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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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PETER M. BERGNA,

7

*Petitioner,*

8

vs.

3:10-cv-00389-RCJ-WGC

9

ORDER

10

JAMES BENEDETTI, *et al.*

11

*Respondents.*

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13 This represented habeas matter comes before the Court on respondents' motion (#46)  
14 to disqualify petitioner's appointed counsel.

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***Background***

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Petitioner Peter Bergna challenges his 2002 Nevada state conviction, pursuant to a  
17 jury verdict, of first-degree murder. He is serving a sentence of life with the possibility of  
18 parole after twenty years. He challenged the conviction on direct appeal and on state post-  
19 conviction review.

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21 JoNell Thomas represented Bergna as retained counsel in the post-conviction  
22 proceedings in the state district court. Thomas represented Bergna from before the March  
23 24, 2006, filing of the counseled state petition through the August 8, 2008, state district court  
24 order denying relief. She withdrew as counsel following the decision. The state district court  
25 initially appointed replacement counsel to represent Bergna on the state post-conviction  
26 appeal. The state supreme court order of affirmance reflects, however, that he refused  
27 representation on the appeal and instead proceeded *pro se*.  
28

1 Petitioner's current federal habeas counsel, Megan Hoffman, was directly employed  
2 by JoNell Thomas from approximately September 2005 through August 2007. Hoffman was  
3 employed first as a law clerk from approximately September 2005 until May 2006. Following  
4 her admission to the bar in May 2006, she thereafter worked as an associate attorney until  
5 she was hired as an Assistant Federal Public Defender in August 2007. As discussed further,  
6 below, however, Hoffman continued to assist Thomas – and thereafter Bergna directly – in  
7 a manner relevant to this case after August 2007.

8 Hoffman assisted Thomas on Bergna's state post-conviction case as a law clerk, as  
9 an associate attorney, and also as an ex-employee after moving on to the Federal Public  
10 Defender. Counsel attests in her declaration (#51-1) that: (a) as a law clerk, she assisted  
11 Thomas in the preparation and filing of Bergna's March 24, 2006, state petition, along with  
12 conducting file review and research on the case; (b) in connection with the preparation of  
13 Bergna's state petition, she also reviewed newspaper articles and television reports on the  
14 case, thereafter preparing and executing an affidavit reflecting what she had observed in the  
15 media reports; (c) after becoming an attorney, she continued to assist Thomas on Bergna's  
16 pending state petition, conducting research and file review; and (d) she assisted Thomas at  
17 the October 2007 evidentiary hearing on Bergna's state petition, which was conducted only  
18 a short time after Hoffman had left Thomas' employ for the Federal Public Defender. With  
19 respect to the state court evidentiary hearing, counsel attests that her "role was limited to  
20 locating and organizing exhibits for Ms. Thomas, and to handling Mr. Bergna's questions."  
21 She attests that she did not question any witnesses or make any strategy decisions.

22 Counsel further attests that, following her attendance at the October 2007 evidentiary  
23 hearing, she "occasionally heard from Mr. Bergna via letter or telephone call," with those  
24 contacts increasing "in June of 2010, as Mr. Bergna prepared to file his pro se federal habeas  
25 petition."

26 In the present action, the Court granted the Federal Public Defender's motion to be  
27 appointed as counsel on October 19, 2010. The Court's action was based – against the  
28 backdrop of the law at that time – in part upon current counsel's familiarity with the case.

1 Subsequently, however, on March 20, 2012, the United States Supreme Court issued  
2 its decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). In *Martinez*, the Court held that  
3 inadequate assistance of counsel in initial-review collateral proceedings – such as, for  
4 example, a state post-conviction proceeding in a state district court – may establish cause for  
5 a petitioner’s failure to pursue a claim of ineffective assistance of trial counsel in such  
6 proceedings.

## ***Discussion***

8       Following *Martinez*, there in truth can be no dispute that petitioner currently does not  
9 have conflict-free counsel. Following *Martinez*, competent federal habeas counsel would  
10 review the state proceedings to determine whether there were (a) possible additional claims  
11 of ineffective assistance of trial counsel that (b) were not pursued by state post-conviction  
12 counsel through inadequate assistance. Following *Martinez*, current counsel thus is placed  
13 in a position of having to review the performance of a state post-conviction litigation team on  
14 which she worked – including as an attorney – to determine whether the team inadequately  
15 failed to raise additional claims of ineffective assistance of trial counsel. The fact that no such  
16 additional claims currently are raised in the current pleadings wholly begs the question.  
17 Current counsel is under an obligation under *Martinez* to conduct such review, and she has  
18 a conflict of interest when doing so. That conflict of interest is real, actual and current.<sup>1</sup>

Counsel suggests the following remedy for the conflict premised upon her prior representation:

Mr. Bergna therefore respectfully requests that this Court:

- (1) appoint counsel to consult with Mr. Bergna regarding the issues raised in Respondents' motion to disqualify counsel; and/or
  - (2) hold a telephonic, ex parte conference with undersigned counsel and Mr. Bergna to determine whether Mr. Bergna can execute a voluntary, knowing and intelligent waiver any potential conflict in this matter.

Should this Court determine that Mr. Bergna cannot execute a voluntary, knowing, and intelligent waiver of any potential conflict in this matter, Mr. Bergna respectfully requests that this Court appoint new counsel to represent him in this case. This Court has already recognized that appointment is appropriate in this case given the “relatively complex petition” and because “Petitioner faces a lengthy sentence.” . . . .

#51, at 4.

The counseled amended petition in this case is 137 pages long. There further are 298 state court record exhibits, many of which themselves consist of numerous sub-exhibits, as many as 69 sub-exhibits. The index of exhibits for the 298 exhibits itself runs for 28 pages.

It would take a panel attorney a prohibitive number of months to become sufficiently conversant with the file to competently advise petitioner regarding the conflict. More time thereafter would be involved in setting the matter on the Court's heavy calendar to conduct the proceeding proposed. If, at the conclusion of that proceeding, the Court ultimately found that petitioner had not executed a knowing, voluntary and intelligent waiver of the conflict, then a substantial number of months would be required for replacement counsel thereafter to more thoroughly investigate the matter and possibly present additional claims.

The more prudent, expedient and efficient course – and the one most in the interests of justice under 18 U.S.C. § 3006A(c)<sup>2</sup> – would be to appoint substitute counsel now.

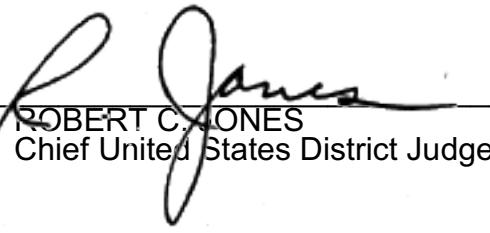
<sup>2</sup>Under 18 U.S.C. § 3006A(c), “the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.” Petitioner does not have a right to have one appointed counsel over another. A possibly invalid waiver thus is not a necessary precondition to a substitution order.

1       Finally, the Court is not persuaded that any different action is appropriate merely  
2 because respondents did not raise the issue until nearly a year after *Martinez*. The  
3 responsibility for addressing the conflict of interest ultimately rests with petitioner's counsel  
4 in the first instance. Here, the assumptions that the Federal Public Defender – as well as this  
5 Court – proceeded on regarding the propriety of the representation were overtaken by a  
6 subsequent event, *Martinez*. The Federal Public Defender simply is going to have to take the  
7 implications of *Martinez* into account in conflict review going forward, including with regard to  
8 currently pending cases.<sup>3</sup>

9       IT THEREFORE IS ORDERED that respondents' motion (#46) to disqualify petitioner's  
10 counsel is GRANTED and that the appointment of the Federal Public Defender, appearing  
11 through Megan Hoffman, Esq., is VACATED.

12       The Clerk of Court shall forward this order to the CJA Coordinator for this Division. The  
13 CJA Coordinator shall identify a replacement panel attorney and forward their name and  
14 address to the *pro se* law clerk assigned to the file, who thereafter shall forward a draft  
15 appointment and scheduling order for the Court's review.<sup>4</sup>

16       DATED: July 9, 2013.

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18  
19         
20 ROBERT C. JONES  
21 Chief United States District Judge  
22  
23  
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25       <sup>3</sup>The Court does not reach any issue as to whether the prospect that counsel potentially might be  
26 called as a witness also might provide a basis for disqualification.

27       <sup>4</sup>For the sake of expediency, the Court will allow replacement counsel the option, following a conflict-  
28 free review, of incorporating the current amended petition (#13) and exhibits by reference in whole or in part  
in any additional pleadings filed, the normal operation otherwise of Local Rule LR 15-1(a) notwithstanding.