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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ernesto Salgado Martinez, Petitioner, v. David Shinn[1], et al., Respondents.	No. CV-05-01561-PHX-ROS DEATH PENALTY CASE **ORDER**

Petitioner Ernesto Salgado Martinez, an Arizona death row inmate, seeks relief under Federal Rule of Civil Procedure Rule 60(b)(6). (Doc. 136). Martinez argues he is entitled to discovery and to issuance of an appealable order regarding arguments made in a prior Rule 60 motion. For the reasons set forth below, Martinez is not entitled to discovery and the arguments he made in a previous Rule 60 motion will be rejected again.

BACKGROUND

In 1997, Martinez was convicted and sentenced to death in state court. After his convictions and sentence were affirmed, Martinez filed a federal petition for writ of habeas corpus. That petition was denied in 2008 but the Court granted a certificate of appealability ("COA") on three claims. Shortly thereafter, Martinez filed a request to alter or amend the judgment and to expand the COA. Those requests were denied and Martinez filed a notice of appeal. (Doc. 92).

Before Martinez filed his opening brief with the Ninth Circuit, he filed a request in

[1] David Shinn, Director of the Arizona Department of Corrections, Rehabilitation & Reentry is substituted for his predecessor pursuant to Fed. R. Civ. P. 25(d)(1).

this court for an "indication" whether it would consider a Rule 60(b) motion. (Docs. 95). The Court summarily denied the request. (Doc. 101). After the completion of appellate briefing, the Ninth Circuit stayed the appeal and issued a limited remand. In describing part of that limited remand, the Ninth Circuit explained it was granting leave for Martinez to file "a renewed request for indication whether the district court would consider a rule 60(b) motion . . . for consideration of a possible *Brady-Napue* claim in light of newly discovered evidence." *Martinez v. Ryan*, 926 F.3d 1215, 1222–23 (9th Cir. 2019).

Upon receiving the limited remand, this Court ruled it would not consider a Rule 60 motion. Proceedings then resumed at the Ninth Circuit and, in 2020, that court affirmed the denial of relief. In doing so, the Ninth Circuit concluded it lacked jurisdiction to review the denial of Martinez's "request for indication" whether this Court would entertain a Rule 60 motion.

A few months after the Ninth Circuit issued its mandate, Martinez filed a "Motion for Relief from Judgment Pursuant to Rule 60(b)." Martinez's motion seeks two forms of relief. First, he seeks "discovery" regarding a "*Napue* claim." (Doc. 136 at 3). That is, Martinez seeks to set aside the judgment so that he can pursue discovery in support of a potential future claim involving the alleged presentation of fabricated evidence. Second, Martinez seeks a ruling on the merits of the arguments set forth in his "request for indication" filed in 2015 after the Ninth Circuit's "limited remand." (Doc. 136 at 6). Martinez explains he needs such a ruling because the Ninth Circuit concluded it lacked jurisdiction to reach those issues and he is entitled to appellate review.

ANALYSIS

The Court will begin with Martinez's request for discovery and then, briefly, address the arguments he made in his 2015 "request for indication."

I. Rule 60 Motion Seeking Discovery

Pursuant to AEDPA, a Rule 60 motion presenting a "claim" cannot proceed in the district court if the petitioner has not first obtained "certification from the court of appeals." *Mitchell v. United States*, 958 F.3d 775, 784 (9th Cir. 2020). However, a Rule 60 motion

seeking discovery in support of possible claims does not require such a certification. *Id.* Therefore, to the extent Martinez's Rule 60 motion is seeking discovery and merely "the opportunity to attempt to develop a claim," the Court has jurisdiction to resolve the motion. *Id.* at 786.[2] While the legal rule that a petitioner can file a Rule 60 motion for the sole purpose of obtaining post-judgment discovery appears to be new, Martinez still must establish "extraordinary circumstances" to justify reopening the judgment. *Id.*

There are six factors to guide the Court's determination of "extraordinary circumstances" in this context.[3] *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009). Those "factors are not a rigid or exhaustive checklist." *Hall v. Haws*, 861 F.3d 977, 987 (9th Cir. 2017). Rather, they are meant to provide guidance when assessing "the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Id.*

The first factor is whether there has been a "change in intervening law." *Id.* at 787. According to Martinez, the Ninth Circuit's decision in *Mitchell* comprised an "extraordinary change in the law." For present purposes, the Court will assume *Mitchell* represented a change in the law regarding post-judgment discovery requests. Thus, after *Mitchell*, such post-judgment discovery requests are *possible*. But nothing in *Mitchell* indicates a court *must* grant such discovery. In fact, in *Mitchell* itself the Ninth Circuit

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[2] 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 judgments 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 in material ways.

[3] The factors are whether (1) there has been an intervening change in law; (2) the petitioner exercised diligence in pursuing the issue; (3) granting the motion would disturb the parties' reliance interest in the finality of the judgment; (4) there is delay between the finality of the judgment and the motion for Rule 60(b)(6) relief; (5) there is a close connection between the original and intervening decisions at issue in the Rule 60(b) motion; and (6) relief from judgment would upset the principles of comity governing the interaction between coordinate sovereign judicial systems. *Phelps v. Alameida*, 569 F.3d 1120, 1135–40 (9th Cir. 2009).

affirmed the denial of post-judgment discovery. Thus, even assuming *Mitchell* represented an "extraordinary change in the law," the precise change *Mitchell* wrought does not support Martinez's request.

After *Mitchell*, the question is not whether discovery can be permitted but whether it should be. Here, Martinez has outlined the evidence he wishes to seek in discovery but even if he secured that evidence, there is no significant likelihood Martinez would obtain relief. First, Martinez would have "to determine which vehicle the law provides for [him] to vindicate the right violated." (Doc. 136 at 4). Given the constraints imposed by AEDPA, that would be a difficult task. Second, assuming Martinez found a legitimate "vehicle" to present claims using the new evidence, there is no meaningful likelihood his convictions or sentences would be upset. At this point in Martinez's criminal proceedings, and in light of the other evidence in the record, disputes about the car's ignition switch or what a witness may or may not have heard Martinez say seem highly unlikely to lead to a different result. Discovery is not required after *Mitchell* and the Court concludes, in its discretion, that discovery is not merited here.

In addition to the alleged change in the law set forth in *Mitchell*, Martinez argues other factors support his request for Rule 60 relief. Martinez argues he has pursued "discovery relief" diligently, allowing him to pursue discovery would not impact any reliance interests, there is a "close relationship" between the discovery he seeks and a claim he may wish to assert, and allowing the discovery would have no negative impact on the principles of comity. (Doc. 136 at 14-15). These factors are not enough to support relief because, again, there is no meaningful likelihood the discovery would lead to a different result. The attenuated circumstances of Martinez pursuing *possible* evidence to support *possible* claims do not present a situation where vacating the judgment would be "appropriate to accomplish justice." *Hall*, 861 F.3d at 987.

At the end of his discovery-related arguments, Martinez argues that if he is allowed to pursue discovery, and that discovery results in favorable evidence, he "may be able to establish a defect in the integrity of the earlier proceeding." (Doc. 136 at 15). It is not clear

if Martinez is asserting this as a separate basis for Rule 60 relief or if he is merely observing that it is possible, if discovery were allowed, that he would have other arguments to make. To the extent he intends for it to be an independent basis for Rule 60 relief, it is not persuasive.

A Rule 60 motion can be used to attack "some defect in the integrity of the federal habeas proceedings." *Jones v. Ryan*, 733 F.3d 825, 836 (9th Cir. 2013). But that concept refers to "the integrity of the prior proceeding with regard to the claims that were actually asserted in that proceeding." *Id.* Martinez has not clearly identified the claims previously asserted that he believes would now come out differently if he were allowed discovery. Martinez is not entitled to Rule 60 relief to pursue discovery.

II. Rule 60 Motion Seeking Ruling on Prior Arguments

In addition to his discovery-related arguments, Martinez seeks a final order on the arguments presented in his renewed Request for Indication filed in 2015. (Doc. 115). As previously indicated, this Court lacks jurisdiction to entertain that motion:

> Petitioner has not demonstrated any defect in the integrity of these habeas proceedings, but instead seeks to raise new substantive claims that his rights under *Brady* and *Napue* were violated. It is therefore a second or successive petition, and this Court lacks jurisdiction to consider the *Brady* and *Napue* claims absent authorization from the court of appeals pursuant to 28 U.S.C. § 2244(b)(3).

(Doc. 127 at 25). The Court rejects Martinez's arguments for the same reasons stated in its previous order. (*See* Doc. 127 at 1–25).

III. Certificate of Appealability

For the reasons stated in this order, the Court finds that reasonable jurists could not debate its application of Rule 60(b) to Petitioner's Rule 60(b) motion regarding discovery or to the Court's finding that it is without jurisdiction to consider Martinez's arguments set forth in his Request for Indication.

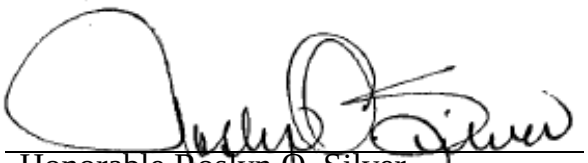
Accordingly,

IT IS ORDERED Martinez's Motion for Relief from Judgment Pursuant to Rule 60(b) (Doc. 136) is **DENIED**.

IT IS FURTHER ORDERED Martinez's Motion for Relief from Judgment Pursuant to Rule 60(b) (Doc. 136) is also **DENIED** to the extent it incorporates the arguments set forth Doc. 115.

IT IS FURTHER ORDERED a Certificate of Appealability is **DENIED**.

Dated this 23rd day of March, 2021.



Honorable Roslyn O. Silver
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ernesto Salgado Martinez, Petitioner, v. Charles L. Ryan, et al., Respondents.	No. CV-05-01561-PHX-ROS DEATH PENALTY CASE **ORDER**

On March 23, 2021, the Court denied Martinez's motion for relief from judgment pursuant to Rule 60(b)(6). (Docs. 136, 141 at 5.) Martinez has filed a motion for reconsideration. (Doc. 142.) The motion is fully briefed. (Docs. 145, 146.) The Court will deny the motion for reconsideration.

I. Discussion

A motion for reconsideration will be denied absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to the Court's attention earlier with reasonable diligence. LRCiv 7.2(g)(1); *see United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009). The motion may not repeat previously made arguments. *See id.*; *Motorola, Inc. v. J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581, 582 (D. Ariz. 2003) (reconsideration cannot "be used to ask the Court to rethink what it has already thought" through).

Martinez's Rule 60(b) motion was premised on the grounds that the Ninth Circuit's decision in *Mitchell v. United States*, 958 F.3d 775 (9th Cir. 2020), entitled him to discovery

regarding a potential *Napue*[1] claim. (Doc. 141.) Martinez now asserts that the Court "overlooked or misapprehended" several points in denying his request for discovery and a certificate of appealability. The Court disagrees.

In denying Martinez's Rule 60(b) motion, the Court found it had jurisdiction to resolve the motion because he sought only the opportunity to develop the potential *Napue* claim, and, unlike his previous attempts to reopen the judgment, did not separately assert the *Napue* claim itself. (*See id.* at 3.) For purposes of the analysis, the Court assumed without deciding that *Mitchell* was an "extraordinary change in the law." (Doc. 141 at 4.) The Court then denied the requested discovery, finding there was no significant likelihood Martinez would be entitled to relief because, "given the constraints imposed by AEDPA," it would be difficult to determine a vehicle for vindicating the right violated. (*Id.*) Assuming he could find a legitimate "vehicle" to present his claim using the new evidence, the Court found no meaningful likelihood his convictions or sentence would be upset. (*Id.*)

The Court did not, as Martinez asserts, "graft[] onto *Mitchell* a requirement that Martinez identify the legal vehicle that would allow Martinez habeas relief if he obtained the *Napue* evidence he seeks." (Doc. 142 at 2.) The Court's suggestion that Martinez would have difficulty identifying the vehicle is not a "disapprobation of the rule announced in *Mitchell*," (*see id.*), rather, it is merely the application of the law controlling discovery in § 2254 habeas. Whether a petitioner has established "good cause" for discovery under Rule 6(a) requires a habeas court to determine the essential elements of the underlying substantive claim and evaluate whether "specific allegations *before the court* show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)) (emphasis added).

A habeas petitioner is not entitled to discovery "as a matter of ordinary course." *Bracy*, 520 U.S. at 904. "[A] district court abuse[s] its discretion in not ordering Rule 6(a) discovery when discovery [i]s 'essential' for the habeas petitioner to 'develop fully' his

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

underlying claim." *Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir. 2005) (quoting *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997)). The Ninth Circuit has explained that in habeas proceedings "discovery is available only in the discretion of the court and for good cause shown," *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999) (citing Rules Governing Section 2254 Cases, Rule 6(a) 28 U.S.C. foll. § 2254), and is not "meant to be a fishing expedition for habeas petitioners to 'explore their case in search of its existence.'" *Id.* at 1067 (quoting *Calderon v U.S.D.C. (Nicolas)*, 98 F.3d 1102, 1106 (9th Cir. 1996)).

Thus, in determining whether discovery should be permitted, the Court properly focused on whether specific allegations before the court demonstrated a significant likelihood of relief. (*See* Doc. 141 at 4.) The Court suggested Martinez's ability to ever present a claim on which it would permit discovery would be a difficult task because of the procedural hurdles AEDPA imposes and because, even if Martinez could prove the allegations set forth in his Rule 60(b) motions, there was no significant likelihood he would obtain relief. (Doc. 141 at 4.)

Assuming, as this Court did, that *Mitchell* was a change in the law, it is not one that permits the Court to ignore the constraints of AEDPA, which contains provisions such as 28 U.S.C. § 2244(b)(3)(A), that prohibits the filing of second or successive petitions absent authorization from the court of appeals, and §§ 2254(d)(1) and (e)(2) that "strongly discourage[s]" state prisoners from submitting new evidence. *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011). "Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams v. Taylor*, 529 U.S. 420, 437 (2000).

Put another way, the Court cannot find good cause to grant discovery where Martinez has no procedurally proper mechanism for demonstrating entitlement to relief. As Martinez notes, the Ninth Circuit in *Mitchell* "ruled that *Peña-Rodriguez* did not set aside the bar on juror interviews in the absence of good cause. *Mitchell*, 958 F.3d at 790-91." (Doc. 146 at 2.) Similarly, *Mitchell* did not set aside the bar on discovery in state habeas cases in the absence of good cause. Good cause cannot be shown if Martinez, after

fully developing the evidence, would still be unable to demonstrate that he is entitled to relief. *See Bracy*, 520 U.S. at 908–09. The Court suggested it would be difficult procedurally to do so, but moreover found that, assuming Martinez uncovered the evidence he hoped to uncover, there was no significant likelihood that such a claim would be successful.

Martinez contends that in doing so, the Court misapprehended the materiality standard of *Napue*, and should reconsider its conclusion that "assuming Martinez found a legitimate 'vehicle' to present claims using the new evidence, there is no meaningful likelihood his convictions or sentences would be upset" and, in its discretion, denied discovery on these grounds. (Doc. 141 at 4)

Assuming, arguendo, that Martinez uncovered evidence supporting his *Napue* claim, reversal would not be "virtually automatic," as he claims. (Doc. 136 at 16) (citing *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008), and *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (en banc); *see also* (Doc. 142 at 3.). Though both *Jackson* and *Hayes* cited this language from the Second Circuit with approval, both cases clarified that *Napue* did not create a "per se rule of reversal." *Jackson*, 513 F.3d at 1076; *Hayes*, 399 F.3d at 984. If error is established, the proper test under *Napue* is materiality; the Court must determine whether there is any reasonable likelihood that the false testimony could have affected the judgment of the jury; if so, then the conviction must be set aside. *Hayes*, 399 F.3d at 984 (quoting *Belmontes v. Woodford*, 350 F.3d 861, 881 (9th Cir. 2003)).

Martinez has failed to demonstrate how the *Napue* violation, if true, could have affected the judgment of the jury. Martinez asserts Sheriff Detective Douglas Beatty testified at the guilt phase of trial that the ignition was missing from a 1975 Monte Carlo driven by Martinez at the time of his arrest, which led prosecutors to argue Martinez had stolen the car and, therefore, had motive to shoot the victim, a state police patrolman, during a traffic stop and premeditated the homicide. (Doc. 142 at 2.) But there was ample evidence, aside from Detective Beatty's testimony about the missing ignition switch, that the Monte Carlo was stolen and that the murder was premeditated. The Court previously

summarized the evidence offered during the guilt phase of Martinez's trial relevant to the determination that the Monte Carlo was stolen and that Officer Martin's murder was premeditated, and will not restate that testimony here. (Doc. 127 at 12–16.)

Martinez argued in his Rule 60(b) motion that:

> Prosecutors *argued repeatedly in closing that the evidence showed that Martinez stole the vehicle* and therefore had motive to shoot Arizona DPS Officer Robert Martin at a traffic stop, which contributed significantly to the element of premeditation necessary to be proved beyond a reasonable doubt to convict of first degree murder. *See* ECF No. 115-5, Appx. 2 at 8-9, 12, 19-20, 28-29.

(Doc. 136 at 7) (emphasis added). He also asserted that the Respondents' arguments regarding premeditation are "disingenuous" and ignore "the critical significance prosecutors placed on that testimony in closing argument to prove beyond a reasonable doubt that Martinez acted with premeditation." (Doc. 139 at 4.)

Martinez's characterization of the significance placed on Det. Beatty's testimony is misleading. The Court has reviewed the closing arguments and the prosecutor did not assert that Martinez stole the Monte Carlo, only that the Monte Carlo he was driving was stolen, an uncontroverted fact whether the ignition switch was missing or not. The prosecution highlighted this and additional facts not contested in these proceedings to establish motive: "A stolen car, a handgun, a warrant for his arrest, on the run, and a prior felony conviction." (Doc. 115-5, Appx. 2 at 12; *see also id.* at 29 ("Motive. He's got a warrant for his arrest. He was on the run, a prior felony conviction, a stolen car. He was illegally in possession of a handgun, and he stated, 'If I am stopped by the police, I am not going back to jail.'.") Even if the fact that the car was stolen was removed from the equation, along with Martinez's statement that he intended not to go back to jail if stopped by police,[2] the fact remains that Martinez had a warrant for his arrest and was illegally in possession of a

[2] For purposes of the materiality analysis, the Court assumes Martinez could prove that 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 was intact 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.

handgun. Moreover, Martinez admits the state's theory of premeditation also relied on the testimony of Maricopa County Chief Medical Examiner, Phillip Keen, M.D., as to the sequence of shots allegedly fired by Martinez that struck Officer Martin. (*See* Doc. 115 at 39). In addition, to prove premeditation the state also relied heavily in closing arguments on the amount of time it would have taken Officer Martin to walk the distance from his vehicle to the stolen Monte Carlo, where he was shot at the driver's side door.

> From 45 feet away, Bob Martin got out of his car and started walking toward the defendant's car. His body was found 37 feet in front of -- the front of his police car, and the location where he would have gotten out of that car is an additional 8 feet. 45 feet. 45 feet. How many steps is that for the defendant to keep thinking what is it? What is it that I am going to do when he gets to my car? However long it takes for Bob Martin to walk up to that car, that's how long the defendant is reflecting on what he's going to do when he gets there.
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> . . .
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> Four times he pulled this trigger, and four times he struck Bob Martin each time in the location designed to murder this police officer. In the neck, in the hand area, and then as the police officer spun, as he gets to the back of his car and perhaps to safety he shot him in the back. And then when he was down -- and we have scuff marks on both of Bob Martin's knees -- when he was down he pulled that trigger again. That's four, four times he shot this man. Premeditation each time he pulls that trigger he's thinking what I am doing to this man in the uniform? I am trying to kill him so I can get out of here. Four times. And then after he was dead or shortly before he died, he shot at him twice more and missed. Six times.

(Doc. 115-5, App. 2 at 17-19, *see also id.*, App. 3 at 73-74).

Further, Martinez has repeatedly, explicitly and incorrectly stated throughout these proceedings that "it is clear from closing argument that the prosecution sought to prove 'premeditation' through . . . the testimony of Det. Beatty *concerning the condition of the ignition* of the 1975 Chevrolet Monte Carlo at the time of [Martinez's] arrest." (Doc. 115 at 39) (citing Doc. 115-5, App. 2 at 8, 12, 19–20, 28–29) (emphasis added).[3] In fact, the

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[3] Additional misstatements attributed to the prosecutor's closing arguments include: "The prosecution argued in closing *argument that the absence of an ignition meant*

missing ignition was not mentioned at all during closing argument. It was mentioned only briefly in rebuttal closing argument in the context of one of several reasons why an eyewitness in Payson was able to remember and identify Martinez from a brief encounter at a gas station:

> . . . [I]t is significant because of the vehicle that was being driven, she told you that the person left the car running. And that is something because if you are driving a stolen vehicle you don't have any keys that work it, and you have to possibly use a screwdriver. And when you go to the gas station and somebody is looking right at you and, remember, she says there is an eye contact here, you don't want that person seeing you stick a screwdriver there in the ignition switch, do you, because right away they are going to know that something is up.

(*Id.*, Appx. 3 at 66.)

Thus, even if Martinez establishes the alleged *Napue* violation, 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. *See Hayes*, 399 F.3d at 984. Martinez has stated in these proceedings that the "Supreme Court has indicated that closing argument is the barometer for the significance the prosecution attaches to its evidence." (Doc. 115 at 39) (citing *Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (for materiality purposes, "[t]he likely damage [to the prosecution's case had it complied with its duty under *Brady*] is best understood by taking the word of the prosecutor" in closing argument). If this is true, the prosecution placed no significance on

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that Petitioner knew the vehicle to be stolen and, therefore, that he had a motive to kill Officer Martin, to wit, a desire not to be returned to prison for stealing the Monte Carlo. R.T., September 25, 1997, at 8, 12, 16, 19-20." (Doc. 95 at 6) (emphasis added).

"Prosecutors argued repeatedly in closing that *the evidence showed that Martinez stole the vehicle*." (Doc. 136 at 7) (emphasis added).

"Sheriff's Detective Douglas Beatty testified at the guilt phase of trial that the ignition was missing from a 1975 Monte Carlo driven by Martinez at the time of his arrest, which led prosecutors to argue *Martinez had stolen the car*." (Doc. 142 at 2) (emphasis added).

the testimony of Det. Beatty regarding the missing ignition switch.

Finally, as the Court previously stated, whatever change in law *Mitchell* may have wrought does not support Martinez's request in these circumstances to permit evidentiary development with respect to the *Napue* claim. (Doc. 141 at 4); *see Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009) ("[T]he proper course when analyzing a Rule 60(b)(6) motion predicated on an intervening change in the law is to evaluate the circumstances surrounding the specific motion before the court.").

The court in *Mitchell* addressed a jurisdictional issue; it rejected the Government's argument that the Fifth Circuit's decision in *In re Robinson*, 917 F.3d 856, 861–66 (5th Cir. 2019), was controlling in the circumstances present in *Mitchell*, and reaffirmed that "[a]s explained in *Gonzalez*, an argument is a 'claim' if it 'substantively addresses federal grounds' for setting aside a prisoner's conviction." *Mitchell*, 958 F.3d at 784. Finding that the district court indeed had jurisdiction to decide the Rule 60(b) motion, the Ninth Circuit proceeded to analyze the motion under the strictures of *Gonzalez*.

Similarly, Martinez argued, and this Court agreed, that under *Gonzalez* and the Ninth Circuit's holding in *Mitchell*, the Court has jurisdiction over Martinez's Rule 60(b) motion because it is not a disguised second or successive petition.

After addressing the jurisdictional issue, the Court in *Mitchell* turned to Mitchell's argument that a recently-decided Supreme Court case, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), was an extraordinary change in the law which would "give Mitchell relief from the prior order denying his request to interview jurors." *Mitchell*, 958 F.3d at 787.

Like Mitchell, Martinez has failed to demonstrate how a change in case law would upset or overturn a settled legal principle relied on by this court in denying his previous requests for discovery. Previously, the Court analyzed Martinez's renewed request for an "indication" whether it would consider a Rule 60(b) motion (Doc. 115) and found that he failed to demonstrate a defect in the integrity of the underlying habeas proceedings, but instead sought to raise new substantive claims under *Brady* and *Napue*. (Doc. 127 at 24–

25.) In doing so, this Court applied the then-controlling law regarding Rule 60(b)(6) motions, *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005), and denied the motion, and consequently the related discovery request, as a disguised second or successive petition. The Ninth Circuit's holding in *Mitchell* did not change that law.

Martinez's arguments are premised on flawed understandings of both the holding in *Mitchell* and the purpose of a Rule 60(b) motion. First, Martinez incorrectly states that the Court in *Mitchell* "explicitly understood the import of *Gonzalez* to be . . . [that] a petitioner may seek discovery via Rule 60(b) so long as he is not raising a merits-based substantive claim in his Rule 60(b) motion." (Doc. 146 at 3.) *Mitchell* neither explicitly nor implicitly said this; a Rule 60(b) motion is not a discovery device, much less a post-judgment one. Martinez's assertion also ignores the fact, as this Court pointed out, that the Court in Mitchell ultimately denied Mitchell's request for discovery because *Peña-Rodriguez* did not unsettle that court's previous order denying Mitchell's request to interview jurors. *Mitchell*, 958 F.3d at 790 ("[T]his change in law left untouched the law governing investigating and interviewing jurors.").

Martinez fails to point to a controlling or well-settled principle of law, relied on by the Court in denying either habeas relief or relief on the motions for indication, that is now unsettled as a result of the holding in *Mitchell*. Martinez has consistently argued that he is entitled to relief on the grounds of the Beatty *Brady* and *Napue* violations and has sought to support his claims with newly discovered evidence, and the Court has denied those requests, and the attendant discovery requests, as disguised second or successive petitions.

Beginning with his Motion to Remand before the Ninth Circuit, Martinez argued for a stay of his appeal and a remand "for consideration of newly-discovered evidence that supports claims that Maricopa County prosecutors violated . . . *Napue* . . . where they deliberately elicited critical testimony from Detective Beatty they knew or should have known was false." *Martinez v. Ryan*, No. 08-99009, (Dkt. 67 at 1) Martinez asserted he was entitled to habeas relief under *Brady*, *Kyles* and *Napue*. (*Id.*, Dkt. 67 at 12–16.) He requested a remand for evidentiary development and for preparation of findings of fact and

conclusions of law with respect to both the *Brady* and *Napue* claims. (*Id.* at 20.) In his reply brief, Martinez clarified that his *Quezada* motion "alleges a violation of *Napue*, . . . which identifies a due process violation where the prosecution fails to correct trial testimony it knows or should know is false." (*Id.*, Dkt. 86 at 3.) Martinez asserted he had established colorable *Brady* and *Napue* claims that should be remanded for discovery and evidentiary hearings. (*Id.* at 5.) Subsequently, the discovery of the photograph showing the apparently intact ignition prompted Martinez to file a motion for leave to supplement the motion to stay and remand stating "[t]he presence of the photo in the Maricopa County Attorney's file conclusively proves the *Napue* claim in the *Quezada* Motion because it is 'material,' as defined by the Supreme Court and this Court, and it establishes that prosecutors knew or should have known Beatty's testimony was false or misleading." (*Id.*, Dkt. 87 at 3.)

After the court granted Martinez's motion to remand for consideration of a possible *Brady-Napue* claim in light of the newly discovered evidence, Martinez asserted in the renewed request that "[t]he *Napue* violation would require that the writ issue." (Doc. 115 at 44.) He alleged that if in fact the ignition was intact, then he had stated a claim which, upon full factual development, might entitle him to habeas corpus relief. (*Id.* at 115 at 45.) Further, Martinez asserted that he was entitled to evidentiary development because he had "alleged *claims* which, if proven true, would establish the violation of the right to federal due process but, despite his diligence, he ha[d] not been able to assemble all of the evidence in support of the claims due to lack of cooperation of Arizona and California law enforcement in his investigation." (*Id.* at 45–46) (emphasis added).

Mitchell did not change the law governing the presentation of newly discovered evidence and new claims in Rule 60(b) motions and does not upset or overturn any legal principle relied on by the Court in previously denying Martinez's Rule 60(b) motions to reopen the judgment as disguised second or successive petitions.

Finally, as this Court previously ruled, in determining whether Martinez's claims of evidence of an intact ignition or false assertions by Detective Beatty would entitle Martinez to relief:

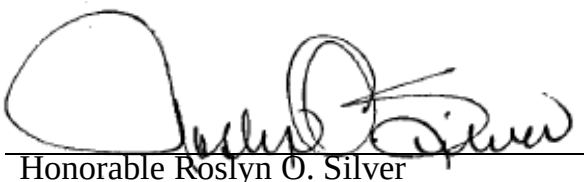
> Even if Petitioner could demonstrate the assertions were false and part of such a scheme, he cannot demonstrate a defect in the integrity of the proceedings because the assertions had no effect on the outcome of the proceedings. The Court found Claim 4 procedurally barred and denied further evidentiary development of Petitioner's theory that the ignition was intact at the time the vehicle was impounded. The Court considered the evidence proffered in support of Claims 9, 16, and 17, and assumed that Petitioner's new evidence would demonstrate that "the ignition was intact at the time Petitioner was arrested," but nonetheless concluded that Petitioner failed to establish that no reasonable juror would have found him guilty of premeditated first degree murder because "*whether the ignition was intact at the time Petitioner was arrested does not negate the fact that the owner had reported it stolen*." (Doc. 88 at 26-27) (emphasis added).

Thus, Martinez has failed to demonstrate that *Mitchell* is an intervening change in law that constitutes extraordinary circumstances sufficient to permit him to reopen the judgment in these circumstances. *See Phelps*, 569 F.3d at 1133.

Accordingly,

IT IS ORDERED Martinez's motion for reconsideration (Doc. 142) is DENIED.

Dated this 13th day of May, 2021.



Honorable Roslyn O. Silver
Senior United States District Judge

33 F.4th 1254
United States Court of Appeals, Ninth Circuit.

Ernesto Salgado MARTINEZ, Petitioner-Appellant,
v.
David SHINN, Director; James Kimble, [*] Warden, Arizona State Prison - Eyman Complex, Respondents-Appellees.

No. 21-99006
|
Submitted May 27, 2021 [**] San Francisco, California
|
Filed May 16, 2022

Synopsis

Background: After affirmance on direct appeal, 196 Ariz. 451, 999 P.2d 795, of petitioner's state-court murder conviction and death sentence, and denial of federal habeas relief, 2008 WL 783355 and 2008 WL 1776500, prisoner again sought federal habeas relief. The United States District Court for the District of Arizona, Roslyn O. Silver, Senior District Judge, 2016 WL 1268344, denied relief, and denied petitioner's motion to alter or amend the judgment to include certificate of appealability with respect to petitioner's renewed request for indication whether the court would consider a motion for relief from judgment, 2016 WL 3345480. Petitioner appealed. The United States Court of Appeals for the Ninth Circuit stayed the appellate proceedings and remanded. The District Court, Earl H. Carroll, J., denied certificate for renewed motion for relief from judgment and denied petition. Petitioner again appealed. The United States Court of Appeals for the Ninth Circuit, 926 F.3d 1215, affirmed in part, and dismissed in part. The United States District Court for the District of Arizona, Roslyn O. Silver, Senior District Judge, denied petitioner's motion for relief from judgment, 2021 WL 1102205, and subsequently, 2021 WL 1947510, denied motion for reconsideration. Petitioner again sought certificate of appealability.

The Court of Appeals held that intervening change in law did not amount to extraordinary circumstances to support motion for relief from judgment denying habeas petition.

Certificate denied.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***1256** Appeal from the United States District Court for the District of Arizona, Roslyn O. Silver, District Judge, Presiding, D.C. No. 2:05-cv-01561-ROS

Attorneys and Law Firms

Jon M. Sands, Federal Public Defender; Timothy M. Gabrielsen, Assistant Federal Public Defender; Office of the Federal Public Defender, Tucson, Arizona; for Petitioner-Appellant.

Mark Brnovich, Attorney General; Lacy Stover Gard, Deputy Solicitor General/Chief of Capital Litigation; Laura P. Chiasson, Assistant Attorney General; Office of the Attorney General, Tucson, Arizona; for Respondents-Appellees.

Before: M. Margaret McKeown, William A. Fletcher, and Milan D. Smith, Jr., Circuit Judges.

OPINION

PER CURIAM:

Ernesto Salgado Martinez moves for a certificate of appealability ("COA") that would allow him to challenge the district court's denial of his Rule 60(b)(6) motion for relief from final judgment. Martinez was convicted of first-degree murder of an Arizona police officer after a jury trial in 1997 and was sentenced to death by the state court. We affirmed the district court's denial of his federal habeas corpus petition under 28 U.S.C. § 2254. *See Martinez v. Ryan*, 926 F.3d 1215 (9th Cir. 2019).

After we affirmed the district court's denial, Martinez moved in the district court under Rule 60(b)(6) for additional discovery to develop (1) a potential claim under *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), that the prosecution knowingly elicited false testimony from witness Detective Douglas Beatty about the condition of the ignition of the stolen car Martinez was driving at the time of the crime; and (2) a potential claim of actual innocence after the apparent ***1257** recantation of key guilt-phase testimony by his acquaintance Oscar Fryer. Martinez argued in the district court that our decision in *Mitchell v. United States*, 958 F.3d 775 (9th Cir. 2020), is a change of law that constitutes an "extraordinary circumstance," permitting him to reopen his final judgment and obtain the requested discovery.

The district court denied Martinez's Rule 60(b)(6) motion and declined to issue a COA. The court also denied Martinez's motion for reconsideration. Because no reasonable jurist could find that *Mitchell* constitutes an extraordinary circumstance justifying the reopening of his final judgment under Rule 60(b)(6), we deny Martinez's request for a COA.

I. Background

A. Factual Background

In August 1995, Martinez drove from California to Globe, Arizona, to visit friends and family in a stolen blue Monte Carlo with stolen license plates registered to another car. Martinez had an outstanding felony warrant for his arrest in Arizona. He met a friend, Oscar Fryer, in Globe. Fryer testified at trial that he spoke with Martinez for half an hour at a carwash while sitting inside his Monte Carlo, and that Martinez showed him a .38 caliber handgun with tape wrapped around the handle. Precisely what Martinez said to Fryer during this conversation is now disputed and is a subject of his instant motion.

A few days later, on August 15, Martinez left Globe and drove to Payson, Arizona, on the Beeline Highway. At approximately 11:30 am, Martinez bought gas at a Circle K in Payson and drove south toward Phoenix, Arizona. Driving at a high rate of speed, he passed several cars, including one driven by Steve and Susan Ball, who noticed his blue Monte Carlo.

Officer Robert Martin pulled Martinez over at Milepost 195. The Balls drove past them and saw Officer Martin's patrol car stopped behind Martinez's Monte Carlo. The Balls both testified that they saw Martinez's driver's side door open, with Officer Martin standing inside the door, and both Officer Martin and Martinez "looking backwards" into the backseat of the car. Susan Ball recalled them remarking, "Oh, good, he got the speeding ticket." After the Balls passed, Martinez shot Officer Martin four times with a .38 caliber handgun. He shot him in the hand, neck, back, and face, killing him.

Shortly after Martinez killed Officer Martin, the Balls again saw him speeding in the blue Monte Carlo. Martinez passed them about a minute after they had passed him and Officer Martin on the side of the road. The Balls later saw Martinez run a red light and drive erratically. They also saw two police officers coming from the opposite direction with lights flashing. The Balls caught up with Martinez at a stop light and saw him "playing with something in the glove box." They wrote down his license plate numbers.

Martinez drove through Phoenix and reached Blythe, California, at around 4:00 pm, when he called his aunt, asking her to wire him money. At 6:00 pm, he called his aunt again asking her to wire him money. At approximately 8:00 pm, he entered a Mini-Mart in Blythe. He stole money from the cash register and shot and killed the clerk. Ballistics reports showed that a shell casing was consistent with the .9 mm ammunition used in Officer Martin's service weapon.

Martinez then drove to his cousin's home in Coachella, California. When police officers apprehended Martinez, they recovered a .38 caliber handgun from his friend Tommy Acuna, who identified it to police ***1258** as "the murder weapon." Martinez had abandoned the Monte Carlo while fleeing on foot.

While in jail awaiting trial, Martinez called a friend, Eric Moreno. He told Moreno that "he got busted for blasting a *jura*"—slang for police officer. He also told him that one of his guns had been "stashed." Police officers obtained a warrant to search Martinez's friend Johnny Acuna's trailer and found Officer Martin's .9 mm handgun under a mattress.

An Arizona jury convicted Martinez of first-degree murder for killing Officer Martin, two counts of theft, and two counts of misconduct involving weapons. The judge sentenced Martinez to death for the murder conviction, and terms of imprisonment for the other crimes.

Martinez was separately indicted for the murder of the clerk of the Mini-Mart in Blythe, California. After he was tried and sentenced in Arizona, he was extradited to stand trial in Riverside County, California.

B. Disputed Testimony

Martinez now seeks discovery to dispute two pieces of evidence—Detective Beatty's testimony that the Monte Carlo had a "punched ignition," and Oscar Fryer's testimony that Martinez had told him that he was "not going back to jail." This evidence was used at trial to help prove that Martinez killed Officer Martin with premeditation. Martinez's defense counsel argued lack of premeditation as an alternative defense

in closing argument. Martinez's primary defenses throughout trial, however, were mistaken identity and failure of the prosecution to carry its burden of proof. In his instant motion, Martinez argued to the district court, and now argues to us, that the evidence he seeks under Rule 60(b)(6) would show that he did not kill Officer Martin with premeditation and that he is therefore actually innocent of first-degree murder. *See Sawyer v. Whitley*, 505 U.S. 333, 336, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

1. Testimony of Detective Beatty

At trial, the prosecution called as a witness Detective Douglas Beatty, a Maricopa County homicide detective who was assigned to investigate Officer Martin's death. The court permitted the State to recall Detective Beatty to the stand to question him about the condition of the ignition of the Monte Carlo when it was recovered in California, in order to help prove that Martinez knew that it was stolen. Detective Beatty testified that when he attempted to turn on the recovered Monte Carlo with keys found in its glove compartment, he discovered that "the ignition switch to the Monte Carlo was missing." He described the ignition switch as "a hollow cavity" that could be turned on with "some sort of instrument," such as a screwdriver.

The prosecution indirectly referred to Detective Beatty's "punched" ignition testimony once during its rebuttal closing argument. The prosecution used the testimony to rehabilitate a witness who had identified Martinez as purchasing gas at the Circle K shortly before the shooting. The State referred to the Monte Carlo as stolen multiple times, in its opening statement and closing arguments, as part of its argument that Martinez had premeditated Officer Martin's killing.

After Martinez's trial in Arizona, he was tried in California for killing the clerk in the Mini-Mart. Prosecutors in the California case gave to Martinez files that they had obtained from the Arizona prosecutors. Those files included notes and a report from Ricci Cooksey, a California forensic examiner. Martinez argues that Cooksey's report "failed to note a punched ***1259** ignition when the Monte Carlo was impounded at the time of Martinez's arrest." Cooksey's notes included the names and phone numbers of "Doug Beatty," of the "Maricopa Co. Sheriff," and of the lead prosecutor, "Bob Shutz [sic]," in Martinez's Arizona case. Martinez argues that these notes are evidence that Cooksey spoke to Arizona prosecutors prior to the Arizona trial. The California prosecutors also gave Martinez a photograph of the Monte Carlo showing an intact ignition. Martinez argues that this photograph shows that the ignition was not "punched" at the time of the crime, and that the photograph was "previously suppressed" by the Arizona prosecutors.

2. Testimony of Oscar Fryer

Also at trial, the prosecution called Oscar Fryer as a witness to testify about his conversation with Martinez at the Globe carwash prior to Officer Martin's murder. Fryer testified that Martinez had told him there was a warrant out for his arrest, that he was on probation, that he had a gun, and that if he was stopped by police, "he wasn't going back to jail."

In its closing argument, the prosecution repeatedly referred to Fryer's testimony, emphasizing Martinez's statement that "he wasn't going back to jail," as central evidence of both his motive and premeditation. The prosecution also emphasized two additional pieces of evidence showing premeditation: (1) the time between the traffic stop and the shooting, and (2) the four times that Officer Martin was shot. That additional evidence was (and is) undisputed.

Seventeen years after Martinez's Arizona trial, Fryer spoke about his testimony to defense investigator Gerald Monahan, who had been appointed to work on Martinez's subsequent California case. Monahan declares that Fryer told him that he "was high on methamphetamine at the time he testified against Mr. Martinez at trial"; that "it was his opinion that Mr. Martinez would shoot it out with police if he were pulled over by police, rather than be arrested"; and that "Mr. Martinez did not tell Mr. Fryer that he would shoot it out with police if he were pulled over." Martinez argues that Fryer's statements, as reported by Monahan, support his claim that he did not premeditate the murder of Officer Martin, and that he is therefore actually innocent of the death penalty.

C. Procedural History

The Supreme Court of Arizona affirmed Martinez's conviction and death sentence in May 2000. *State v. Martinez*, 196 Ariz. 451, 999 P.2d 795 (2000). Martinez sought post-conviction relief in state court, which the Superior Court denied. The Arizona Supreme Court denied his petition for review in May 2005.

Martinez filed a federal habeas petition on May 25, 2005. On April 30, 2007, Martinez filed a motion for evidentiary development in the district court. He sought to inspect the Monte Carlo's ignition switch to assess the veracity of Detective Beatty's testimony. He also sought to develop evidence that prosecutors withheld evidence undermining Oscar Fryer's credibility, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), including evidence of Fryer's drug use and of a favorable plea deal. On September 7, 2007, Martinez filed a supplemental motion for evidentiary development, requesting the court's permission, *inter alia*, to test the keys found in the glove box of the Monte Carlo.

The district court denied Martinez's motions for evidentiary development. The court concluded that further discovery as to both Detective Beatty and Oscar Fryer would not establish Martinez's actual innocence ***1260** of premeditated, first-degree murder. The court denied Martinez's habeas petition on March 20, 2008.

Martinez appealed from the district court's decision. While the appeal was pending, he filed a motion in the district court, styled as a "Request for Indication Whether Court Would Consider Motion for Relief from Judgment Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure." The motion sought to reopen the court's final judgment to revisit the court's denial of his earlier motions for evidentiary development. The district court denied the motion.

Martinez then moved to stay appellate proceedings and for a limited remand to the district court. On July 7, 2014, we granted Martinez's motion for a limited remand to the district court for possible consideration of several procedurally defaulted claims in light of the Supreme Court's intervening decision in *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). We also remanded to allow Martinez to move for leave to file in the district court a motion styled as "a renewed Request for Indication Whether District Court Would Consider a Rule 60(b) Motion ... for consideration of a possible *Brady-Napue* claim in light of newly discovered evidence."

Martinez filed a "Renewed Request for Indication Whether the District Court Would Consider a Rule 60(b) Motion and Supplemental *Martinez* Brief" in the district court. Martinez argued that under *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005), his motion met the requirements for Rule 60(b)(6) relief on the grounds that he was attacking the integrity of the earlier habeas proceeding, that relief "is appropriate to accomplish justice," and that the basis for the relief was truly "extraordinary." He argued that the newly discovered photograph of the intact ignition of the Monte Carlo, and handwritten investigative notes suggesting that the ignition was intact when Martinez was driving the car, should have been produced to his defense counsel in Arizona. Martinez also sought evidence to develop the related *Napue* claim that prosecutors knowingly elicited false ignition testimony from Detective Beatty.

The district court declined Martinez's request to entertain a Rule 60(b)(6) motion. The district court characterized Martinez's request as raising new substantive claims, and therefore, as a second-or-successive petition. The district court denied Martinez's request to issue a COA. Martinez moved in this court for leave to file a motion for a COA, which we granted on October 7, 2016, expanding the COA to include all of his remanded claims.

In our opinion issued June 18, 2019, we affirmed the district court's denial of habeas corpus relief. *Martinez*, 926 F.3d at 1221. We declined to reach the discovery requests relevant to the potential *Brady* and *Napue* claims because the district court's ruling on Martinez's "Request for Indication" constituted a non-reviewable order that was procedural and "interlocutory in nature." *Id.* at 1229 (quoting *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984)). The Supreme Court of the United States denied certiorari. —— U.S. ——, 140 S.Ct. 2771, 206 L.Ed.2d 942 (2020).

On July 29, 2020, Martinez renewed his request in the district court under Rule 60(b)(6) for relief from judgment to obtain additional discovery to develop a potential *Napue* claim based on Detective Beatty's ignition testimony and an actual innocence claim based on the 2014 purported recantation of Oscar Fryer's guilt-phase trial testimony.

The district court denied Martinez's Rule 60(b)(6) motion and his request for a ***1261** COA on March 23, 2021. Martinez moved for reconsideration, which the court also denied. The court explained in its order denying reconsideration that Martinez lacked "good cause" for discovery because the evidence, even if obtained, would not unsettle his conviction for first-degree premeditated murder. The court wrote, "Even if the fact that the car was stolen was removed from the equation, along with Martinez's statement that he intended not to go back to jail if stopped by police, the fact remains that Martinez had a warrant for his arrest and was illegally

in possession of a handgun." Further, the court noted that to prove premeditation, "the state also relied heavily in closing arguments on the amount of time it would have taken Officer Martin to walk the distance from his vehicle to the stolen Monte Carlo, where he was shot at the driver's side door." The court determined that "the evidence supporting premeditation was overwhelming and uncontroverted." The court concluded that "Martinez has failed to demonstrate that *Mitchell* is an intervening change in law that constitutes extraordinary circumstances sufficient to permit him to reopen the judgment in these circumstances."

Martinez timely filed a notice of appeal and moved for a COA in this court.

II. Standard of Review

A COA is required in order to appeal the denial of a Rule 60(b) motion for relief from a district court's judgment denying federal habeas relief. *See United States v. Winkles*, 795 F.3d 1134, 1141–43 (9th Cir. 2015); *see also* 28 U.S.C. § 2253(c)(1) (establishing the general COA requirement for habeas petitioners); *Payton v. Davis*, 906 F.3d 812, 817–18 (9th Cir. 2018) (extending the COA requirement to a Rule 60(d) motion in a § 2254 habeas petition). A COA may only issue if the movant shows that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying section 2255 motion or section 2254 petition states a valid claim of the denial of a constitutional right. *See Winkles*, 795 F.3d at 1143 (explaining that this test accords with the standard governing COAs for procedural rulings set forth in *Slack v. McDaniel*, 529 U.S. 473, 484–85, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), while also incorporating the standard of review applicable to Rule 60(b) motions—abuse of discretion).

The COA inquiry is a threshold inquiry that "is not coextensive with a merits analysis." *Buck v. Davis*, —— U.S. ——, 137 S. Ct. 759, 773, 197 L.Ed.2d 1 (2017). At the COA stage, we ask "only if the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 348, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)). To meet this standard, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; *or* that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (internal quotation marks and brackets omitted) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)).

III. Discussion

A. Rule 60(b)

Rule 60(b) provides for relief from a district court's final judgment on six grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, ***1262** 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 court's power to vacate judgments under Rule 60(b) in order "to accomplish justice" is balanced against "the strong public interest in the timeliness and finality of judgments." *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009) (alterations and internal quotation marks omitted).

Some Rule 60(b) motions are available to federal habeas petitioners despite the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). In relevant part, AEDPA establishes three requirements for second or successive habeas petitions:

> First, any claim that has already been adjudicated in a previous petition

> must be dismissed. [28 U.S.C.] § 2244(b)(1). Second, any claim that has *not* already been adjudicated must be dismissed unless it relies on either a new or retroactive rule of constitutional law or new facts showing a high probability of actual innocence. § 2244(b)(2). Third, before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions. § 2244(b)(3).

Gonzalez, 545 U.S. at 529–30, 125 S.Ct. 2641. However, "[w]hen no 'claim' is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application," and therefore the motion may be considered by a district court. *Id.* at 533, 125 S.Ct. 2641. Rule 60(b) motions alleging a "previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar," or alleging "some defect in the integrity of the federal habeas proceedings," such as "[f]raud on the federal habeas court," do not advance a "claim" and are permitted despite AEDPA. *Id.* at 532, 532 nn.4–5, 125 S.Ct. 2641. On the other hand, motions asking "for a second chance to have the merits determined favorably" are not. *Id.* at 532, 125 S.Ct. 2641 n.5.

Rule 60(b)(6), upon which Martinez relies, is a catchall provision that depends on the "exercise of a court's ample equitable power ... to reconsider its judgment." *Phelps*, 569 F.3d at 1135. A movant seeking relief under Rule 60(b)(6) is required "to show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535, 125 S.Ct. 2641 (quoting *Ackermann v. United States*, 340 U.S. 193, 199, 71 S.Ct. 209, 95 L.Ed. 207 (1950)). "Extraordinary circumstances occur where there are 'other compelling reasons' for opening the judgment" that prevented the movant from raising the basis of the motion during the pendency of the case. *Bynoe v. Baca*, 966 F.3d 972, 979, 983 (9th Cir. 2020) (quoting *Klapprott v. United States*, 335 U.S. 601, 613, 69 S.Ct. 384, 93 L.Ed. 266 (1949)). Although "[s]uch circumstances will rarely occur in the habeas context," *Gonzalez*, 545 U.S. at 535, 125 S.Ct. 2641, "Rule 60(b)(6) can and should be 'used sparingly as an equitable remedy to prevent manifest injustice,' " *Hall v. Haws*, 861 F.3d 977, 987 (9th Cir. 2017) (quoting *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)).

***1263** We held in *Phelps* that an intervening change in law can constitute an "extraordinary circumstance" justifying relief under Rule 60(b)(6) for habeas petitioners, but that courts must analyze motions under Rule 60(b)(6) using a "case-by-case inquiry" that balances numerous factors. 569 F.3d at 1133. "A relevant alteration to constitutional rights, for example, may be sufficient, but a narrow change in peripheral law is 'rarely' enough." *Bynoe*, 966 F.3d at 983 (citations omitted). In *Phelps*, we outlined six non-exhaustive factors that are to be flexibly considered to determine whether a post-judgment change in the law meets the "extraordinary-circumstances" requirement:

> (1) [T]he nature of the legal change, including whether the change in law resolved an unsettled legal question; (2) whether the movant exercised diligence in pursuing reconsideration of his or her claim; (3) the parties' reliance interests in the finality of the judgment; (4) the delay between the finality of the judgment and the Rule 60(b)(6) motion; (5) the relationship between the change in law and the challenged judgment; and (6) whether there are concerns of comity that would be disturbed by reopening a case.

Id. at 983 (summarizing *Phelps*, 569 F.3d at 1134–40). Relevant here, "only [legal rulings] that may have affected the outcome of the judgment the petitioner seeks to review should weigh toward a finding of extraordinary circumstances." *Id.* at 986. "[W]e consider ... whether the change in law affects an issue dispositive to the outcome of the case." *Id.* In the case before us, as we explain below, *Mitchell* does not substantially affect either Martinez's underlying case or his request for discovery. The only effect of *Mitchell* is to make clear that the district court had jurisdiction to consider his Rule 60(b)(6) request.

B. *Mitchell*

In *Mitchell*, Lezmond Mitchell, a Navajo citizen sentenced to death for a carjacking resulting in death, moved under Rule 60(b)(6) for relief from final judgment following his unsuccessful § 2255 habeas proceedings. 958 F.3d at 780, 783. Mitchell challenged the court's earlier procedural rulings denying him authorization to interview the jurors at his criminal trial to investigate juror misconduct. *Id.* at 779. In 2009, the district court found that Mitchell did not show good cause for the requested interviews because he identified no evidence of juror misconduct. *Id.* In 2018, Mitchell moved for relief from the district court's 2009 ruling, arguing that the Supreme Court's intervening decision in *Peña-Rodriguez v. Colorado*, —— U.S. ——, 137 S. Ct. 855, 197 L.Ed.2d 107 (2017), significantly changed the law governing requests to interview jurors for racial bias and therefore constituted an "extraordinary circumstance" justifying reopening his habeas proceeding under Rule 60(b)(6). *Mitchell*, 958 F.3d at 779. The Court in *Peña-Rodriguez* had held that juror statements demonstrating racial animus could be admissible as evidence notwithstanding the longstanding no-impeachment rule barring juror testimony about deliberations and Rule 606(b) of the Federal Rules of Evidence. *Peña-Rodriguez*, 137 S. Ct. at 869–70.

In *Mitchell*, we considered the district court's jurisdiction to entertain Mitchell's Rule 60(b)(6) motion. We held, as a matter of first impression, that a "prisoner's request to develop evidence for a *potential new claim*" does not qualify as a "claim" under *Gonzalez* if it does not assert a federal basis for relief from the prisoner's conviction or sentence, but rather simply gives a prisoner "the opportunity to attempt to develop a claim" that might entitle him or her to relief. ***1264** *Mitchell*, 958 F.3d at 786 (emphasis added). Therefore, such a request for discovery brought under Rule 60(b) was not barred as a "disguised second or successive" habeas application, and "the district court had jurisdiction to decide [Mitchell's] Rule 60(b)(6) motion." *Id.*

We then turned to the question of whether Mitchell had established "extraordinary circumstances" that would justify the reopening of his case under Rule 60(b)(6). *Id.* ("[W]e consider whether the alleged extraordinary circumstance, such as a change in the law, was material to the prisoner's claim."). We explained, "a mere development in jurisprudence, as opposed to an unexpected change, does not constitute an extraordinary circumstance for purposes of Rule 60(b)(6)." *Id.* at 787. We considered the legal change wrought by the Supreme Court's decision in *Peña-Rodriguez* and rejected Mitchell's contention that it represented such a "fundamental change in the law relevant to his request to interview jurors ... [that] the district court was obliged to grant his Rule 60(b)(6) motion." *Id.* at 790. Rather, we held, "[a]lthough *Peña-Rodriguez* established a new exception to Rule 606(b), this change in law left untouched the law governing investigating and interviewing jurors." *Id.* We concluded that because Mitchell failed to present an extraordinary circumstance that would justify reopening in his case, "the district court did not abuse its discretion by denying Mitchell's Rule 60(b) motion." *Id.* at 792.

C. Martinez's Rule 60(b)(6) Motion

In his Rule 60(b)(6) motion, Martinez relied on *Mitchell* for two propositions: (1) that *Mitchell* provided the district court with jurisdiction to consider his motion requesting discovery to develop potential *Napue* and actual innocence claims under Rule 60(b)(6) because it is not a disguised second or successive petition; and (2) that *Mitchell* constitutes an extraordinary change in the law governing post-judgment requests for discovery and therefore authorizes the district court to grant his motion under Rule 60(b)(6). Martinez's first proposition is correct, but his second is not.

We agree with Martinez's assertion that, under our holding in *Mitchell*, the district court had jurisdiction to consider his Rule 60(b)(6) motion for discovery to develop potential claims. The district court correctly declined to dismiss Martinez's Rule 60(b)(6) motion as a disguised second or successive petition.

The district court initially assumed that *Mitchell* constituted an "extraordinary change in the law" such that it could entertain Martinez's motion. Based on that assumption, the district court denied his motion on the merits. We do not assume, as the district court initially did,[1] that *Mitchell* constitutes an "extraordinary circumstance" under Rule 60(b)(6). 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.

There 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. Our new holding in *Mitchell* was that a district court has

jurisdiction to consider discovery requests brought pursuant to Rule 60(b). ***1265** *Mitchell*, 958 F.3d at 785–86. But there was no new law with respect to the discovery request itself. *See id.* at 790. Rather, we held that *Peña-Rodriguez* was not an extraordinary change in the law governing access to jurors such that a Rule 60(b)(6) motion was authorized. *Id.* at 791.

Because *Mitchell* did not change the substantive law governing Martinez's discovery requests, it does not constitute an extraordinary circumstance justifying relief from final judgment under Rule 60(b)(6). Just as we held in *Mitchell* that *Peña-Rodriguez* did not disturb the longstanding rules giving trial courts discretion over granting requests to interview jurors, we hold here that *Mitchell* did not disturb the underlying rules governing the discovery that Martinez seeks. *See id.* at 789. The district court therefore did not err in applying our well-settled rules governing discovery in habeas proceedings in denying Martinez's Rule 60(b)(6) motion for additional discovery. *See* Rule 6(a), Rules Governing § 2254 Cases (allowing discovery for "good cause"); *see also Bracy v. Gramley*, 520 U.S. 899, 908–909, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (defining "good cause" for discovery). No reasonable jurist would disagree with the district court's decision.

IV. Conclusion

It is beyond debate among reasonable jurists that the district court did not abuse its discretion in denying Martinez's motion under Rule 60(b)(6). We therefore decline to grant Martinez's requested COA.

Certificate of Appealability DENIED.

All Citations

33 F.4th 1254, 22 Cal. Daily Op. Serv. 5005, 2022 Daily Journal D.A.R. 4939

Footnotes

* James Kimble has been substituted for his predecessor, Charles Goldsmith, as Warden of the Arizona State Prison - Eyman Complex under Fed. R. App. P. 43(c)(2).

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1 Although the district court initially assumed *arguendo* that *Mitchell* was an extraordinary change in the law, in its order denying reconsideration, the court concluded that "Martinez has failed to demonstrate that *Mitchell* is an intervening change in law that constitutes extraordinary circumstances sufficient to permit him to reopen the judgment in these circumstances."

FILED

JUL 1 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNESTO SALGADO MARTINEZ, Petitioner-Appellant, v. DAVID SHINN, Director; JAMES KIMBLE, Warden, Arizona State Prison - Eyman Complex, Respondents-Appellees.	No. 21-99006 D.C. No. 2:05-cv-01561-ROS District of Arizona, Phoenix ORDER

Before: McKEOWN, W. FLETCHER, and M. SMITH, Circuit Judges.

Petitioner–Appellant filed a petition for panel rehearing and rehearing en banc on May 31, 2022 (Dkt. Entry No. 7). The panel has unanimously voted to deny the petition for panel rehearing. Judges McKeown and M. Smith have voted to deny the petition for rehearing en banc, and Judge W. Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is **DENIED**.