No. ________________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

ERNESTO SALGADO MARTINEZ,

***Petitioner*,**

v.

DAVID SHINN, Director, Arizona Department of Corrections,

***Respondent*.**

PETITION FOR WRIT OF CERTIORARI

**TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JON M. SANDS
Federal Public Defender
TIMOTHY M. GABRIELSEN
(Counsel of Record)
Assistant Federal Public Defender
407 West Congress Street, Suite 501
Tucson, Arizona 85701
Telephone: (520) 879-7614
tim_gabrielsen@fd.org

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE

I.

Whether the district court abused its discretion by denying Martinez's Rule 60(b)(6) request to reopen the judgment in order to compel discovery where it ruled that Martinez could not prove, *in the absence of discovery*, the materiality prong of his due process violation that was premised on a violation of *Napue v. Illinois*, 360 U.S. 264 (1959)—and thus he could not prove the "extraordinary circumstances" necessary to re-open the judgment under *Gonzalez v. Crosby*, 545 U.S. 524 (2005);

II.

Whether the Ninth Circuit violated the rule of *Buck v. Davis*, 137 S. Ct. 759 (2017), by rendering a merits ruling that Martinez had not demonstrated "extraordinary circumstances" for the granting of his Rule 60(b)(6) motion under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), where the sole question before the court at the COA stage was the debatability of the district court's decision to deny discovery under Rule 60(b)(6).

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

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

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

Opinion (convictions and sentences affirmed), *State v. Martinez*, 999 P.2d 795 (Ariz. 2000).

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

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

Order (denying petition for review on denial of post-conviction relief), *State v. Martinez*, CR-04-0432-PC (Ariz. Sup. Ct. May 24, 2005), Doc. No. 11.

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

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

Order (denying motion to alter or amend judgment under Rule 59(e)), *Martinez v. Schriro*, CV-05-1561-PHX-EHC (D. Ariz. Apr. 15, 2008), ECF No. 91.

Order (granting motion to remand pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012)), *Martinez v. Schriro*, No. 08-99009 (9th Cir. July 7, 2014), ECF No. 99.

Order (denying claims remanded pursuant to *Martinez* and Request for Indication Whether the District Court Would Consider a Rule 60(b) Motion for relief from judgment with respect to *Brady* and a potential *Napue* claims), *Martinez v. Schriro*, CV-05-1561-PHX-ROS, (D. Ariz. Mar. 31, 2016), ECF No. 127.

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

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

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

Denial of Petition for Writ of Certiorari, *Martinez v. Shinn*, 140 S. Ct. 2771 (2020).

Order (denying Motion for Relief from Judgment Pursuant to Rule 60(b) and certificate of appealability)), *Martinez v. Shinn*, CV-05-01561-PHX-ROS (D. Ariz. March 23, 2021), ECF No. 141.

Order (denying Motion for Reconsideration), *Martinez v. Shinn*, CV-05-01561-PHX-ROS (D. Ariz. May 14, 2021), ECF No. 147.

Opinion (denying COA), *Martinez v. Shinn*, 33 F.4th 1254 (9th Cir. 2022).

Order (denying panel and en banc rehearing) *Martinez v. Shinn*, No. 21-99006 (9th Cir. Jul. 1, 2022), ECF No. 8.

Order (denying motion for stay of mandate), *Martinez v. Ryan*, No. 21-99006 (9th Cir. Jul. 12, 2022), ECF No. 10.

TABLE OF CONTENTS

Questions Presented for Review i

Parties to the Proceeding ii

Related Proceedings .... ii-iii

Table of Contents iv

Table of Authorities vi

Opinions and Orders Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 4

I. Statement of facts material to consideration of the Questions Presented 4

II. *Brady* litigation in the district court proceedings 10

III. Production of *Brady* and potential *Napue* evidence by a California prosecutor 12

IV. Beatty *Brady* claim on remand to the district court 13

V. The post-remand appeal to the Ninth Circuit 14

Motion for Relief from Judgment 15

Reasons For Granting the Writ 18

I. The district court abused its discretion by denying Martinez's Rule 60(b)(6) request to reopen the judgment in order to compel discovery where it ruled that Martinez could not prove, *in the absence of discovery*, the materiality prong of his due process violation that was premised on a violation of *Napue v. Illinois*, 360 U.S. 264 (1959)—and thus he could not prove the "extraordinary circumstances" necessary to re-open the judgment under *Gonzalez v. Crosby*, 545 U.S. 524 (2005) 18

II. The Ninth Circuit violated the rule of *Buck v. Davis*, 137 S. Ct. 759 (2017), by rendering a merits ruling that Martinez had not demonstrated "extraordinary circumstances" for the granting of his Rule 60(b)(6) motion under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), where the sole question before the court at the COA stage was the debatability of the district court's decision to deny discovery under Rule 60(b)(6). 22

Conclusion 27

Appendix A

Order, *Martinez v. Shinn*, CV-05-01561-PHX-ROS (D. Ariz. March 23, 2021), ECF No. 141 .... A-1

Appendix B

Order, *Martinez v. Shinn*, CV-05-01561-PHX-ROS (D. Ariz. May 14, 2021), ECF No. 147 .... B-1

Appendix C

Opinion, *Martinez v. Shinn*, 33 F.4th 1254 (9th Cir. 2022) C-1

Appendix D

Order, *Martinez v. Shinn*, No. 21-99006 (9th Cir. July 1, 2022), ECF No. 8 .... D-1

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Bracy v. Gramley, 520 U.S. 899 (1997) 10, 11, 19

Brady v. Maryland, 373 U.S. 83 (1963) .... *passim*

Buck v. Davis, 137 S. Ct. 759 (2017).................... *passim*

Giglio v. United States, 405 U.S. 150 (1972) 20

Gonzalez v. Crosby, 545 U.S. 524 (2005).................... *passim*

Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005) 20, 21

Jackson v. Brown, 513 F.3d 1057 (9th Cir. 2008) 21

Martinez v. Ryan, 566 U.S. 1 (2012) 16, 24

Martinez v. Ryan, 926 F.3d 1215 (9th Cir. 2019).................... *passim*

Mitchell v. United States, 958 F.3d 775 (9th Cir. 2020).................... *passim*

Mooney v. Holohan, 294 U.S. 103 (1935) 20

Napue v. Illinois, 360 U.S. 264 (1959) .... *passim*

Phelps v. Alameida, 569 F.3d 1120 (9th Cir. 2009) 17, 24

Quezada v. Scribner, 611 F.3d 1165 (9th Cir. 2010)....................9, 12, 13, 26

Sivak v. Hardison, 658 F.3d 898 (9th Cir. 2011) 20

Slack v. McDaniel, 529 U.S. 473 (2000) 22, 23

Townsend v. Sain, 372 U.S. 293 (1963)....................9, 13

Trevino v. Thaler, 569 U.S. 413 (2013)....................16, 24

Federal Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2244(a) 14

28 U.S.C. § 2253(c) 3

28 U.S.C. § 2253(c)(2)....................22
28 U.S.C. § 2254.................... *passim*

Rules

Fed. R. Civ. P. 59(e) 2
Fed. R. Civ. P. 60(b)(6).................... *passim*
Fed. R. Civ. 60(b) .... *passim*
Rule 6(a), Rules Governing Section 2254 Cases in the District Courts 19

Constitutional Provisions

U.S. Const. Amendment XIV 3

PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS AND ORDERS BELOW

The Arizona Supreme Court affirmed Martinez's convictions and death sentence on direct appeal. Opinion, *State v. Martinez*, 999 P.2d 795 (Ariz. 2000).

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

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

Order (denying petition for review on denial of post-conviction relief), *State v. Martinez*, CR-04-0432-PC (Ariz. Sup. Ct. May 24, 2005), Doc. No. 11.

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

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

Order (granting motion for remand pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012)), *Martinez v. Schriro*, No. 08-99009 (9th Cir. July 7, 2014), ECF No. 99.

Order (denying claims remanded pursuant to *Martinez* and Request for Indication Whether the District Court Would Consider a Rule 60(b) Motion for relief from judgment with respect to *Brady* and a potential *Napue* claims), *Martinez v. Schriro*, CV-05-1561-PHX-ROS, (D. Ariz. Mar. 31, 2016), ECF No. 127.

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

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

stay appeal and remand for consideration of claim brought under *Brady v. Maryland*, 383 U.S. 73 (1963).

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

Denial of Petition for Writ of Certiorari, *Martinez v. Shinn*, 140 S. Ct. 2771 (2020).

Order (denying Motion for Relief from Judgment Pursuant to Rule 60(b)), *Martinez v. Shinn*, CV-05-01561-PHX-ROS (D. Ariz. March 23, 2021), ECF No. 141 (attached as Appendix A).

Order (denying Motion for Reconsideration), *Martinez v. Shinn*, CV-05-01561-PHX-ROS (D. Ariz. May 14, 2021), ECF No. 147 (Attached as Appendix B).

Opinion (denying COA, *Martinez v. Shinn*, 33 F.4th 1254 (9th Cir. 2022)) (Attached as Appendix C).

Order (denying panel and en banc rehearing), *Martinez v. Shinn*, No. 21-99006 (9th Cir. Jul. 8, 2022), ECF No. 8 (Attached as Appendix D).

Order (denying motion for stay of mandate), *Martinez v. Ryan*, No. 21-99006 (9th Cir. Jul. 12, 2022), ECF No. 10.

JURISDICTION

The United States District Court for the District of Arizona filed an order on March 23, 2021, in which it denied Martinez's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6) in his federal habeas corpus case brought pursuant to 28 U.S.C. § 2254, and denied a certificate of appealability (COA). The district court denied a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). The Ninth Circuit denied Martinez's request for a COA in a published opinion on May 16, 2022. The Ninth Circuit denied panel and en banc rehearing on July 1, 2022. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

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

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

28 U.S.C. § 2253(c), in pertinent part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

* * *

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

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

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

* * *

(6) any other reason that justifies relief.

/ / /

/ / /

STATEMENT OF THE CASE

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

Ernesto Martinez was convicted by a jury of the first degree murder of Arizona Department of Public Safety ("DPS") Officer Robert Martin and other felonies for events that occurred on the Beeline Highway in Maricopa County, Arizona, on August 15, 1995. Appx. C-2. Martinez was 19 years old at that time. 6-ER-1463.

Oscar Fryer testified that he sat in a blue Monte Carlo with Martinez at a car wash in Globe, Arizona, sometime prior to the shooting on the Beeline Highway. C-2; 2-ER-217.[2] According to Fryer, Martinez said a warrant was issued for his arrest related to his probation. 2-ER-221. Evidence showed Martinez had been convicted of a felony in Gila County, 4-ER-971, and an arrest warrant issued for him on April 13, 1995. 5-ER-1144. According to Fryer, Martinez showed Fryer a .38 handgun with a brown handle that bore black tape on the handle. 2-ER-222–23. Martinez said he had the gun "[f]or protection and in case shit happens." 2-ER-223. Fryer testified that, after a squad car passed them at the carwash, Fryer asked what Martinez would do if he were stopped by police, to which Martinez "said he wasn't going back to jail." 2-ER-225.

---

[1] The Statement includes citations to Martinez's Excerpts of Record filed in the United States Court of Appeals for the Ninth Circuit in Ninth Cir. No. 08-99009, ECF No. 119-1 to ECF No. 119-11.

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

As the Ninth Circuit noted in its 2022 opinion in which it denied a COA, Fryer recanted his trial testimony to the effect that Martinez told him he was not going back to jail if he were pulled over. C-3. That recantation, referred to as "Disputed Testimony" by the Ninth Circuit, C-2, is the subject of Martinez's Rule 60(b) motion and subsequent appeal. Fryer further acknowledged that he was intoxicated with methamphetamine when he testified Martinez's 1997 trial. C-3.

Fryer testified he had two prior felony convictions for escape. 2-ER-214. On cross-examination, Fryer acknowledged that he left Gila County without authorization of his probation officer, and there were warrants issued for his arrest for that violation and new felony charges filed that included assault of a police officer, escape and resisting arrest, and domestic battery. 2-ER-228, 2-ER-231. He pleaded to a single count of misdemeanor assault, and he was restored to the original probation. 2-ER-232–37. The Gila County Attorney negotiated Fryer's plea, and Fryer later turned himself in to Gila County Attorney Investigator Abraham Castaneda. 2-ER-228–42.

There was no eyewitness to the shooting. Elizabeth Martin testified she saw Martinez in Globe a few days before Officer Martin's death and he drove a blue Monte Carlo with a white top with California license plates. 2-ER-191–92. Michelle Miller testified that she and Martinez each purchased gasoline at a Circle K in Payson, Arizona, on an unspecified morning in August 1995. 2-ER-250. Prosecution witnesses testified to having seen Martinez or someone resembling him and the Monte Carlo on the morning of August 15, 1995, on the Beeline Highway between

Payson and Phoenix. 2-ER-268, 2-ER-272, 2-ER-287, 2-ER-289, 2-ER-364–67, 2-ER-374, 2-ER-393–94. Susan and Steve Ball, whom the Monte Carlo passed, later noticed the car on the side of the road with a police car. 2-ER-290, 2-ER-326. Thomas Pantera, who was also passed by the Monte Carlo, later saw a police car and a body on the side of the Beeline Highway. 2-ER-273. Maricopa County Sheriff's Detective Douglas Beatty testified that a 911 call was received reporting the officer down at 12:36 p.m. 5-ER-1127, 5-ER-1145. The Balls later saw the Monte Carlo at the traffic light, and Mrs. Ball wrote down the license plate number, 1 CUK 259. 2-ER-298, 2-ER-308, 2-ER-338. Douglas Chidester came to Officer Martin's assistance and radioed for help from Martin's vehicle. 2-ER-405, 2-ER-407. Off-duty DPS Officer Hiram Renfro heard the radio call and responded to the scene. 2-ER-427. Robert Newcomer and Renfro testified that Martin's service revolver was missing. 2-ER-371, 2-ER-430–31. DPS Officer Steven Page identified Exhibit 152 as the registration for Officer Martin's Sig Sauer service revolver. 2-ER-449.

Maricopa County Chief Medical Examiner Phillip Keen, M.D., who did not perform the autopsy, testified to its results at trial, including that Officer Martin was shot in the right hand, neck, back and right cheek. 4-ER-1002, 4-ER-1004–05. Dr. Keen testified that the last and fatal shot was to the head and may have occurred while Officer Martin was prone which, he acknowledged, contradicted the opinion he offered in a pretrial interview in which he said the last shot fired was to Officer Martin's back and occurred while he was standing. 4-ER-1013–15, 4-ER-1021.

Esther Martinez, Ernesto's aunt, testified that Martinez called her from Blythe, California, twice on August 15, 1995, asking that she wire him money. 3-ER-570, 3-ER-573. She failed to do so. Anna Martinez and her husband David, a cousin of Martinez, testified that Martinez spent the night at their residence in Indio, California, and accompanied them to a restaurant the next day. 3-ER-593, 3-ER-622. A community service officer spotted the blue Monte Carlo in Indio after 4 p.m. and saw two adults and a child exit the vehicle. 3-ER-547, 3-ER-553. An officer allowed them to approach a residence to use a phone. 3-ER-601–02, 3-ER-624–27. Tommy Acuna testified that Anna used the restroom in his residence, where he later found a handgun with black tape on the handle, which he identified as Trial Ex. 133. 3-ER-676. Acuna retrieved the gun and gave it to police. 3-ER-677. Maricopa County Sheriff's criminalists testified that one of the two bullets recovered from Officer Martin at autopsy was fired from Trial Ex. 133, a .38 revolver with black tape on the handle, 4-ER-924–43, and Martinez's fingerprint was found on the black tape removed from the .38. 4-ER-951. Indio Police Officer Humberto Alvarez observed the Monte Carlo stop and a Mexican male exit the vehicle and run south before jumping a fence into a compound of trailers. 3-ER-558, 3-ER-563, 3-ER-566. Later, Martinez exited one of the trailers and was arrested. 3-ER-763, 5-ER-1084.

Blythe Police Officers Jeffrey Wade and Robert Whitney responded to the report of a shooting and theft at a mini-mart in Blythe on August 15, 1995. 3-ER-721, 4-ER-844. The officers were at the mini-mart at 8 p.m. on August 15, 1995, but found no shell casing and were notified at 2 p.m. the following day that employee

Melina Garcia had found a casing. 3-ER-721–724. Wade determined that the casing was consistent with the ammunition used by the Maricopa County Sheriff's Office in their handguns. 3-ER-725. On August 17, 1995, Wade and Whitney participated in the search of the trailer where Martinez was arrested, and found a .9mm Sig Sauer handgun, Trial Ex. 130, with a serial number Wade was told matched the one issued to Officer Martin. 3-ER-728–29, 3-ER-733–37, 4-ER-846–47. California DOJ Criminalist Philip Pelzel testified that the shell casing from the mini-mart was fired by the Sig Sauer retrieved from the Indio trailer. 4-ER-919–20.

DPS Officer Benjamin Quezada testified that he interviewed Eric Moreno concerning a phone call Martinez purportedly made to Moreno after his arrest in which Martinez said he blasted a "placa," a slang term for a police officer. 5-ER-1095–97. Moreno, his brother, Mario Hernandez, and his mother, Patricia Baker, testified that Martinez resided with them in Indio for several months prior to Martinez's arrest. 3-ER-459, 3-ER-461, 3-ER-521, 3-ER-527. Hernandez testified that he took a call from Martinez around midnight on August 16, 1995, and passed the phone to Moreno. 3-ER-522–524.[3] Moreno testified that Martinez told him that he blasted a "jura," or police officer. 3-ER-466. Moreno testified that Martinez said

[3] The suppression by prosecutors of Hernandez's red weekly planner, which came to be called the "Hernandez *Brady* Claim," was unearthed in 2017 during the pendency of Martinez's appeal. It appeared to show that those in the Baker residence learned of Martinez's arrest from TV news accounts that occurred at 2:30 a.m. on August 17, 1995, later than the purported phone call from Martinez. Martinez's motion to stay the appeal and remand to the district court was denied in the Ninth Circuit opinion in which the court affirmed the denial of habeas corpus relief. *Martinez v. Ryan*, 926 F.3d 1215, 1237–38 (9th Cir. 2019).

he had passed through Blythe before being apprehended in Indio and that he had two handguns, including a ".9," at the time of his arrest. 3-ER-472, 3-ER-475.

On August 16, 1995, the car was secured by Indio Police Officer Raymond Elias, who identified the license plate and VIN, which matched a plate reported stolen in Indio and the VIN of a Monte Carlo reported stolen in Cathedral City, California, on July 29, 1995. 4-ER-837–840, 3-ER-540–43, 4-ER-889–91. Riverside County Sheriff's Department Investigators David Ortloff and Thomas Fisher photographed and lifted fingerprints from the Monte Carlo. 4-ER-873–75, 4-ER-883, 4-ER-903–914. Analyst Kelly Donaldson testified that Martinez's prints were not found on the license plate, but many of Martinez's prints were found on the Monte Carlo. 4-ER-989, 4-ER-953–57. Criminalist Lucian Haag testified that two chemical tests confirmed the presence of gunshot residue inside the driver's door. 4-ER-898–901.

Prosecutor Robert Shutts asked Detective Beatty whether he tested keys found in the glove box in the Monte Carlo's ignition after Martinez's arrest. 5-ER-1185. Beatty testified:

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

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

---

[4] A photograph of an intact ignition at the time of Martinez's arrest was produced by a Riverside County district attorney in 2012 after Martinez's extradition to California. Martinez moved on March 9, 2012, for a remand for consideration of what came to be called the "Beatty *Brady Claim*." *See* Appellant's Motion to Stay Appeal and for Remand Pursuant to *Townsend v. Sain*, 372 U.S. 293 (1963), and *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010), *Martinez*, No. 08-99006 (9th Cir. Mar. 9,

On September 26, 1997, the jury returned verdicts finding Martinez guilty of first degree murder and other charged offenses. 5-ER-1266–67. The court imposed a sentence of death.

II. *Brady* litigation in the district court proceedings.

On May 23, 2006, Martinez filed an Amended Writ of Habeas Corpus under 28 U.S.C. § 2254 in which he raised *inter alia* the Fryer *Brady* Claim. *See* Amended Writ, *Martinez*, CV-05-01561-PHX-EHC, Doc. No. 30 at 61–67. He also raised a Confrontation Clause Claim based on the admission of hearsay evidence to prove that the Monte Carlo impounded at the time of his arrest and its license plate were stolen. Doc. No. 30 at 34–40.

Martinez's investigation of the Confrontation Clause Claim evolved into a "theory" under *Bracy v. Gramley*, 520 U.S. 899, 908 (1997), that the Maricopa County Attorney's Office suppressed material exculpatory evidence in violation of Martinez's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Prosecutors did so by suppressing exculpatory evidence that would have undermined Detective Beatty's

---

2012), ECF No. 67-1. It was premised on the Riverside County district attorney's January 2012 court-ordered disclosure of the notes of a criminalist who processed the Monte Carlo after Martinez's arrest 1995, Ricci Cooksey, who failed to note a punched ignition. On February 11, 2013, Martinez moved to supplement his *Quezada* remand motion with the photograph of the intact ignition, also disclosed pursuant to a Riverside County Superior Court order. *See* Motion for Leave to Supplement Motion to Stay Appeal and for Remand Pursuant to *Townsend* and *Quezada* with Newly-Discovered Exculpatory Photographic Evidence, *Martinez*, No. 08-99006 (9th Cir. Feb. 11, 2013), ECF No. 87. The Ninth Circuit granted the remand motion but "construed" it to be a Request for Indication Whether the District Court Would Consider a Rule 60(b) Motion. *See* Order, *Martinez*, No. 08-99006 (9th Cir. Jul. 7, 2014), ECF No. 99 at 2–3.

guilt phase testimony that the Monte Carlo's ignition was a "hollow cavity." 5-ER-1185. That Martinez punched the ignition, prosecutors later argued to the jury, was evidence of the car's theft and gave Martinez motive to kill Officer Martin; it established premeditation, an element of first degree murder. 5-ER-1222. Martinez pleaded that theory under this Court's decision in *Bracy* in his first Motion for Evidentiary Development on April 30, 2007. 5-ER-2124.

FPD Investigator John Castro found the ignition's cylinder and chrome bezel under the Monte Carlo's front passenger seat during an inspection on the Maricopa County Sheriff's Office's impound lot on June 8, 2007. 10-ER-2525 ¶ 4. Castro executed a declaration to that effect and his photos of the ignition cylinder and bezel were appended to the motion. 10-ER-2525–28, 10-ER-2537–45.

The FPD's discovery of ignition parts on the floor of the Monte Carlo in June 2007, despite their omission from all three law enforcement inventories performed on the Monte Carlo after Martinez's arrest, 10-ER-2547–59, which included one executed by California Criminalist Ricci Cooksey, 10-ER-2547, supported the Supplemental Motion for Evidentiary Development Martinez filed on September 7, 2007. 10-ER-2508. Martinez again sought discovery with which to prove a freestanding *Brady* claim. 10-ER-2518. While the district court denied evidentiary development as to Claim Four in its Memorandum of Decision and Order of March 21, 2008, including with respect to whether Martinez could prove actual innocence to overcome the procedural default of his Confrontation Clause claim, 1-ER-48–50, it failed even to acknowledge that Martinez sought evidentiary development in his

Supplemental Motion for Evidentiary Development of a freestanding *Brady* claim for which he alleged a "theory" based on the discovery of ignition parts upon a defense inspection of the Monte Carlo. See 10-ER-2509, 2518.

III. Production of *Brady* and potential *Napue* evidence by a California prosecutor.

While Martinez's appeal pended in the Ninth Circuit, Martinez was extradited to California in 2010 to stand trial for a Blythe convenience store homicide Martinez was alleged to have committed on August 15, 1995. California prosecutors obtained from the Maricopa County Attorney the handwritten notes of Criminalist Cooksey who, in processing the Monte Carlo, omitted any reference to a punched ignition or ignition parts on the floor. The notes were produced to Martinez's Arizona counsel, who attached them in support of the *Quezada* remand motion filed on March 9, 2012, Ninth Cir. ECF Nos. 67-1, 67-2 at 8–17. Cooksey included in his notes the Phoenix phone numbers of lead prosecutor Robert Shutts and Detective Beatty, including a message left for Shutts on February 13, 1997, which suggest contact between Cooksey and the Maricopa County prosecutor and case agent well prior to trial. ECF No. 67-2 at 16. Martinez proffered another theory, to wit, that Cooksey's notes, which implied an intact ignition, suggested that prosecutors may have violated *Napue v. Illinois*, 360 U.S. 264 (1959), by eliciting false or misleading testimony from Detective Beatty that the Monte Carlo's ignition was punched by Martinez prior to his arrest.

Riverside County prosecutors also obtained from the Maricopa County Attorney and produced to Martinez the photo of the intact ignition taken in California

after the car was impounded, see 10-ER-2705, which, Martinez alleged, eliminated any need to draw an inference that the ignition was intact. As noted *supra* n.4, Martinez attached the photo of the intact ignition to the Motion for Leave to Supplement Motion to Stay Appeal and for Remand Pursuant to *Townsend* and *Quezada* with Newly-Discovered Exculpatory Photographic Evidence. See 10-ER-2610.

In granting Martinez's *Quezada* remand motion, the Ninth Circuit "construed" it to be "a motion for leave to file in the district court a renewed Request for Indication Whether District Court Would Consider a Rule 60(b) Motion." Order, *Martinez v. Ryan*, No. 08-99006 (9th Cir. July 7, 2014), ECF No. 99 at 2.

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

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

and would have introduced it to impeach Detective Beatty had it been produced at trial. 10-ER-2792 ¶ 10; 10-ER -2796–97 ¶ 10. Appointed PCR counsel and an FPD records custodian averred that the photo of the intact ignition was not found in trial counsel's files. 10-ER-2755 ¶ 8; 11-ER-2800 ¶¶ 3, 4.

The court denied the Request for Indication on the basis "Petitioner's *Brady* and possible *Napue* claims are properly characterized as second or successive claims because Petitioner is asserting new bases for relief from the underlying convictions," citing *Gonzalez v. Crosby*, 545 U.S. 524 (2005), and, because Martinez failed to obtain authorization to file an SOS petition from the Ninth Circuit, *see* 28 U.S.C. § 2244(a), the court could not consider the claims. 1-ER-112. The court further concluded that Martinez failed to establish a defect in the integrity of the proceedings that would have rendered its outcome suspect. 1-ER-111–12 (citing *United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011)). On those bases, the district court also denied Martinez's request for evidentiary development of his *Brady* and potential *Napue* claims. 1-ER-112.

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

While the Ninth Circuit granted a COA as to the denial of the Rule 60(b) request, Ninth Cir. ECF No. 109 at 1, it nonetheless ruled that it lacked jurisdiction to review the district court's denial that request. The court noted that a "district court order declining to entertain or grant a Rule 60(b) Motion is a procedural ruling and not a final determination on the merits. Because there is no final judgment on the merits, the underlying issues raised by the Rule 60(b) Motion are not reviewable on

appeal." *Martinez*, 926 F.3d at 1229. As such, the district court's decision to decline to consider the claim constituted a non-final, non-appealable interlocutory order. *Id.*

Martinez raised in the § 2254 petition in the district court a *Brady* claim based on the prosecution's suppression of impeachment evidence with respect to Oscar Fryer. The evidence included his drug use prior to his trial testimony and benefits bestowed in exchange for his testimony. *Martinez*, 926 F.3d at 1227-29. The Ninth Circuit ruled the Fryer *Brady* Claim procedurally defaulted and that Martinez could not establish cause to excuse the default. *Id.*

MOTION FOR RELIEF FROM JUDGMENT

On July 29, 2020, Martinez filed a Motion for Relief from Judgment Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. *Martinez v. Shinn*, CV-05-01561-PHX-ROS, (D. Ariz. July 29, 2020), ECF No. 136. Consistent with the relief sought by a capital § 2255 petitioner in *Mitchell v. United States*, 958 F.3d 775 (9th Cir. 2020), Martinez sought to reopen his judgment in order to secure discovery *inter alia* of a potential claim pursuant to *Napue*, 360 U.S. 264, that trial prosecutors knowingly elicited or failed to correct false or misleading guilt phase testimony from Maricopa County Sheriff's Deputy Beatty that the ignition of the Monte Carlo seized at the time of Martinez's arrest had been punched and could be started with an object other than the vehicle's ignition key—which evidence assisted the prosecution in proving motive for the murder of a Department of Public Safety officer and, thus, premeditation, an element of first degree murder under state law and necessary predicate to death-eligibility. Martinez further alleged that prosecution trial witness

Oscar Fryer had recanted his guilt phase evidence that Martinez told him at the Globe, Arizona, car wash prior to the homicide that if he were stopped by police, he would not go back to jail.

Mitchell cited *Gonzalez*, 545 U.S. 524, for the proposition that a motion for relief from judgment pursuant to Rule 60(b)(6), which does not itself allege a substantive merits-based federal constitutional claim for which relief from conviction is being sought, is permissible even though the AEDPA's interests in comity and finality of state court judgments require "extraordinary circumstances" to reopen a judgment in habeas. *Mitchell*, 958 F,3d at 786–87. *Gonzalez* ruled that such circumstances "will rarely occur in the habeas context." 545 U.S. at 535.

The *Mitchell* Court ruled that an intervening change in the law may constitute an extraordinary circumstance that would allow for the reopening of a state court judgment in habeas. 958 F.3d at 786–87. *See Buck v. Davis*, 137 S. Ct. 759, 779–80 (2017) (intervening decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), allow merits review of procedurally defaulted ineffective assistance of trial counsel claim where ineffective assistance of state post-conviction relief counsel constitutes cause and prejudice to excuse the default).

Martinez cited *Mitchell* for the proposition that the district court possessed jurisdiction to consider the Rule 60(b)(6) motion because it failed to allege a claim. Motion, *Martinez*, CV-05-01561-PHX-ROS, ECF No. 136 at 10. The district court, App. A at 2-3, and, later, the Ninth Circuit agreed, the Ninth Circuit finding "[t]here is no question that *Mitchell* established new law in this circuit as to the district court's

jurisdiction to hear Rule 60(b) motions for post-judgment discovery in habeas cases." *Martinez*, 33 F.4th at 1264.

Martinez pleaded in the district court both that the change in the law in *Mitchell* and other extraordinary circumstances suggested by Ninth Circuit precedent, *see Phelps v. Alameida*, 569 F.3d 1120, 1136–40 (9th Cir. 2009) (citing *Gonzalez*), required that the judgment be reopened and that he be permitted discovery. Motion, *Martinez*, CV-05-01561-PHX-ROS, ECF No. 136 at 12–15. Initially the district court assumed arguendo that Martinez's assertions as to *Mitchell*'s providing an extraordinary circumstance was valid. *See* Appx. A-3. The court ruled that the balance of circumstances, however, did not favor re-opening the judgment and the court declined to do so. Appx. A-4. The court ruled that Martinez possessed no vehicle with which he could bring a claim, even if he were successful in obtaining evidence in discovery to prove his *Napue* claim, and that "there is no meaningful likelihood that his convictions or sentences would be upset." Appx. A-4

With respect to the Fryer recantation, the court ruled that "what a witness may or may not have heard Martinez say seem[s] "highly unlikely to lead to a different result." Appx. A-4.

On reconsideration, the court rejected Martinez's argument that the court had "grafted onto *Mitchell*" a requirement that Martinez identify with precision the legal vehicle he would employ to bring his *Napue* claim were he successful in discovery. *See* Appx. B-2. The court again stated that even if Martinez demonstrated that Detective Beatty's guilt phase testimony were proven to be false, there was "ample

evidence . . . that the Monte Carlo was stolen and the murder was premeditated." Appx. B-4–5. Specifically, the court stated:

> For the purpose of the materiality analysis, the Court assumes Martinez could prove the ignition switch was intact at the time of his arrest, that Maricopa County prosecutors were told by Detective Beatty or California criminalist Ricci Cooksey that the ignition in the Monte Carlo driven by Martinez when it was impounded after his arrest, and that Fryer's testimony regarding Martinez's statements about what he would do if stopped by police were successfully impeached.

Appx. B-5 n.2.

The court concluded "there is no reasonable likelihood that the false testimony could have affected the judgment of the jury because the evidence supporting premeditation was overwhelming and uncontroverted." Appx. B-7. The court denied a certificate of appealability (COA) in its initial order, Appx. A-5, and did not revisit that determination on reconsideration. Appx. B.

Martinez moved in the Ninth Circuit for a COA. Motion for Certificate of Appealability, *Martinez v. Shinn*, Ninth Cir. No. 21-99006 (Jun. 29, 2021), ECF NO. 2. The court denied the certificate on May 16, 2022. *Martinez*, 33 F.4th 1254 (9th Cir. 2022). The court denied Martinez's petition for panel and en banc rehearing on July 1, 2022. Appx. D.

REASONS FOR GRANTING THE WRIT

I.

The district court abused its discretion by denying Martinez's Rule 60(b)(6) request to reopen the judgment in order to compel discovery where it ruled that Martinez could not prove, *in the absence of discovery*, the materiality prong of his due process violation that was premised on a violation of *Napue v. Illinois*, 360 U.S. 264 (1959)—and thus he could

> not prove the "extraordinary circumstances" necessary to re-open the judgment under *Gonzalez v. Crosby*, 545 U.S. 524 (2005)

In *Bracy v. Gramley*, 520 U.S. 899 (1997), when confronted with a habeas petitioner's "theory" that an Illinois state trial judge engaged in a compensatory bias to favor the prosecution in a capital murder trial—to deflect suspicion that he accepted bribes to fix cases for other capital defendants—the Court found "good cause" for discovery under Rule 6(a) of the Rules Governing Habeas Corpus Cases in the United States District Courts. The Seventh Circuit had ruled that an appearance of impropriety on the judge's part, *in the absence of discovery*: 1) provided a weak basis for supposing the original trial to be an unreliable test of the issues before it; 2) failed sufficiently to compel a presumption of actual judicial bias; and, 3) failed to provide good cause for discovery that any compensatory bias on the judge's part infected the petitioner's own trial. *Id.* at 903. This Court reversed on the basis that Bracy had, in fact, demonstrated good cause under Rule 6(a) for the facts he sought in discovery, facts that ultimately might support his theory of a presumption of actual judicial bias. *Id.*

Tension exists between *Bracy* and the procedure employed here to determine whether Martinez was entitled to discovery in habeas pursuant to Rule 60(b). The district court described the untenability of application of the Ninth Circuit's decision in *Mitchell* thusly:

> Unfortunately, the Ninth Circuit did not explain clearly how courts should resolve such motions. And, in practice, this approach seemingly contemplates an unorthodox sequence of events. In most cases, valid judgment cannot be set aside to allow a party to pursue discovery that may or may not impact the correctness of the judgment. Normally, a

> party must present a valid reason for setting aside the judgment beyond mere hopes that discovery will be somehow helpful. However, the analysis in *Mitchell* appears to contemplate a situation where 1) a petitioner requests to set aside the judgment so he can conduct discovery; 2) the court sets aside the judgment; 3) the petitioner conducts discovery; and 4) the court then decides whether to reissue a judgment similar to the vacated judgment or issue a judgment that differs from the original judgment in material ways.

Appx. A-3 n.2. Regrettably, that was not the path chosen by the district court here.

The district court minimized Martinez's showing of extraordinary circumstances in ruling that he was not entitled to relief from judgment and discovery to establish whether a *Napue* violation existed and the extent to which any such violation infected Martinez's state court trial—even though Martinez unearthed during his § 2254 appeal evidence that trial prosecutors and, later, Respondents suppressed exculpatory evidence consisting of the photograph of the intact Monte Carlo ignition and criminalist Cooksey's notes that gave rise to a showing of an intact ignition. Moreover, Cooksey's notes appeared to demonstrate telephone contact between him, Detective Beatty and lead prosecutor Shutts prior to trial.

In *Giglio v. United States*, 405 U.S. 150, 153 (1972), the Court stated, "As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *See Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (same). The Ninth Circuit noted that a claim under *Napue* will succeed when: "(1) the testimony or evidence was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material." *Sivak v. Hardison*, 658 F.3d 898, 909 (9th Cir.

2011) (quoting *Jackson v. Brown*, 513 F.3d 1057, 1071–72 (9th Cir. 2008)). If it is established that the prosecution knowingly permitted the introduction of false testimony, reversal is "virtually automatic." *Jackson*, 513 F.3d at 1076; *Hayes*, 399 F.3d at 978. That is because "the prosecution's knowing use of perjured testimony is more likely to affect our confidence in the jury's decision, and hence more likely to violate due process than will a failure to disclose evidence favorable to the defendant." *Jackson*, 513 F.3d at 1076 n.12. The test of *Napue* materiality, which the district court took to mean "whether there is a reasonable likelihood that the false testimony could have affected the judgment of the jury," Appx. B-4 (citations omitted), could simply not be made the absence of the discovery necessary to ascertain whether Detective Beatty testified falsely and whether Maricopa County, Arizona, prosecutors suborned that testimony and engaged in other misconduct at trial.

The prosecution's and Respondents' later suppression of the photograph of the intact Monte Carlo ignition and Cooksey's notes until disclosed after Martinez's 2010 extradition to California came to be called in the proceedings in the district court and Ninth Circuit evidence of a "Beatty *Brady* claim." Martinez diligently sought the production of such *Brady* evidence beginning with the filing of his Supplemental Motion for Evidentiary Development in 2007. Respondents blithely dismissed Martinez's requests for discovery of Beatty *Brady* evidence as a search for evidence "which may not even exist" and "a fishing expedition." *Martinez*, Dist. Ct. No. CV-05-01561-PHX-ROS, ECF No. 66 at 31, No. 77 at 2. The district court credited those assertions in denying evidentiary development. If Maricopa County prosecutors

deliberately deceived the judge and jury at Martinez's state court trial by eliciting false or misleading testimony in support of the premeditation element of first degree murder, and Respondents made material misrepresentations to the district court as to the existence of such evidence, calling such requests speculative and a fishing expedition—even when placed on notice by Martinez since 2007 that such evidence likely existed—the rudimentary demands of justice have been violated and *Gonzalez* would require a finding that there has been a defect in the integrity of Martinez's § 2254 proceeding.

With that defect clearly established, the district court abused its discretion in failing to order the discovery Martinez sought in his Rule 60(b)(6) motion.

II.

> The Ninth Circuit violated the rule of *Buck v. Davis*, 137 S. Ct. 759 (2017), by rendering a merits ruling that Martinez had not demonstrated "extraordinary circumstances" for the granting of his Rule 60(b)(6) motion under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), where the sole question before the court at the COA stage was the debatability of the district court's decision to deny discovery under Rule 60(b)(6).

While 28 U.S.C. § 2253(c)(2) states that a COA may issue under the AEDPA "only if the applicant has made a substantial showing of the denial of a constitutional right," the Court acknowledged in *Slack v. McDaniel*, 529 U.S. 473 (2000), that the statute must be elastic enough to allow a § 2254 petitioner to appeal an adverse procedural ruling that prevented the district court from reaching a constitutional claim. In *Slack*, the Court rejected the State of Nevada's argument that § 2253(c)(2) did not apply to procedural grounds employed by a district court to deny relief on a

federal constitutional claim, which would have barred review altogether. The Court ruled:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id. at 484.

In *Buck*, 137 S. Ct.at 777, the Court ruled that the Fifth Circuit erred in denying a COA from the denial of a capital petitioner's Rule 60(b) motion. The Court first ruled that the Fifth Circuit denied Rule 60(b) relief on the merits without having first determined whether the petitioner had shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id. at* 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). The Court found that the Fifth Circuit's consideration of whether the petitioner had demonstrated "extraordinary circumstances" as required under *Gonzalez*, 545 U.S. at 535, for a grant of relief under Rule 60(b)(6), constituted a merits ruling rather than a determination as to the debatability of the district court's decision, which is the sole question before the court of appeals on a motion for COA. *Buck*, 137 S. Ct. at 772–774. Having identified the error in the Fifth Circuit's conflation of merits review and the COA standard, the *Buck* Court ruled that the petitioner met the requirement of showing that "a reasonable jurist could conclude that the District Court abused its discretion in declining to re-open the judgment" based on the change in the law

wrought by *Martinez*, 566 U.S. 1, and *Trevino*, 569 U.S. 413, a procedural ruling. *Id.* at 777.

As noted above, Martinez pleaded in the district court in his Rule 60(b) motion extraordinary circumstances, apart from the change in the law of *Mitchell*, that the Ninth Circuit has found to be compelling in its controlling precedent, *Phelps v. Alameida*, 569 F.3d 1120, 1136–40 (9th Cir. 2009). *See* Motion, *Martinez*, CV-05-01561-PHX-ROS, ECF No. 136 at 12–15. Martinez relied for support of his motion for COA in the Ninth Circuit on his district court pleadings. *See* Ninth Cir. No. 21-99006, ECF 2 at 1–2.

In ruling on his motion for COA, however, the Ninth Circuit concluded, "Applying the factors set forth in *Phelps*, 569 F.3d at 1134–40, we find that the holding in *Mitchell* falls short of satisfying the extraordinary circumstances requirement here." *Martinez*, 33 F.4th at 1264. The court failed to address the other factors identified in *Phelps* and cited by Martinez as supporting the "extraordinary circumstances" required by *Gonzalez.* As Martinez noted, *Martinez*, CV-05-01561-PHX-ROS, ECF No. 136 at 12–15, extraordinary circumstances included:

(1) the grant of discovery "would not undo 'past executed effects of the judgment' upon which the parties have relied. *Phelps*, 569 F.3d at 1137 (quoting *Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987). Because this is a death penalty case, and because Martinez has pursued remedies provided under state and federal law, no effects of judgment have been executed."

(2) "[t]he court's grant of *Napue* and Fryer recantation discovery would not upset the 2008 judgment, as Martinez would not be stating a habeas claim per se and, thus, finality would not be disturbed."

(3) the discovery sought here is not available through other sources.

(4) Respondents suppressed Beatty *Brady* and potential *Napue* evidence in the earlier § 2254 proceeding where Martinez could have requested evidentiary development outside the narrow parameters of Rule 60(b) and *Gonzalez*.

(5) comity would not be offended by the discovery requested because Detective Beatty was a state actor whose potentially false or misleading testimony was elicited by other state actors.

Two additional circumstances found extraordinary by this Court in *Buck* further compel a finding of extraordinary circumstances and the grant of certiorari. Martinez has been treated disparately from other Arizona prisoners. *Buck* stated that disparate treatment of prisoners constituted an extraordinary circumstance where, unlike five other Texas capital defendants against whom the psychologist asserted future dangerousness on the basis of their race and the state confessed error, the state sought to affirm Buck's death sentence. 137 S. Ct. at 771, 778–80.

The Ninth Circuit remanded another Arizona capital appeal to the district court for consideration of a possible *Brady* claim, where exculpatory material not unearthed until the matter was on habeas appeal, was alleged to have been suppressed by prosecutors at trial. *See* Order and Opinion, *Gallegos v. Ryan*, No. 08-99029 (9th Cir. Apr. 7, 2016), ECF No. 72-1 at 4. The matter was not remanded for

the filing of a request for indication whether the district court would consider a Rule 60(b) motion, as occurred here, the result of which the court ruled to be an unappealable interlocutory order. The Ninth Circuit simply remanded *Gallegos* and the non-capital appeal upon which Martinez relied earlier for remand, *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010), for straight-up determinations of *Brady* claims based on newly-discovered evidence and whether to grant the discovery requested by the petitioners. The denials of relief on remand would have permitted appeals.

In *Buck*, the Court ruled that one extraordinary circumstance to be considered in the *Gonzalez* calculus was the fact that Buck had been sentenced to death. 137 S. Ct. at 779; *id.* at 785 (Thomas, J., dissenting). Martinez's capital conviction was doubtless supported, at best, by the prosecution's suppression of material exculpatory evidence consisting of the photo of the intact ignition photo and criminalist's notes; and, at worst, by the fact that Detective Beatty's false or misleading testimony may have been elicited by lead prosecutor Shutts after criminalist Cooksey informed him and Detective Beatty that the ignition was intact when it was searched after it was impounded after Martinez's arrest.

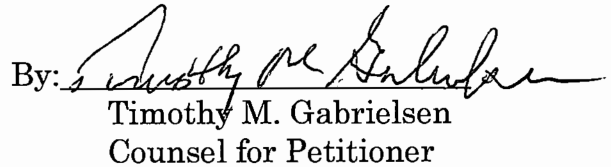
Even if the Ninth Circuit properly considered only the debatability of the district court's ruling, the court clearly erred in ignoring the above-described extraordinary circumstances that compelled the re-opening of the judgment in order to allow Martinez to engage in discovery of his *Napue* and Fryer recantation claims. Those circumstances played no role in the Ninth Circuit's debatability calculus.

CONCLUSION

For the foregoing reasons, Ernesto Martinez respectfully requests that the Court grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and order it to review the decision of the United States District Court for the District of Arizona in which it denied Martinez's Motion for Relief from Judgment Pursuant to Rule 60(b).

Respectfully submitted this 28th day of September, 2022.

Jon M. Sands
Federal Public Defender
Timothy M. Gabrielsen
Assistant Federal Public Defender



By: ______________
Timothy M. Gabrielsen
Counsel for Petitioner

September 28, 2022