cox filed a pro se petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons.Stat. Ann. §§ 9541–9546. The attorney who had represented Cox in his petition to the Pennsylvania Supreme Court was again appointed to represent Cox in his collateral review proceeding under PCRA. Counsel filed an amended PCRA petition asserting claims of ineffective assistance of trial counsel. [2] Judge Temin, sitting as the PCRA court, held a hearing at which PCRA counsel chose to proceed on only one of the multiple claims of trial counsel's ineffectiveness: failure to impeach the Littles with their criminal records and motive to curry favor with the Commonwealth to gain leniency in their own cases.

2 The counseled PCRA petition claimed that trial counsel had provided constitutionally deficient representation when he failed to impeach the Little sisters with (1) the fact that they had charges pending against them when they first gave statements to the police, were eventually convicted of lesser charges, and were on probation at the time of trial; (2) their alleged familial relationship to the murder victim, Davis; and (3) a prior inconsistent statement by Kimberly Little. Trial counsel was also allegedly deficient for failing to present evidence of Cox's lawful employment.

On August 28, 1998, Judge Temin denied postconviction relief, finding that Cox had not been prejudiced by trial counsel's failure to impeach Kimberly and Mary Little with their criminal records because evidence aside from their testimony established his guilt. The Superior Court affirmed in July of 1999 and the Supreme Court denied allocatur in December of that year. Cox filed a second PCRA petition pro se, alleging ineffective assistance claims against trial and PCRA counsel. Judge Temin dismissed the petition as untimely, and the Superior Court affirmed after Cox failed to file a brief.

In October of 2000, Cox, now represented by the Federal Defender, filed a petition for a writ of habeas corpus in the U.S. District Court. The petition raised eight grounds for relief: (1) six claims of ineffective assistance of trial counsel; (2) one violation of ***118** *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and (3) a claim of cumulative error. In July of 2003, a magistrate judge issued a report and recommendation ("R & R") in which he determined that the ineffective assistance claims abandoned by PCRA counsel before the PCRA court, as well as the *Brady* and cumulative error claims, were procedurally defaulted. He reviewed the remaining claim of ineffective assistance—trial counsel's failure to impeach the Littles with their criminal records—and concluded that the Superior Court's decision rejecting that claim was neither "contrary to" nor an "unreasonable application" of established federal law. (A. 44–47 (quoting 28 U.S.C. § 2254(d)(1)).) Cox filed objections to the R & R, arguing that PCRA counsel's unilateral decision to abandon claims constituted cause to

overcome the procedural default bar. In August of 2004, the District Court rejected Cox's objections, adopted the R & R, and dismissed the habeas petition. [3] We affirmed on appeal. *Cox v. Horn,* 174 Fed.Appx. 84 (3d Cir.2006).

3 The District Court granted a certificate of appealability on two issues: (1) whether the Superior Court's resolution of Cox's ineffective assistance of counsel claim, based on trial counsel's failure to impeach Kimberly Little with evidence of her criminal record, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law" and (2) "whether the Superior Court's failure to remand to the trial court to conduct a hearing to determine whether [Cox] wanted to proceed pro se or with counsel establishe[d] cause to overcome a procedural default" of his other claims. *Cox v. Horn,* No. 00–5188 (E.D.Pa. Aug. 11, 2004) (order granting certificate of appealability).

Six years later, on June 20, 2012, Cox filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(6) seeking relief from the District Court's order of dismissal due to the intervening change in procedural law occasioned by the March 20, 2012 decision of the Supreme Court of the United States in *Martinez v. Ryan.* The Court held in *Martinez* that, under certain circumstances, error by post-conviction counsel can constitute cause to overcome the procedural default of claims alleging trial counsel's ineffective assistance. Cox argued that it was only due to PCRA counsel's ineffective assistance at the initial PCRA proceeding that his claims of ineffectiveness against trial counsel had been abandoned and were now procedurally defaulted.

On May 23, 2013, the District Court denied Cox's motion, finding that "*Martinez*'s change of law, without more," was not cause for relief. (A.5.) In a separate July 2, 2013 order, the District Court issued a certificate of appealability on the "legal question" of "whether the change in law resulting from *Martinez* constitutes extraordinary circumstances that would warrant relief" under Rule 60(b)(6). (A.6.)

II. *JURISDICTION AND STANDARD OF REVIEW*

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. We have appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

[1] We review for abuse of discretion a district court's denial of a motion under Rule 60(b)(6). *Brown v. Phila. Hous. Auth.,* 350 F.3d 338, 342 (3d Cir.2003). A district court abuses its discretion when it bases its decision upon a clearly erroneous finding of fact, an erroneous conclusion of law, or an improper application of law to fact. *Morris v. Horn,* 187 F.3d 333, 341 (3d Cir.1999).

III. *ANALYSIS*

A. The *Martinez* Rule

[2] When reviewing a state prisoner's petition for a writ of habeas corpus, a ***119** federal court normally cannot review a federal claim for post-conviction relief that has already been rejected by a state court on the basis of an independent and adequate state procedural rule. *Walker v. Martin,* —— U.S. ——, 131 S.Ct. 1120, 1127, 179 L.Ed.2d 62 (2011); *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A petitioner may obtain federal review of a procedurally defaulted claim, however, if he demonstrates cause for the default and prejudice arising from the violation of federal law. *Martinez,* 132 S.Ct. at 1316 (citing *Coleman,* 501 U.S. at 750, 111 S.Ct. 2546).

When Cox's habeas petition was initially under review by the District Court, the governing rule, as recognized in *Coleman,* was that error by counsel in state post-conviction proceedings could not serve as "cause" sufficient to excuse procedural default of a petitioner's claim. *See Coleman,* 501 U.S. at 752–54, 111 S.Ct. 2546; *Sweger v. Chesney,* 294 F.3d 506, 522 & n. 16 (3d Cir.2002). The Supreme Court carved out a significant exception to that rule nearly eight years after Cox's petition was denied when, in 2012, it decided *Martinez.*

[3] In *Martinez,* the Supreme Court held that, where state law requires a prisoner to raise claims of ineffective assistance of trial counsel in a collateral proceeding, rather than on direct review, a procedural default of those claims will not

bar their review by a federal habeas court if three conditions are met: (a) the default was caused by ineffective assistance of post-conviction counsel or the absence of counsel (b) in the initial-review collateral proceeding (i.e., the first collateral proceeding in which the claim could be heard) and (c) the underlying claim of trial counsel ineffectiveness is "substantial," meaning "the claim has some merit," analogous to the substantiality requirement for a certificate of appealability. *Martinez,* 132 S.Ct. at 1318–20. The Court adopted this "equitable ruling" for several reasons. *Id.* at 1319. First, "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system" vital to ensuring the fairness of an adversarial trial. *Id.* at 1317. Second, a prisoner cannot realistically vindicate that right through a claim of ineffective assistance of trial counsel without "an effective attorney" to aid in the investigation and presentation of the claim. *Id.* Finally, if the lack of effective counsel in an initial-review collateral proceeding could not excuse the federal procedural default bar, no court—state or federal—would ever review the defendant's ineffective assistance claims, given that they were first brought in that collateral proceeding. *Id.* at 1316.

The majority in *Martinez* noted that it was propounding a "narrow," *id.* at 1315, "limited qualification" to *Coleman, id.* at 1319. Even so, what the Court did was significant. *See, e.g., id.* at 1327 (Scalia, J., dissenting) (criticizing *Martinez* as "a radical alteration of ... habeas jurisprudence"); *Lopez v. Ryan,* 678 F.3d 1131, 1136 (9th Cir.2012) ("*Martinez* constitutes a remarkable—if 'limited,'—development in the Court's equitable jurisprudence." (citation omitted)).

In *Trevino v. Thaler,* —— U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), issued the following Term, the Supreme Court clarified that the *Martinez* rule applied not only to states that expressly denied permission to raise ineffective assistance claims on direct appeal (such as Arizona, which *Martinez* addressed), but also to states in which it was "virtually impossible," as a practical matter, to assert an ineffective assistance claim before collateral review. *Id.* at 1915 (quotation marks omitted). Texas law, at issue in *Trevino,* ostensibly permitted (though it did not require) criminal defendants to raise ineffective ***120** assistance of trial counsel claims on direct appeal. In practice, however, Texas' criminal justice system "[did] not offer most defendants a meaningful opportunity" to do so. *Id.* at 1921. As the Texas courts themselves had observed, trial records often lacked information necessary to substantiate ineffective assistance of trial counsel claims, and motion filing deadlines, coupled with the lack of readily available transcripts, generally precluded raising an ineffective assistance claim in a post-trial motion. Moreover, the Texas courts had invited, and even directed, defendants to wait to pursue such claims until collateral review. The Court "conclude[d] that where, as [in Texas], state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, [the] holding in *Martinez* applies." *Id.*

B. Cox's Rule 60(b)(6) Motion

Rule 60(b)(6) is a catch-all provision that authorizes a court to grant relief from a final judgment for "any ... reason" other than those listed elsewhere in the Rule. Fed.R.Civ.P. 60(b)(6). As we noted at the outset, courts are to dispense their broad powers under 60(b)(6) only in "extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur." *Sawka,* 989 F.2d at 140.

Ninety-two days after the Supreme Court issued its decision in *Martinez,* Cox filed a motion under Rule 60(b)(6), seeking to reopen his federal habeas proceeding based on the "significant change in procedural law" caused by the decision. (A.74.) In ruling on Cox's motion, the District Court noted that neither the Supreme Court nor our Court had decided whether the rule announced in *Martinez* constituted an "extraordinary circumstance" sufficient in and of itself to support a 60(b)(6) motion and observed a divide among the courts of appeals that had addressed the issue. The Court explained that the Fifth Circuit, in *Adams v. Thaler,* 679 F.3d 312, 320 (5th Cir.2012), held that "a change in law, including the change announced in *Martinez,* can never be the basis of 60(b) relief." (A.4.) In contrast, it said, the Ninth Circuit had left open the possibility that *Martinez,* assessed together with other factors on a case-by-case basis, could justify 60(b) relief. (A. 4 (citing *Lopez,* 678 F.3d 1131).)[4] Joining what

it viewed to be the position of every other district court in our Circuit to have opined on the impact of *Martinez,* the Court "adopt[ed] the reasoning of the Fifth Circuit to hold that *Martinez*'s change of law, without more, [was] insufficient to warrant relief under 60(b)(6)." (A.4–5.)

4 In *Lopez,* the Ninth Circuit also denied Rule 60(b)(6) relief. 678 F.3d at 1137.

Although we agree with the District Court's ultimate conclusion that *Martinez,* without more, is an insufficient basis for reopening a long-since-dismissed habeas petition, such as Cox's, we cannot endorse the path it took to arrive at that conclusion. For one thing, *Adams* is not concordant with our precedent applying Rule 60(b)(6). For another, we cannot determine from what it wrote whether the Court considered factors—if any there be—beyond *Martinez*'s jurisprudential change in assessing Cox's request for relief. To the extent the Court "adopt[ed] the reasoning" of *Adams* and there stopped its inquiry, it did not employ the full, case-specific analysis we require when faced with a 60(b)(6) motion, although, as we have already noted, little was offered by the parties in that regard.

***121** 1. Whether *Martinez* Is Itself an Extraordinary Circumstance

Because it was a focal point of the District Court's reasoning, we begin with a discussion of the Fifth Circuit's decision in *Adams v. Thaler.* In *Adams,* as in this case, the district court dismissed a habeas petitioner's ineffective assistance of counsel claims as procedurally defaulted under state law, finding that errors by state post-conviction counsel could not excuse the default. Following the Supreme Court's decision in *Martinez,* the petitioner, who had been sentenced to death in Texas state court, filed a Rule 60(b)(6) motion seeking relief from the order dismissing his habeas petition. The petitioner pointed to several factors that, in combination, established "extraordinary circumstances" and entitled him to 60(b)(6) relief: (1) the " 'jurisprudential sea change' in federal habeas corpus law" occasioned by *Martinez;* (2) the fact that his case had resulted in a death sentence; and (3) "the equitable imperative that the true merit" of his claims be heard. *Adams,* 679 F.3d at 319. He also filed a motion for a stay of execution pending the district court's resolution of his 60(b)(6) motion. The district court granted the stay of execution.

The Fifth Circuit vacated that order as an abuse of the district court's discretion, given that the petitioner had not shown a likelihood of success on his Rule 60(b)(6) motion. The court determined that the 60(b)(6) motion would not succeed because, under Fifth Circuit precedent, "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment." *Id.* (alteration in original) (internal quotation marks omitted). That proposition flowed from prior Fifth Circuit cases, which stated that "changes in decisional law ... do not constitute the 'extraordinary circumstances' required for granting Rule 60(b)(6) relief." *Hess v. Cockrell,* 281 F.3d 212, 216 (5th Cir.2002); *accord Hernandez v. Thaler,* 630 F.3d 420, 430 (5th Cir.2011) (per curiam). Concluding that *Martinez* was "simply a change in decisional law" and its development of procedural default principles was "hardly extraordinary," the *Adams* court denied 60(b)(6) relief without examining any of the petitioner's individual circumstances. *Adams,* 679 F.3d at 320 (internal quotation marks omitted).

Adams does not square with our approach to Rule 60(b)(6).

As an initial matter, we have not embraced any categorical rule that a change in decisional law is never an adequate basis for Rule 60(b)(6) relief. Rather, we have consistently articulated a more qualified position: that intervening changes in the law *rarely* justify relief from final judgments under 60(b)(6). *See, e.g., Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections,* 174 F.3d 305, 311 (3d Cir.1999) (en banc) (" '[I]ntervening developments in the law by themselves *rarely* constitute the extraordinary circumstances required for relief under Rule 60(b)(6).' " (quoting *Agostini v. Felton,* 521 U.S. 203, 239, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)) (emphasis added)); *Morris,* 187 F.3d at 341 (same). Stated somewhat differently, we have not foreclosed the possibility that a change in controlling precedent, even standing alone, might give reason for 60(b)(6) relief. *See Wilson v. Fenton,* 684 F.2d 249, 251 (3d Cir.1982) (per curiam) ("A decision of the Supreme Court of the United States or a Court of Appeals may provide the extraordinary circumstances for granting a Rule 60(b)(6) motion....").

Even if there is not much daylight between the "never" position of the Fifth Circuit and the "rarely" position that we have staked out, *Adams* differs from our ***122** precedent in yet another significant respect: its failure to consider the full set of facts and circumstances attendant to the Rule 60(b)(6) motion under review. The Fifth Circuit in *Adams* ended its analysis after determining that *Martinez*'s change in the law was an insufficient basis for 60(b)(6) relief and did not consider whether the capital nature of the petitioner's case or any other factor might counsel that *Martinez* be accorded heightened significance in his case or provide a reason or reasons for granting 60(b)(6) relief. Indeed, the court did not address in any meaningful way the petitioner's claim that he was not offering *Martinez* "alone" as a basis for relief. In *Diaz v. Stephens,* 731 F.3d 370, 376 (5th Cir.2013), the Fifth Circuit later acknowledged that *Adams* and its other precedent had not cited additional equitable factors "as bearing on the analysis of extraordinary circumstances under Rule 60(b)(6)."[5] *See also id.* at 376 n. 1. The fact that the petitioner's 60(b)(6) motion was predicated chiefly on a postjudgment change in the law was the singular, dispositive issue for the *Adams* court.

5 The court in *Diaz* assumed, for the sake of argument, that a district court may consider several equitable factors in the Rule 60(b)(6) context, but found that consideration of those factors in Diaz's case did not entitle him to 60(b)(6) relief. 731 F.3d at 377–78.

[4] We have not taken that route. Instead, we have long employed a flexible, multifactor approach to Rule 60(b)(6) motions, including those built upon a post-judgment change in the law, that takes into account all the particulars of a movant's case. *See Coltec Indus., Inc. v. Hobgood,* 280 F.3d 262, 274 (3d Cir.2002) (noting, in the context of a 60(b)(6) analysis, the propriety of "explicit[ly]" considering "equitable factors" in addition to a change in law); *Lasky v. Cont'l Prods. Corp.,* 804 F.2d 250, 256 (3d Cir.1986) (citing multiple factors a district court may consider in assessing a motion under 60(b)(6)).[6] The fundamental point of 60(b) is that it provides "a grand reservoir of equitable power to do justice in a particular case." *Hall v. Cmty. Mental Health Ctr.,* 772 F.2d 42, 46 (3d Cir.1985) (internal quotation marks omitted). A movant, of course, bears the burden of establishing entitlement to such equitable relief, which, again, will be granted only under extraordinary circumstances. *Mayberry v. Maroney,* 558 F.2d 1159, 1163 (3d Cir.1977). But a district court must consider the full measure of any properly presented facts and circumstances attendant to the movant's request.

6 Notably, the factors outlined in *Lasky* parallel the equitable factors cited by the Fifth Circuit in *Diaz* as being of questionable relevance to Rule 60(b)(6) motions.

The Commonwealth appellees contend that *Gonzalez v. Crosby,* 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005), effectively displaced our flexible approach in the habeas context and precludes Rule 60(b)(6) relief based on a change in law, including *Martinez.* In *Gonzalez,* the district court dismissed a petitioner's habeas petition as barred by the statute of limitations of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d). It found that the limitations period was not tolled while his second state post-conviction motion was pending because the motion was untimely and successive and, therefore, had not been "properly filed." *Id.* at 527, 125 S.Ct. 2641. The Eleventh Circuit denied a certificate of appealability and the petitioner did not seek subsequent review of that decision. Several months later, the Supreme Court rejected the district court's reasoning in *Artuz v. Bennett,* 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), and held that an application for state post-conviction relief ***123** can be "properly filed" even if it was dismissed by the state as procedurally barred. The petitioner then filed a 60(b)(6) motion citing *Artuz* as an extraordinary circumstance. The Supreme Court rejected his argument. Noting that the circumstances warranting 60(b) relief would "rarely occur in the habeas context," *Gonzalez,* 545 U.S. at 535, 125 S.Ct. 2641, the Court opined that "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final," *id.* at 536, 125 S.Ct. 2641. It was "hardly extraordinary" that the district court's interpretation of AEDPA, which was correct under the Eleventh Circuit's then-governing precedent, was subsequently rejected in a different case. *Id.* at 536, 125 S.Ct. 2641.

The Eleventh Circuit, describing *Gonzalez,* has observed that, in that opinion, "the U.S. Supreme Court ... told us that a change in decisional law is insufficient to create the 'extraordinary circumstance' necessary to invoke Rule 60(b)(6)." *Arthur v. Thomas,* 739 F.3d 611, 631 (11th Cir.2014) (citing *Gonzalez,* 545 U.S. at 535–38, 125 S.Ct. 2641). Relying on *Gonzalez,* the Eleventh Circuit in *Arthur,* just as the Fifth Circuit in *Adams,* went on to hold that "the change in the decisional law affected by the *Martinez* rule is not an 'extraordinary circumstance' sufficient to invoke Rule 60(b)(6)." *Id.* The Commonwealth appellees cite the Eleventh Circuit's decision in an effort to persuade us that, in light of *Gonzalez,* we should abandon our case-by-case approach to 60(b)(6) motions.

We are not persuaded. We believe that the Eleventh Circuit extracts too broad a principle from *Gonzalez,* which does not answer the question before us. *Gonzalez* did not say that a new interpretation of the federal habeas statutes—much less, the equitable principles invoked to aid their enforcement—is *always* insufficient to sustain a Rule 60(b)(6) motion. *Gonzalez* merely highlights, in action, the position of both the Supreme Court and this Court that "[i]ntervening developments in the law by themselves *rarely* constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini,* 521 U.S. at 239, 117 S.Ct. 1997 (emphasis added); *Morris,* 187 F.3d at 341. And, to be clear, the *Gonzalez* Court examined the individual circumstances of the petitioner's case to see whether relief was appropriate, concluding that relief was not warranted given the petitioner's "lack of diligence in pursuing review [in his own case] of the statute-of-limitations issue" eventually addressed in *Artuz. Gonzalez,* 545 U.S. at 537, 125 S.Ct. 2641. For that matter, even after categorically pronouncing that *Martinez*'s change in the law could not sustain a 60(b)(6) motion, the Eleventh Circuit in *Arthur* briefly considered (and rejected) "other factors" cited by the movant, including the capital nature of his case, as justification for 60(b)(6) relief in the wake of *Martinez.* [7] *Arthur,* 739 F.3d at 633.

7 At least three other courts of appeals have similarly assessed a variety of factors on a case-by-case basis when deciding whether to grant a habeas petitioner's Rule 60(b)(6) motion based on *Martinez* and *Trevino. See Nash v. Hepp,* 740 F.3d 1075, 1078–79 (7th Cir.2014) (noting that, per *Gonzalez* and prior Seventh Circuit precedent, *Martinez*'s change in law could not justify 60(b)(6) relief, but analyzing the specific circumstances of the petitioner's case, including his lack of diligence and his prior opportunity to raise the defaulted claims); *McGuire v. Warden, Chillicothe Corr. Inst.,* 738 F.3d 741, 750–52 (6th Cir.2013) (denying 60(b)(6) motion after concluding that *Trevino* did not impart new constitutional rights, *Trevino's* change of the law was the sole basis for the motion, and its rule arguably did not apply to the petitioner's claims); *Lopez,* 678 F.3d at 1135–37 (applying a non-exhaustive, six-factor test to determine whether to grant 60(b)(6) motion predicated on *Martinez*).

***124** **[5]** **[6]** We, therefore, believe that our case-dependent analysis, fully in line with Rule 60(b)(6)'s equitable moorings, retains vitality post-*Gonzalez,* and we do not adopt a per se rule that a change in decisional law, even in the habeas context, is inadequate, either standing alone or in tandem with other factors, to invoke relief from a final judgment under 60(b)(6). The District Court abused its discretion when it based its decision solely on the reasoning of *Adams* and failed to consider how, if at all, the capital aspect of this case or any other factor highlighted by the parties would figure into its 60(b)(6) analysis. We will remand to give it the opportunity to conduct that equitable evaluation now.

2. Rule 60(b)(6) Analysis

The grant or denial of a Rule 60(b)(6) motion is an equitable matter left, in the first instance, to the discretion of a district court. We offer, however, the following thoughts to aid the District Court in its further review of Cox's motion.

[7] First, and importantly, we agree with the District Court that the jurisprudential change rendered by *Martinez,* without more, does not entitle a habeas petitioner to Rule 60(b)(6) relief. To be sure, *Martinez*'s change to the federal rules of procedural default, though "limited," was "remarkable." *Lopez,* 678 F.3d at 1136 (internal quotation marks omitted). *Martinez* sharply altered *Coleman's* well-settled application of the procedural default bar and altered the law of every circuit. The rule adopted in *Martinez* was also

important, crafted, as it was, to ensure that fundamental constitutional claims receive review by at least one court.

Even so, *Martinez* did not announce a new constitutional rule or right for criminal defendants, but rather an equitable rule prescribing and expanding the opportunity for review of their Sixth Amendment claims. *See* *Martinez,* 132 S.Ct. at 1319; *Arthur,* 739 F.3d at 629; *McGuire,* 738 F.3d at 750–51; *Buenrostro v. United States,* 697 F.3d 1137, 1139–40 (9th Cir.2012) (published order). A post-judgment change in the law on constitutional grounds is not, perforce, a reason to reopen a final judgment. *See Coltec Indus.,* 280 F.3d at 276 (affirming denial of Rule 60(b)(6) motion even though law on which judgment based declared unconstitutional); *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefits Fund,* 249 F.3d 519, 524 (6th Cir.2001). Much less does an *equitable* change in procedural law, even one in service of vindicating a constitutional right, demand a grant of 60(b)(6) relief.

We also hasten to point out that the merits of a petitioner's underlying ineffective assistance of counsel claim can affect whether relief based on *Martinez* is warranted. It is appropriate for a district court, when ruling on a Rule 60(b)(6) motion where the merits of the ineffective assistance claim were never considered prior to judgment, to assess the merits of that claim. *See* *Lasky,* 804 F.2d at 256 n. 10. After all, the *Martinez* exception to procedural default applies only where the petitioner demonstrates ineffective assistance by post-conviction counsel, as well as a "substantial" claim of ineffective assistance at trial. *Martinez,* 132 S.Ct. at 1318. When 60(b)(6) is the vehicle through which *Martinez* is to be given effect, the claim may well need be particularly substantial to militate in favor of equitable relief.[8] A ***125** court need not provide a remedy under 60(b)(6) for claims of dubious merit that only weakly establish ineffective assistance by trial or post-conviction counsel.

8 Of course, the procedural default exception announced in *Martinez* applies only in states where ineffective assistance claims, either expressly or as a matter of practicality, could not have been raised on direct appeal. *Trevino,* 133 S.Ct. at 1914–15. In *Commonwealth v. Grant,* 572 Pa. 48, 813 A.2d 726, 738 (2002), Pennsylvania decided to defer consideration of ineffective assistance of counsel claims to collateral review, making *Martinez* applicable to its criminal procedural system. At the time Cox's direct appeal and PCRA proceeding were being adjudicated by the Pennsylvania courts, however, Pennsylvania required a criminal defendant to raise ineffective assistance claims at the earliest stage of proceedings during which he was no longer represented by the allegedly ineffective lawyer, for example, the post-trial motions phase or direct appeal. *Id.* at 729; *Commonwealth v. Hubbard,* 472 Pa. 259, 372 A.2d 687, 695 & n. 6 (1977). The District Court determined that, because Cox was represented by the same attorney at trial and on direct appeal to the Superior Court, his PCRA proceeding presented the first opportunity to raise an ineffective assistance of trial counsel claim and *Martinez,* therefore, applied.

The Commonwealth appellees argue that *Martinez* does not apply to pre-*Grant* Pennsylvania and that, in any event, Cox availed himself of the opportunity to raise ineffective assistance claims before the trial court and the Pennsylvania Supreme Court. We do not decide whether, as a general matter, Pennsylvania's pre-*Grant* legal landscape falls within the ambit of the *Martinez* rule. We note simply that appellees have not established why the District Court erred in concluding that, under the pre-*Grant* procedural paradigm, defendants who, like Cox, were represented by the same counsel at trial and on direct appeal did not have a realistic opportunity to raise an ineffective assistance of trial counsel claim until collateral review. Extant Pennsylvania precedent made clear that Cox was not obligated to assert such a claim until trial counsel had been relieved of his representation. Cox was entitled to rely on that guidance, and, therefore, did not have to raise his ineffective assistance claims until PCRA review. *See* *Trevino,* 133 S.Ct. at 1919–20; *Sutton v. Carpenter,* 745 F.3d 787, 793–94 (6th Cir.2014).

It is true that trial counsel no longer represented Cox in his petition for allocatur to the Pennsylvania Supreme Court. Given the "unlikely and unpredictable" manner in which allocatur is granted by that court, however, a petition for allocatur had never been seen as the first

> opportunity to raise a claim of ineffective assistance. *Commonwealth v. Moore,* 569 Pa. 508, 805 A.2d 1212, 1223 (2002) (Castille, J., concurring in part and dissenting in part). In addition, a party may not present new claims in a petition for allocatur. Pa. R. A pp. P. 302(a). Cox's trial counsel did not raise claims of his own ineffective assistance before the Superior Court —something he could not do, in any event, *see Commonwealth v. Green,* 551 Pa. 88, 709 A.2d 382, 384 (1998); *Commonwealth v. Dancer,* 460 Pa. 95, 331 A.2d 435, 438 (1975)—likely barring Cox from raising those claims in his allocatur petition.

Furthermore, courts must heed the Supreme Court's observation—whether descriptive or prescriptive—that Rule 60(b)(6) relief in the habeas context, especially based on a change in federal procedural law, will be rare. *Gonzalez,* 545 U.S. at 535–36 & n. 9, 125 S.Ct. 2641. Principles of finality and comity, as expressed through AEDPA and habeas jurisprudence, dictate that federal courts pay ample respect to states' criminal judgments and weigh against disturbing those judgments via 60(b) motions. In that vein, a district court reviewing a habeas petitioner's 60(b)(6) motion may consider whether the conviction and initial federal habeas proceeding were only recently completed or ended years ago. Considerations of repose and finality become stronger the longer a decision has been settled. *See id.* at 536–37, 125 S.Ct. 2641 (cautioning against 60(b)(6) relief in "cases long since final" and "long-ago dismissals"); *id.* at 542 n. 4, 125 S.Ct. 2641 (Stevens, J., dissenting) ("In cases where significant time has elapsed between a habeas judgment and the relevant change in procedural law, it would be within a district court's discretion to leave such a judgment in repose."). Here, Cox's direct appeal was decided in 1996 and his initial habeas petition, in ***126** which his claims were deemed defaulted, was dismissed in 2004, eight years before *Martinez.*

[8] A movant's diligence in pursuing review of his ineffective assistance claims is also an important factor. Where a movant has not exhausted available avenues of review, a court may deny relief under Rule 60(b)(6). *See id.* at 537, 125 S.Ct. 2641 (majority opinion); *Lopez,* 678 F.3d at 1136 & n. 1; *In re Fine Paper Antitrust Litig.,* 840 F.2d 188, 194–95 (3d Cir.1988).

A special consideration arises in this case, as well. Courts must treat with particular care claims raised in capital cases. *Burger v. Kemp,* 483 U.S. 776, 785, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) ("Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). Although Cox did not receive a capital sentence for the murder of Davis, that murder conviction was used as an aggravating factor in arriving at a death sentence in a separate case, albeit one that is still under habeas review. That fact is significant.

Finally, we offer no opinion on the substantiality or lack thereof of Cox's claims or how the District Court should weigh the various factors that may be pertinent to his Rule 60(b)(6) motion. Nor do we intimate that the Court is precluded from reaching the same conclusion on remand following a more comprehensive analysis. We conclude only that, perhaps with additional briefing by the parties, a more explicit consideration of the facts and circumstances relevant to the concededly timely filed underlying motion would have been, and is now, appropriate.

IV. *CONCLUSION*

We will vacate the order of the District Court denying Cox's Rule 60(b)(6) motion and remand for further proceedings consistent with this Opinion. If, following the proceedings on remand, an appeal is filed, that appeal shall be forwarded to this panel for decision.

All Citations

757 F.3d 113, 89 Fed.R.Serv.3d 73

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JERMONT COX,	:	
Petitioner	:	CIVIL ACTION
	:	No. 00-5188
v.	:	
	:	
MARTIN HORN, et. al.	:	
Respondents	:	

EXPLANATION AND ORDER

Petitioner Jermont Cox was convicted in 1993 of the first degree murder of Lawrence Davis, criminal conspiracy, and possession of an instrument of crime. He was sentenced to life imprisonment. He was represented on at trial, post-verdict motions, and direct appeal by David McLaughlin. A new lawyer, David Silverman, was appointed to represent Cox during his Pennsylvania Post Conviction Relief Act ("PCRA") proceedings. Although Cox, through Silverman, raised multiple claims relating to the ineffective assistance of his trial counsel in his PCRA petition, Silverman dropped every claim but one during the PCRA evidentiary hearing. The PCRA court denied Cox's PCRA petition, and the Pennsylvania Superior Court affirmed.

In 2000, Cox filed a timely federal habeas petition, raising eight claims of ineffective assistance of counsel, among other claims. On August 9, 2004, I adopted Magistrate Judge Hart's Report and Recommendation to deny Cox's petition. I found that only one claim from his petition had been fairly presented and exhausted in state court: that his trial counsel had provided ineffective assistance when he failed to impeach key witnesses Kimberly and Mary Little with their criminal records. I denied that claim on the merits. The petition presented five other ineffective assistance claims that I determined were procedurally defaulted. Because Cox had failed to show cause and prejudice for the default, I denied those claims without a review of the

merits, as required by *Coleman v. Thompson*, 501 U.S. 722 (1991).

Before me now is Cox's Motion for Relief from Final Judgment Pursuant to Fed. R. Civ. P. 60(b)(6). Cox requests that I reopen his habeas petition to examine the ineffective assistance claims that I had previously determined were procedurally defaulted. He relies on the Supreme Court's recent decision of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that

> a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, ... counsel in that proceeding was ineffective.

Martinez, 132 S. Ct. at 1320. In other words, *Martinez* allows a federal court to examine on the merits ineffective assistance of trial counsel claims that had been defaulted as a result of ineffective assistance of post-conviction counsel.[1] It held that post-conviction counsel's failure to raise such claims can constitute cause that would excuse a procedural default and allow a court to examine the underlying ineffective assistance claim on the merits.

Here, Cox argues that his lawyer during his PCRA proceedings was ineffective for waiving five claims of ineffective assistance of trial counsel, which became Claims 3, 4, 5, 6, and 8 of his habeas petition. As his PCRA proceedings were his first opportunity to raise these ineffectiveness claims, Cox argues that his PCRA counsel's ineffectiveness provides cause, under *Martinez*, for his default of those claims. As a result, he asks me to reopen his habeas proceedings and examine these claims, which have never been examined on the merits by any court.

Relief from judgment under Rule 60(b)(6) is available only where the petitioner has

[1] This relief is available assuming that the ineffective assistance at trial claims could not have been raised earlier, before post-conviction proceedings (such as on direct appeal). Pennsylvania used to require criminal defendants to raise ineffective assistance claims at the earliest state of the proceedings during which the allegedly ineffective lawyer no longer represented them. *See Com. v. Hubbard*, 372 A.2d 687, 695 & n.6 (Pa. 1977). This rule was in effect at the time of Cox's direct appeal and PCRA proceedings. Because Cox was represented by David McLaughlin at both trial and on direct appeal, his first opportunity to raise claims relating to ineffective assistance at trial came during PCRA proceedings. Accordingly, Cox is potentially eligible for relief under *Martinez*.

demonstrated "extraordinary circumstances." *Gonzales v. Crosby*, 545 U.S. 524, 535 (2005). Such circumstances "will rarely occur in the habeas context." *Id.* at 535. Neither the Supreme Court nor the Third Circuit has yet ruled whether the new rule announced in *Martinez* constitutes extraordinary circumstances, but the Third Circuit has stated that "intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Morris v. Horn*, 187 F.3d 333, 341 (3d Cir. 1999) (quotations omitted). Only two circuit courts have squarely addressed whether *Martinez* provides a basis for 60(b) relief. The Fifth Circuit ruled that a change in law, including the change announced in *Martinez*, can never be the basis of 60(b) relief. *See Hernandez v. Thaler*, 630 F.3d 420, 430 (5th Cir. 2011); *Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012) ("The *Martinez* Court's crafting of a narrow, equitable exception to *Coleman's* holding is hardly extraordinary."). The Ninth Circuit, by contrast, leaves open the possibility that *Martinez* could provide a basis for 60(b) relief. In interpreting *Martinez* in the 60(b) context, the court applied a multi-factor test, developed in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), that examines the nature of the change in law, the petitioner's diligence, the interest in finality, any delay in requesting relief, the connection between the new law and the judgment in question, and principles of comity. *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012).

In this circuit, every district court that has examined the issue has either not ruled squarely on the question or agreed with the Fifth Circuit that *Martinez*'s change of law is not, by itself, an "extraordinary circumstance" justifying relief. *Bender v. Wynder*, No. 05-998, 2012 WL 6737840 (W.D. Pa. Dec. 28, 2012); *Brown v. Wenerowicz*, No. 07-1098, 2012 WL 6151191 (E.D. Pa. Dec. 11, 2012); *Vogt v. Coleman*, No. 08-530, 2012 WL 2930871 (W.D. Pa. July 18, 2012); *Allen v. Walsh*, No. 06-4299, 2013 WL 1389752 (E.D. Pa. Mar. 15, 2013) report and

recommendation adopted, No. 06-4299, 2013 WL 1389749 (E.D. Pa. Apr. 4, 2013); *Ford v. Wenerowicz*, No. 09-3537, 2013 WL 460107 (E.D. Pa. Feb. 7, 2013); *House v. Warden*, SCI-Mahanoy, No. 08-0331, 2013 WL 297838 (M.D. Pa. Jan. 24, 2013); *Fitzgerald v. Klopotoski*, No. 09-1379, 2012 WL 5463677 (W.D. Pa. Nov. 8, 2012); *United States v. Correa*, No. 89-163, 2013 WL 203558 (W.D. Pa. Jan. 17, 2013).

Because the Third Circuit has not yet ruled on this issue, I join the other district courts of this circuit in adopting the reasoning of the Fifth Circuit to hold that *Martinez*'s change of law, without more, is insufficient to warrant relief under 60(b)(6).

AND NOW, this __23rd__ day of ___May_____, 2013, it is **ORDERED** that Petitioner's Motion for Relief of Judgment (ECF No. 56) is **DENIED**.

s/Anita B. Brody

ANITA B. BRODY, J.

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J.S46020/99

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
JERMONT COX,	:	
Appellant	:	No. 2529 Philadelphia 1998

Appeal from the Order July 21, 1998
In the Court of Common Pleas of Philadelphia County
Criminal No. Feb. Term 1993 No. 3160-63

BEFORE: KELLY, STEVENS, JJ., and CIRILLO, P.J.E.

MEMORANDUM:

FILED JUL 15 1999

Jermont Cox appeals from the order of the Court of Common Pleas of Philadelphia County dismissing his petition for collateral relief under the Post-Conviction Relief Act (PCRA).[1] We affirm.

Cox is currently serving a life sentence for first degree murder. The PCRA court succinctly rendered the circumstances of the crime as follows:

> At trial, the Commonwealth proved the following: Cox and Larry Lee ("Lee") were members of a drug business that operated at 246 West Queen Lane in Philadelphia. Cox served as a "look-out" and would signal his colleagues if the police approached. On July 19, 1992 at approximately 1:55 A.M., Lee and Lawrence Davis ("Davis") were standing beside Lee's 1979 green Malibu which was parked in the street outside 246 West Queen Lane. Lee and Davis began a verbal argument relating to a small amount of drugs. A physical fight ensued and Lee hit Davis several times knocking him to the ground.

PCRA court opinion filed 8/31/98 at 2-3. Exiting from a nearby bar, Cox

[1] 42 Pa.C.S.A. §§ 9541-9546.

observed the fight between Lee and Davis. Approaching the two, Cox removed a gun from Lee's car and shot Davis, hitting him in the neck, chest, right shoulder, and right hand. ***Id.***

Cox was convicted of first degree murder following an October 1993 bench trial, and was sentenced on October 29, 1993. Post-sentence motions were filed, alleging insufficiency of the evidence and trial court error in admitting evidence of unrelated drug activity. Those motions were denied on April 4, 1994. Cox also filed a *pro se* motion to remove his trial counsel for ineffectiveness. Argument was heard on that motion on February 17, 1994, after which the motion was denied.

Still represented by his original trial counsel, Cox appealed to the Superior Court on April 12, 1994, and on June 2, 1995, a panel of this Court affirmed the trial court, finding that the evidence was sufficient to support Cox's conviction, and that the trial court committed no error in admitting the evidence of Cox's involvement in a drug ring. On December 15, 1995, new counsel was appointed to represent Cox on appeal to the Pennsylvania Supreme Court, but allowance of appeal to the Supreme Court was denied on April 30, 1996.

On May 28, 1996, Cox filed a PCRA petition, and PCRA counsel was appointed on August 13, 1996. Despite appointment of counsel, Cox filed a *pro se* supplement to his PCRA petition on September 11, 1996, alleging ineffectiveness of trial/direct appeal counsel. PCRA counsel then requested

and received permission to withdraw as Cox's counsel, and new PCRA counsel was appointed on April 28, 1997. An amended PCRA petition was filed on June 11, 1997, and on September 9, 1997, the Commonwealth filed a motion to dismiss the petition. The motion to dismiss was denied on October 16, 1997, and an evidentiary hearing was subsequently held on February 4, 1998. The PCRA court then dismissed the PCRA petition on March 20, 1998, but a motion for reconsideration was filed and argument was held on May 8, 1998. On July 23, 1998, Cox was notified that his PCRA petition was formally dismissed.

Cox filed the instant appeal on August 12, 1998, raising the following issues:

> (1) Did the PCRA court err in dismissing appellant's PCRA petition on the basis that trial counsel's admitted negligence in failing to establish the bias and motive to fabricate of the Commonwealth's sole eyewitness did not sufficiently affect the outcome in this first-degree murder case because other evidence implicated him, where this other evidence was equally consistent with a finding of third degree murder and the Commonwealth's sole eyewitness provided the only evidence of an intentional killing?
>
> (2) Did the PCRA court err in assessing the prejudicial impact of trial counsel's negligence by temporarily placing itself back into the role of factfinder, as opposed to an appellate-type reviewing court, and then erroneously concluding that it would not have affected her prior decision to convict had counsel properly impeached the Commonwealth's sole eyewitness?

Appellant's brief at 3.

When addressing the denial of a PCRA petition, this Court operates under a well-established standard: We are limited to examining whether the

PCRA court's determination is supported by the evidence of record and whether the determination is free of legal error. ***Commonwealth v. Morales***, __ Pa. __, 701 A.2d 516, 520 (1997) (*citing* ***Commonwealth v. Travaglia***, 541 Pa. 108, 117 n. 4, 661 A.2d 352, 356 n. 4 (1995)). To be eligible for relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that the conviction or sentence in question arose from one or more of the errors enunciated by Section 9543(a)(2),[2] and that the issues raised have not been previously litigated or waived. 42 Pa.C.S.A. 9543(a)(2), (3).

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[2] Section 9543(a)(2) requires the petitioner to show that the challenged conviction or sentence resulted from one or more of the following:

> (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
> (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
> (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
> (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
> (v) Deleted by statute.
> (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
> (vii) The imposition of a sentence greater than the lawful maximum.
> (viii) A proceeding in a tribunal without jurisdiction.

42 Pa.C.S.A. § 9543.

Here, Appellant has raised an ineffectiveness of counsel argument at the earliest possible time after he was no longer represented by the counsel in question.[3] We turn, therefore, to the merits of his ineffectiveness claim.

Counsel is presumed effective, ***Commonwealth v. Garnett***, 613 A.2d 569 (Pa.Super. 1992), and to defeat that presumption a petitioner must prove (1) that the course of action the petitioner alleges counsel was ineffective for failing to pursue had arguable merit; (2) that counsel had no reasonable basis for the act or omission in question; and (3) that the act or omission prejudiced the petitioner to the point that but for the act or omission the outcome of the case would have been different. ***Commonwealth v. Appel***, 547 Pa. 171, 689 A.2d 891 (1997); ***Commonwealth v. Fowler***, 550 Pa. 152, 703 A.2d 1027 (1997).

Here, Cox alleges that his trial counsel was ineffective in failing to bring out evidence that an eyewitness to Davis' murder had a criminal record. In its opinion of August 31, 1998, the PCRA court acknowledged that trial counsel conceded that he made no attempt to investigate the witness' criminal record, and that he had no reasonable basis for failing to do so. PCRA court opinion filed 8/31/98 at 4 n.1. The PCRA court concluded,

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[3] The claim of ineffectiveness of counsel must be raised at the earliest stage in the proceeding where the petitioner is no longer represented by the allegedly ineffective counsel. ***Commonwealth v. Miller***, 564 A.2d 975 (Pa.Super. 1989).

however, that Cox is nevertheless unable to show ineffectiveness of counsel because he cannot show that he was prejudiced by counsel's tactics, since even without the witness' testimony, there was sufficient evidence to convict Cox of first degree murder. ***Id***. at 4. Specifically, Cox made a statement to the police on January 14, 1993, admitting that he shot the victim, who died as the result of close range gun shot wounds to his neck and chest; there was no evidence to suggest the crime was an accident; and the ballistics expert testified that it was highly unlikely for the gun to accidentally discharge three times. ***Id***. at 4-5.

There is no question here whether or not Cox killed Davis; the only question is Cox's degree of guilt. "A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." Pa.C.S.A. § 2502(a). The use of a deadly weapon on a vital part of the victim's body establishes the degree of intent necessary to support a conviction for first degree murder. ***Commonwealth v. Collins***, 549 Pa. 593, 702 A.2d 540 (1997). The evidence produced in this case shows that Cox used a deadly weapon on vital parts of the victim's body.

As such, we cannot conclude that counsel's omission rendered the verdict unreliable, because the witness' testimony was not critical to the prosecution's case. Because there is additional evidence to sustain a conviction for first degree murder without taking into account the testimony of the witness in question, Cox has failed to show that he was prejudiced by

his trial counsel's failure to impeach that witness. Therefore, he is unable to show ineffectiveness of counsel, and the PCRA court correctly denied his petition.

Affirmed.

J-A21029/95

COMMONWEALTH OF PENNSYLVANIA	)	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	)	
JERMONT COX, Appellant	)	NO. 01303 PHILADELPHIA, 1994

Appeal from the Judgment of Sentence in the Court of Common Pleas of Philadelphia County, Criminal Division, No. 93-02-3160-3163

BEFORE: ROWLEY, P.J., TAMILIA and SAYLOR, JJ.

MEMORANDUM:

FILED JUN - 2 1995

On October 28, 1993, after a bench trial, the appellant, Jermont Cox, was found guilty of murder in the first degree,[1] criminal conspiracy[2] and possession of an instrument of crime.[3] The court thereafter sustained defendant's demurrer to the Commonwealth's purported aggravating circumstances and sentenced appellant to life imprisonment. Cox now appeals from this October 29, 1993 judgment of sentence.

Appellant argues the verdict of first degree murder was against the weight and sufficiency of the evidence, averring there was no evidence of premeditation. Appellant challenges the standard definition of premeditation and contends premeditation "requires time for some reflection on the contemplated action, and it is that aspect, so condemned by society throughout civilization, which generates the awesome punishments attached to a first degree murder conviction...." (Appellant's brief at 7.)

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[1] 18 Pa.C.S. § 2502(a).

[2] *Id.*, § 903.

[3] *Id.*, § 907.

The test for determining the sufficiency of the evidence is to view the evidence, and all reasonable inferences deducible therefrom, in a light most favorable to the Commonwealth, as the verdict winner, and determine whether the fact-finder reasonably could have concluded all elements of the crime were established beyond a reasonable doubt. *Commonwealth v. Baker*, 531 Pa. 541, 614 A.2d 663 (1992); *Commonwealth v. Woods*, 432 Pa. Super. 28, 638 A.2d 1013 (1994). A new trial is warranted on a challenge to the weight of the evidence only if the verdict was so contrary to the evidence as to shock one's sense of justice. *Commonwealth v. Fox*, 422 Pa. Super. 224, 619 A.2d 327 (1993), *alloc. denied*, ___ Pa. ___, 634 A.2d 222 (1993). We will not substitute our judgment for that of the trial court where issues of weight and credibility of the evidence are concerned. *Id.* To prove first degree murder, the Commonwealth must establish the defendant killed the victim with malice aforethought, premeditation and deliberation. *Id.* Premeditation may be inferred from statements made by the defendant and from the attendant circumstances. *Commonwealth v. Davis*, 331 Pa. Super. 59, 479 A.2d 1077 (1984). Whenever there is a conscious purpose to bring about death, the requirement of premeditation and deliberation is met. *Fox, supra.* No specific length of time is necessary before premeditation will be found to have entered into a defendant's act of killing. *Commonwealth v. Clemmons*, 312 Pa. Super. 475, 459 A.2d 1 (1983), *rev'd on other grounds*, 505 Pa. 356, 479 A.2d 955 (1984).

The evidence reveals the appellant, a look-out for an illegal drug enterprise, observed a physical altercation between a co-worker/runner and a customer, calmly laid his six-pack of beer on a car, retrieved a .38 caliber handgun from the car, and repeatedly shot the victim/customer from a distance of four feet, through the neck, shoulder and chest. In his statement to police, defendant admitted shooting the victim but stated the gun had discharged accidentally.

The trial court, sitting as the finder of fact, found defendant's explanation of the shooting incredible. We will not disturb this finding. *See Fox, supra.* Further, the trial court's verdict was not so contrary to the evidence presented as to shock this Court's sense of justice.

Appellant also argues the trial court erred by admitting irrelevant evidence of his involvement in an illegal drug operation, thereby causing him undue prejudice.

A judge has broad powers concerning the conduct of a trial, particularly with regard to the admission or exclusion of evidence. *Commonwealth v. Kunkle,* 425 Pa. Super. 499, 623 A.2d 336 (1993). All such evidence must be relevant, however, tending to prove or disprove a material fact in issue, make such fact more or less probable or afford the basis for or support a reasonable inference regarding the existence of a material fact. *Commonwealth v. Ingram,* 404 Pa. Super. 560, 591 A.2d 734 (1991). Evidence of other crimes may be introduced to establish motive, intent, an absence of mistake, a common scheme or an identity linking the accused to the second crime. *Commonwealth v. Lank,*

518 Pa. 290, 543 A.2d 491 (1988). The evidence may be admitted under circumstances where the probative value outweighs any tendency to prejudice the defendant. *Id.*

We find the trial court did not abuse its discretion by allowing into evidence testimony establishing defendant's connection with the illegal drug operation. The evidence served to establish defendant's motive in shooting the unarmed victim who was involved in a fistfight with another man who worked as a drug/money runner. The evidence was not introduced for the purpose of attacking appellant's character but to establish the killing was not an act of random violence. Also, evidence of defendant's involvement with the drug operation was offered to contradict appellant's statement he had shot the victim accidentally. Finally, appellant has shown no evidence to support his contention he was prejudiced by the introduction of this evidence.

Having found each of appellant's arguments devoid of merit, we affirm the October 29, 1993 judgment of sentence.

Judgment of sentence affirmed.

PHILADELPHIA POLICE DEPARTMENT
FIREARM IDENTIFICATION UNIT

CASE: 92FIU-3195 **DC #:** 92-14-053610 **ARREST:** **SECURITY:**

OCCURRENCE DATE/TIME: **LOCATION:**

SUBMITTED BY: **BADGE/PAYROLL:** **DIST/UNIT:** 6003

DATE/TIME SUBMITTED: 07/19/1992/ 4:56 pm **PROPERTY REC:** 0390326

TAKEN FROM NAME: **AGE:**

ADDRESS: **ASSOC. DC#:**

BULLET SPECIMEN(S):

COATED: **UNCOATED:** Lead **JACKETED:**

TYPE: LRN **BASE:** Cupped **CALIBER:** 38/357

CANNELURE 1: 2 Knurled **CANNELURE 2:**

MARKED: X-1 923195 **WEIGHT:** 153.3 grns.

LAG: I/RH **LWD:** **GWD:**

REMARKS: Bullet Specimen, B-1:
Portion of nose area and circumference distorted, gouged and bearing foreign markings. Base distorted. Three LAG visible. Blood and tissue-like substances attached. Decontaminated, by examiner, for safety.

Stated Source: Tan ME's envelope labled: Davis, Larry, 3198, Left Arm.

Control #: N/A **LAB FEE $** 630.00

EXAMINATION DATE: 04/11/2013

EXAMINER: Police Officer 1 KELLY D WALKER
#5576/225211

CO-EXAMINER: Police Officer 1 JESUS CRUZ
#9748/205768

LAB# 92FIU-3195 **DC#** 92-14-053610 **PR#** 0390326

BULLET SPECIMEN(S):

COATED: **UNCOATED:** **JACKETED:** Copper Alloy

TYPE: FMJ **BASE:** Flat **CALIBER:** 38/357

CANNELURE 1: **CANNELURE 2:**

MARKED: X-2 923195 **WEIGHT:** 158.8 grns.

LAG: 05R **LWD:** **GWD:**

REMARKS: Bullet Specimen, B-2:
No major deformation, however, circumference bears foreign markings. Decontaminated, by examiner, for safety.

Stated Source: Tan ME's envelope labled: Davis, Larry, 3198, Back R Chest.

EXAMINATION DATE: 04/11/2013

EXAMINER: Police Officer 1 KELLY D WALKER
#5576/225211

CO-EXAMINER: Police Officer 1 JESUS CRUZ
#9748/205768

LAB# 92FIU-3195 **DC**# 92-14-053610 **PR**# 0390326

REMARKS: CONCLUSIONS: Re-Examination: (Determined through microscopic comparison)

B-1 and B-2, when compared against each other, were NOT fired from the same firearm.
(LAG Dimensions)

NOTE: Re-Examination not in complete agreement with previous examination (See above conclusion).
Previous report listed a lead fragment. No lead fragment was present at time of my examination.

EXAMINATION DATE: 04/23/2013

EXAMINER: Police Officer 1 KELLY D WALKER
#5576/225211

CO-EXAMINER: Police Officer 1 JESUS CRUZ
#9748/205768

LAB# 92FIU-3195 **DC#** 92-14-053610 **PR#** 0390326

REMARKS: Crosscheck Request per ADA Affronti:

B-2 (this report) was fired from the same firearm as B-1, B-2 and BJ-1 thru BJ-3 of FIU#923736 DC#92-19-061074.

EXAMINATION DATE: 04/23/2013

EXAMINER: Police Officer 1 KELLY D WALKER
#5576/225211

CO-EXAMINER: Police Officer 1 JESUS CRUZ
#9748/205768