Jon M. Sands
Federal Public Defender
Timothy M. Gabrielsen (Nevada Bar No. 8076)
Assistant Federal Public Defender
407 W. Congress, Suite 501
Tucson, AZ 85701
Telephone: (520) 879-7614
tim_gabrielsen@fd.org

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Robert Glen Jones, Jr., Petitioner, vs. Charles L. Ryan, et al., Respondents.	No. CV 03-478-TUC-DCB **LODGED** **MOTION FOR RELIEF FROM JUDGMENT** DEATH PENALTY CASE

Jon M. Sands
Federal Public Defender
Timothy M. Gabrielsen (Nevada Bar No. 8076)
Assistant Federal Public Defender
407 W. Congress, Suite 501
Tucson, AZ 85701
Telephone: (520) 879-7614
tim_gabrielsen@fd.org

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Robert Glen Jones, Jr., Petitioner, vs. Charles L. Ryan, et al., Respondents.	No. CV 03-478-TUC-DCB **MOTION FOR RELIEF FROM JUDGMENT** DEATH PENALTY CASE

TABLE OF CONTENTS

Relief Lies Pursuant to *Martinez* 2

Relief Lies Pursuant to *Brady* 3

I. INTRODUCTION 5

II. CHANGE OF LAW IN MARTINEZ REQUIRES RELIEF FROM JUDGMENT 9

A. The law of *Martinez* and § 2254 counsel's conflict of interest. 9

B. Mr. Jones claims are procedurally defaulted. 12

1. Trial counsel rendered ineffective assistance for failure to challenge David Nordstrom's EMS "alibi" on *Frye* grounds or to renew an inadequate foundation objection to the court's "conditional" admissibility of the evidence; PCR counsel rendered ineffective assistance for failing to exhaust the claim. 14

a. David Nordstrom's alibi. 14

b. Evidence of the unreliability of the BI EMS systems that existed prior to Mr. Jones' trial... 15

c. Trial counsel rendered deficient performance for failing to challenge the admission of the EMS evidence based on F*rye*. 17

d. Trial counsel rendered deficient performance for failing to renew his foundational objection to the EMS evidence. 19

2. Trial counsel rendered ineffective assistance under *Strickland* for failure to call Stephen Coats to rebut the prejudicial and false testimony of Lana Irwin, including with respect to Mr. Jones' purported admissions about a "kicked-in door"; PCR counsel rendered ineffective assistance for failing to introduce the testimony of Mr. Coats to rebut inculpatory statements Ms. Irwin attributed to Mr. Jones at the guilt phase of trial. 24

3. Trial counsel rendered ineffective assistance at the capital sentencing hearing for failing to object to the trial court's application of an unconstitutional causal nexus test to omit from its consideration Mr. Jones' proffered non-statutory mitigation; PCR counsel rendered ineffective assistance for failing to raise the claim that trial counsel rendered ineffective assistance for failing to object to the application of the causal nexus test. 28

C. The Court should grant relief from judgment pursuant to rule 60(b) based on *Martinez*. 33

1. The change of law in *Martinez* favors reopening the judgment. 33

(a) Whether the district court's interpretation of then-prevailing circuit precedent was correct or, put another way, whether the intervening change in the law "overruled an otherwise settled legal precedent." *Phelps*, 569 F.3d at 1135 (*quoting Gonzalez*, 545 U.S. at 536). 34

(b) Whether the change of law was less extraordinary due to the petitioner's lack of diligence in pursuing review. *Phelps*, 569 F.3d at 1135-36. 35

(c) Whether granting the motion would undo the past, executed effects of the judgment. *Id*. at 1137-38. 36

(d) Whether there has been delay between the judgment and the motion for Rule 60(b) relief. *Id*. at 1138. 36

(e) Whether the principle of comity would be impermissibly damaged by the grant of habeas relief. *Phelps*, 569 F.3d at 1139. 37

III. THE VIOLATION OF *BRADY* IN THE § 2254 PROCEEDINGS REQUIRES RELIEF FROM JUDGMENT. 38

A. The law with respect to disclosure in federal habeas corpus. 38

B. The *Brady* violation requires relief from judgment 41

Conclusion 44

Petitioner, Robert Glen Jones, Jr., through counsel, respectfully moves pursuant to Fed. R. Civ. P. 60(b) for relief from the judgment entered by the Court on January 29, 2010. S*ee* Dkt. 79. Mr. Jones alleges two distinct theories in support of this Motion for Relief from Judgment: 1) an extraordinary change in the procedural jurisprudence of the Supreme Court in *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309 (2012), allows merits consideration of claims of ineffective assistance of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), that are procedurally defaulted for failure to exhaust them "in an initial-review collateral proceeding" in Arizona, specifically in post-conviction relief ("PCR") proceedings. *Id*. at 1313. Mr. Jones alleges three claims of ineffective assistance of trial counsel under this theory, two that go to trial counsel's guilt phase omissions and one that goes to an omission at the capital sentencing hearing; and, 2) Appellees suppressed exculpatory evidence *in the § 2254 proceedings* in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and Ninth Circuit precedent, which deprived Mr. Jones of critical support for one of his claims of guilt phase ineffective assistance claims, to wit, counsel's failure to contest the admissibility of evidence of the "alibi" of suspect-turned-informant David Nordstrom, which derived from records generated by an electronic monitoring system ("EMS").

The former theory for relief from judgment, which applies to all three claims of constitutional deprivation, relies on the Ninth Circuit's change-in-law decision in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). The latter theory, which applies to the EMS alibi claim, relies on circuit precedent and the Tenth Circuit's persuasive opinion in *In re Pickard*, 681 F.3d 1201 (10th Cir. 2012), which holds that Rule 60(b) may be used to obtain relief from judgment where the prosecution withholds, *in a § 2255 proceeding*, *Brady* evidence that would, in turn, have supported a *Brady* claim that alleged the Government withheld evidence that *inculpated* the Government's key witness, an uncharged informant, and therefore *exculpated* the petitioner. Mr. Jones alleges an identical claim below.

Relief Lies Pursuant to *Martinez*

Martinez allows a habeas petitioner to establish ineffective assistance of PCR counsel as "cause" to excuse the failure to exhaust claims of ineffective assistance of trial counsel in the PCR proceedings. *Martinez*, 132 S.Ct. at 1313. Mr. Jones' three constitutional claims are procedurally defaulted for failure to exhaust them in state PCR proceedings. Two of those claims derive from trial counsel's failure to challenge the guilt phase testimony of key prosecution witnesses David Nordstorm and Lana Irwin. The third claim alleges trial counsel's ineffectiveness for failure to object to the state sentencing court's application of an unconstitutional causal nexus test, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The sentencing court's invocation of the causal nexus test prevented the court from weighing non-statutory mitigating evidence of Mr. Jones' history of drug abuse, which would have mitigated the present offenses and others used in aggravation, his having been physically abused and exposed to the physical abuse of his mother when he was a child, and a diagnosed personality disorder. The Ninth Circuit has granted the writ on virtually identical facts in recent cases.

The three claims described above were not exhausted in state court or raised in § 2254 proceedings but would now be considered "technically exhausted but procedurally defaulted," as noted in the Court's Memorandum of Decision and Order. Dkt. 79 at 4. There are two reasons why Mr. Jones is entitled to restoration of the *status quo ante* so that he may either supplement his § 2254 petition with those claims or to plead those claims in what should, as a matter of law, be considered a first § 2254 petition: 1) the rights in equity conferred by *Martinez* necessarily include restoration to the *status quo ante* and allow the pleading of claims that, prior to *Martinez* were not available due to the default; and, 2) the change in procedural jurisprudence also rendered Mr. Jones' § 2254 counsel conflicted where he also represented Mr. Jones in PCR proceedings and could not raise his own ineffectiveness to establish "cause" to excuse *his* failure to exhaust

claims of trial counsel's ineffectiveness in state court. The federal courts have begun to acknowledge the conflict implications for § 2254 counsel wrought by *Martinez*. *See e.g. Gray v. Pearson*, No. 12-5, 2013 WL 2451083 (4th Cir. June 7, 2013) at * 3. PCR counsel had a strong disincentive to evaluate whether *he* exhausted all of Mr. Jones' federal claims in the PCR petition and, therefore, suffered from an actual conflict of interest that requires that Mr. Jones be restore to the procedural position he occupied before the conflict arose. *See United States v. Del Muro*, 87 F.3d 1078, 1080 (9th Cir. 1996). This Court is asked to address these implications of *Martinez* as matters of first impression.

Relief Lies Pursuant to *Brady*

Investigation performed to support the *Martinez* claim on David Nordstrom reveals the near certainty that either the Pima County prosecutor knew of deficiencies in the EMS systems of Behavioral Intervention, Inc. ("BI"), of Boulder, Colorado, *or* failed to inquire of BI, or have the Arizona Department of Corrections ("ADC"), who contracted with BI for EMS services, inquire whether there were deficiencies that would have refuted Nordstrom's alibi, inculpated Nordstrom and exculpated Mr. Jones. Mr. Jones has consistently maintained that witnesses confused him and David Nordstrom.

Inquiry was particularly required in this case because the Arizona courts had not yet passed on whether EMS technology met the test for admissibility of such evidence under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which was in effect in Arizona at the time of Mr. Jones' trial. Prior to Mr. Jones' trial, BI was involved in civil and criminal proceedings based on allegations of its system malfunctions that resulted in parolees or others committing crimes. Since BI was integral to proving Nordstrom had an electronic alibi for the four homicides at the Fire Fighters Union Hall ("the Fire Fighters") and was therefore allied with the prosecution, the prosecutors had a duty to make requisite inquiries of BI for proof

of malfunctions and errors in its monitoring and reporting system. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Mr. Jones exhausted in the state PCR proceedings claims that trial counsel rendered ineffective assistance for failure to both impeach Nordstrom and to effectively challenge his EMS alibi with other witnesses, and those claims were pleaded in this Court in the federal proceeding. Dkt. 79 at 31, 34. This court characterized the claim as to Nordstrom's alibi as alleging trial counsel should have more effectively challenged the guilt phase testimony of Nordstrom's parole officer, Fritz Ebenal, and the Arizona Department of Corrections' EMS supervisor, Rebecca Matthews. *Id*. at 34. The Court ruled that the state PCR court was not unreasonable in concluding that Ebenal and Matthews were effectively cross-examined *and Mr. Jones produced no further witnesses to undercut the EMS evidence*. *Id*. at 34-35.

Thus, Appellees were on notice that the functioning of the BI EMS system was being challenged as part of an ineffective assistance claim. ADC's director contracted with BI. In a letter of July 29, 2013, ADC indicated that BI was responsible for monitoring parolees such as Nordstrom with BI's equipment. Ex. 5 at 1. However, there is no showing of record that Respondents have ever sought information from BI relative to the operation and functioning of the equipment used to monitor Nordstrom for ADC. The duty of disclosure under *Brady* attached to Appellees when the case entered PCR proceedings and continued in federal court because Appellees were on notice that the functioning of the EMS system was at issue. *See Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992). Rule 60(b) relief lies in the failure to disclose the exculpatory EMS evidence. *See Pickard*, 681 F.3d at 1205.

Rule 60(b) is "a grand reservoir of equitable power," which "affords courts the discretion and power 'to vacate judgments whenever such action is appropriate to accomplish justice.'" *Phelps*, 569 F.3d at 1135 (*quoting Harrell v. DCS*

Equipment Leasing Corp., 951 F.2d 1453, 1458 (5th Cir. 1992), and *Gonzales*, 545 U.S. at 542). Mr. Jones demonstrates below that the *vacatur* of his convictions or death sentences, due to omissions of his trial, PCR, and conflicted federal counsel, would be "appropriate to accomplish justice. *Gonzales v. Crosby*, 545 U.S. at 524. Jones relies for support on the attached Memorandum in Support and attached exhibits, and the state court and § 2254 records before the Court.

MEMORANDUM IN SUPPORT

I.

INTRODUCTION

David Nordstrom was a suspect in six Tucson homicides, two at the Moon Smoke Shop ("the Moon") on May 30, 1996, and four at the Fire Fighters on June 13, 1996. David cut a deal in which he served four years in prison after pleading guilty to armed robbery for events that took place at the Moon, in exchange for dismissal of the two murder counts. The FPD found him living in Sacramento. Ultimately, he was not charged with offenses that included four homicides at the Fire Fighters due, in primary part, to the admission of EMS records that allegedly provided him with an alibi for events at the Fire Fighters. He testified against Mr. Jones and his brother, Scott Nordstrom, at their separate trials. Mr. Jones and Scott were convicted of six homicides and sentenced to death by judges in separate trials in Pima County, Arizona. *See State v. Jones*, 197 Ariz. 290, 297, 4 P.3d 345, 352 (2000); *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 171 (2002).[1]

[1] Scott Nordstrom's death sentence was vacated pursuant to *Ring v. Arizona*, 536 U.S. 545 (2002), and he was re-sentenced to death by a jury. *See State v. Nordstrom*, 206 Ariz. 242, 77 P.3d 40 (2003).

Mr. Jones demonstrates he received ineffective assistance from PCR counsel, Daniel D. Maynard, Esq., who failed to exhaust two claims of guilt phase ineffective assistance of counsel. Mr. Maynard failed to challenge the credibility of David Nordstrom, whose "alibi" for the four homicides at the Fire Fighters derived from the admission of EMS records used to monitor him while on parole for an unrelated offense. The relative of one of the Fire Fighters victims, who was not a trial witness and whose identity does not appear to have been revealed until PCR proceedings, contacted the prosecution two months prior to trial to say she had evaded EMS detection for her Pima County probation and wanted to know why David Nordstrom's EMS evidence allowed him not to be charged with the Fire Fighters homicides. Ex. 20. She was monitored with a BI Model 9000. Information available at the time of trial shows that parolees evaded detection in other jurisdictions when monitored by BI, which manufactured the unit used on Nordstrom. BI even went to court in a Florida murder case prior to Mr. Jones' trial to prevent disclosure of trade secrets and methods of evading its EMS system.

Trial counsel allowed the EMS alibi evidence to be admitted without demanding proof that the new technology passed the test for admissibility under *Frye*, 293 F. 1013, or met other foundational requirements for admission under Arizona evidence law.[2] The record fails to reflect the production of any discovery implicating BI for any false or inaccurate information deriving from the use of its Model 9000 or other EMS systems in this or any other jurisdictions.

Since its recent appointment, the FPD has made records requests of the Pima County Attorney, which prosecuted the case against Mr. Jones, Exhibit 1; BI, Ex. 2; and, ADC, whose Parole Division conducted the home arrest electronic

[2] Arizona had not adopted at the time of trial the rule for admission of scientific evidence announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). It did so on January 1, 2012. *See State v. Salazar-Mercado*, No. 2-CA-CR-2012-0155, 2013 WL 3120192, at *1 (Ariz. App. Div. 2 June 20, 2013).

monitoring on David Nordstrom. Ex. 3. BI has not yet responded or supplied requested data on the BI Model 9000 that was used on Mr. Nordstrom. Ex. 4 at ¶ 6. BI has been forced to defend itself in civil litigation where its units malfunctioned and offenders evaded detection while in violation of curfew and committed violent crimes. BI likely will not respond without being compelled by subpoena to do so. BI representatives have even been called to testify in other criminal cases.

Ms. Ondreyco, who responds to public information requests for the ADC and who confirmed for undersigned counsel that it was, indeed, the BI Model 9000 that was used to monitor David Nordstrom, agreed to attempt to assist in efforts to obtain the requested unit tracking and repair data from BI but she is not optimistic that it will be produced without a subpoena. *Id*. at ¶ 3. Ms. Ondreyco ultimately concluded that ADC no longer has records on site, due to a six-year records retention policy, and wrote on July 29, 2013, to say she has requested records from the Arizona State Library, Archives and Public Records at Arizona State University. Ex. 5. Those records have not yet been produced. Significantly, Ms. Ondreyco also states Nordstrom "was monitored electronically by BI and the monitoring system was maintained electronically by BI." *Id*.

Undersigned counsel requested authorization from the Pima County Attorney's Office to review files on David Nordstrom and Mr. Jones that might include EMS records. Ex. 1 at 1. The FPD's review found those records completely lacking with respect to EMS records. Ex. 4 at ¶ 4. Undersigned counsel wrote the head of the Pima County Attorney's Criminal Division, Ms. Kellie Johnson, a second time with a specific request for access to EMS records for that period, including those implicating BI. Ex. 1 at 2. Ms. Johnson called to say she had not found responsive records but referred the request to Steve Merrick, the prosecution's trial investigator in the cases of Mr. Jones and David and Scott Nordstrom. He is still with that office. Ex. 4 at ¶ 5. He has not responded. *Id*.

In light of other evidence set forth below that demonstrates the units malfunctioned, it is vital that Mr. Jones be permitted to develop, as a basis for relief from judgment evidence that Respondents, in the § 2254 proceedings, either failed to disclose EMS records within their possession or failed to obtain from BI or ADC evidence that would have impugned the BI Model 9000 and undercut the accuracy of records it generated and, therefore, David Nordstrom's alibi.

Mr. Maynard also failed to claim in state PCR court or federal court that trial counsel rendered ineffective assistance for failing to investigate and introduce evidence, including testimony of Stephen Coats, to refute the testimony of Mr. Coats' then-girlfriend and key prosecution witness Lana Irwin, who testified to having overheard Mr. Jones make admissions concerning the homicides to Mr. Coats. Not only would this have constituted substantive evidence of Mr. Jones' innocence, but it would have refuted the state and federal court rulings to the effect that Mr. Jones could not prove sufficient prejudice with respect to other constitutional claims of guilt phase error, in large measure, due to the testimony of Ms. Irwin. Refuting the substance of her trial testimony would have altered dramatically the prejudice calculus and required that the writ issue.

Mr. Jones must now be permitted to assert a claim of ineffective assistance of counsel at capital sentencing that should have been raised in PCR and § 2254 proceedings, to wit, that counsel rendered ineffective assistance for failing to object to the sentencing court's application of a causal nexus test to exclude from its consideration proffered non-statutory mitigating evidence of drug abuse history, physical abuse he suffered and observed as part of his dysfunctional childhood, and a diagnosed personality disorder, in violation of *Eddings*, 455 U.S. 104. The Ninth Circuit has granted relief recently in two cases based on violations of *Eddings*. *See Williams* (*Aryon*) *v. Ryan*, 623 F.3d 1258, 1271 (9th Cir. 2010); *Styers v. Schriro*, 547 F.3d 1026, 1034-36 (9th Cir. 2008) (*per curiam*).

Mr. Jones sets forth the law with respect to *Martinez* and its application in recent Ninth Circuit cases that have been remanded for evidentiary hearings on the ineffective assistance of trial and PCR counsel. Mr. Jones also sets forth in detail the support for his substantial claims of trial counsel's ineffective assistance and that of Mr. Maynard in the PCR proceedings as "cause." Finally, Jones sets forth the law with respect to Rule 60(b) and why it entitles him to habeas relief.

II.

CHANGE OF LAW IN *MARTINEZ* REQUIRES RELIEF FROM JUDGMENT

A. The law of *Martinez* and § 2254 counsel's conflict of interest.

Martinez holds that ineffective assistance of counsel in an initial-review collateral proceeding in Arizona, such as initial petitions for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., constitutes "cause" to excuse the failure of that counsel to exhaust a federal constitutional claim of ineffective assistance of trial counsel. 132 S.Ct. at 1315. The *Martinez* Court noted that *Coleman v. Thompson*, 501 U.S. 722 (1991), left open the question "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Martinez*, 132 S.Ct. at 1315.

Martinez announced a two-pronged test for whether PCR counsel's ineffectiveness constitutes "cause": 1) whether counsel rendered ineffective assistance in failing to raise the claim of trial counsel's ineffectiveness; and, 2) whether the underlying claim of trial counsel's ineffectiveness is a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id*. at 1318-19. The standard for whether the underlying ineffective assistance claim is "substantial" is whether reasonable jurists could debate its merits. *Id*. (*quoting* the standard for the granting of a certificate of appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). *Martinez* has retroactive effect. 132

S.Ct at 1321 (remanding to "determine whether Martinez's attorney in his first collateral proceeding was ineffective and whether his claim of ineffective assistance of trial counsel is substantial."

Thus, Mr. Jones had a right to have his § 2254 counsel assert the ineffective assistance of PCR counsel as cause to excuse the failure to exhaust claims of ineffective assistance of counsel in the state PCR courts. *Martinez*, however, rendered Mr. Maynard's representation of Mr. Jones conflicted. Mr. Maynard was appointed to represent Mr. Jones in state PCR proceedings on or about August 31, 2001, *see State v. Jones*, Pima Co. No. 57526, PCR Dkt. 1, and he would represent Mr. Jones until the Arizona Supreme Court denied the Petition for Review from denial of post-conviction relief on September 9, 2003. *See State v. Jones*, Az. S.Ct. No. CR-03-0002-PC, Dkt. 13. This Court then appointed Mr. Maynard to represent Mr. Jones on October 8, 2003, Dkt. 5, and Mr. Maynard remained as his counsel until the Ninth Circuit granted his motion to withdraw on April 24, 2013, following his filing of a petition for certiorari in the Supreme Court of the United States after denial of habeas corpus relief. Ninth Cir. No. 10-99006, Dkts. 56, 57.

The record here fails to reflect any circumspection on the part of Mr. Maynard with respect to the claims he raised on the PCR petition. He raised precisely the same federal claims in the § 2254 petition. C*ompare* Memorandum in Support of Petition for Post-Conviction Relief, *State v. Jones*, Pima Co. No. CR-57526, February 15, 2002, Dkt. 16 at 3 - 39, *with* Amended Petition for Writ of Habeas Corpus by a Person in State Custody, Dkt. 27 at 7 - 39.

Mr. Maynard did not and could not seek the relief Mr. Jones seeks here pursuant to *Martinez* because he could not ethically or practically bring claims of his own ineffectiveness. *See Gray*, 2013 WL 2451083 at * 3 (state PCR counsel cannot represent the petitioner in *Martinez* proceedings due to a clear conflict of interest); *Bergna v. Benedetti*, No. 3:10-CV-00389-RCJ, 2013 WL 3491276, at *2 (D.Nev. July 9, 2013) ("Following *Martinez*, there in truth can be no dispute that

petitioner does not currently have conflict-free counsel" because his § 2254 counsel at the FPD's office represented him in his state PCR proceedings).

As noted above, there is strong disincentive for an attorney to seek evidence and argue his own ineffectiveness. *See Del Muro*, 87 F.3d at 1080. *See also Abbamonte v. United States*, 160 F.3d 922, 925 (2d Cir. 1998) (an attorney is generally disinclined to "seek out and assert his own prior ineffectiveness," excusing procedural default on an ineffective assistance of trial counsel claim in a § 2255 proceeding). Those federal rulings are in accord with the Arizona Supreme Court's view of conflict where the same counsel represents a defendant in successive stages of criminal proceedings. *See State v. Bennett*, 213 Ariz. 562, 566 (2006) (it is improper for appellate counsel to argue his own ineffectiveness at trial or for PCR counsel to argue his ineffectiveness on direct appeal; the "standard for determining whether counsel was reasonably effective is 'an objective standard' which we feel can best be developed by someone other than the person responsible for the conduct.").

While the practice of appointing the same counsel in federal court may result in cost and time saving because new counsel is not required to familiarize himself with the record or draft pleadings from scratch, it also deprives a petitioner facing the death penalty the circumspection that would come with having a different set of eyes evaluate whether his conviction and death sentence were imposed in violation of the United States Constitution. The ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) contemplate that the same counsel will *not* represent the client is successive stages of litigation. Guideline 10.7(B)(1) states that "[c]ounsel at every stage have an obligation to conduct a full examination of the defense provided at all prior phases of the case. This obligation includes at a minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel." *Martinez* rendered the change of counsel imperative once Mr. Jones' case went to federal

habeas corpus. Rule 6.8(c)(4), Ariz. R. Crim. P., states that Arizona attorneys are to be guided by the standards announced in the 2003 ABA Guidelines.

The relief requested by Mr. Jones, to wit, application of *Martinez* and merits consideration of three defaulted claims, is not novel. After the Supreme Court's decision, the Ninth Circuit remanded *Martinez* to the district court for application of the Court's new rule. *See Martinez v. Ryan*, 680 F.3d 1160 (9th Cir. 2012). The Court recently ordered a hearing to determine whether the petitioner in an Arizona capital habeas case set forth a substantial claim of ineffective assistance of trial counsel in his *Martinez* Motion. *See Atwood v. Ryan*, U.S.D.C. No. CV-98-116-TUC-JCC, Dkt. 401. The Ninth Circuit has stayed multiple Arizona capital § 2254 appeals, including oral argument, and remanded to the district court for consideration of cause and prejudice under *Martinez*, or has affirmed the denial of habeas relief but remanded nonetheless for consideration of cause to excuse the default resulting from PCR counsel's failure to investigate and present entire claims or even facts supporting a claim of ineffectiveness of trial counsel. *See Runningeagle v. Ryan*, 686 F.3d 758 (9th Cir. 2012); *Runningeagle*, Ninth Cir. No. 07-99026, Dkts. 55 at 12-15, 59-1; *Lopez*, Ninth Cir. No. 09-99028, Dkt. 56. The Ninth Circuit, sitting *en banc*, heard argument on June 24, 2013, on the parameters of the application of *Martinez* in an Arizona capital habeas appeal. *See Dickens v. Ryan*, Ninth Cir. No. 09-99017, Dkts. 69, 73, 89 (argued and submitted). Several capital habeas appeals have been stayed by the Ninth Circuit to await the *en banc* decision in *Dickens*. *See Gallegos v. Ryan*, Ninth Cir. No. 08-99029, January 8, 2013, Dkt. 56 (court vacated the submission of a capital appeal one and one-half years *after* oral argument, pending the *en banc* consideration in *Dickens*). *Dickens* will arrive in short order.

B. Mr. Jones claims are procedurally defaulted.

Mr. Jones' three ineffective assistance of trial counsel claims, which follow in Sections 1, 2, and 3 are procedurally defaulted for *Martinez* purposes to the full

extent they would be were Mr. Maynard to have raised them in the § 2254 petition. Consistent with this Court's Memorandum of Decision and Order and established federal law, Maynard failed to exhaust them in the state courts, and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." Dkt. 79 at 3-4, *citing Coleman v. Thompson*, 501 U.S. 722, 735 (1991); *Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998). *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). *See also Martinez v. Schriro*, U.S.D.C. No. CV-05-1561-PHX-EHC, Dkt. 88 at 6 (March 20, 2008) ("[i]f no remedies are currently available pursuant to Rule 32, the claim is 'technically' exhausted but procedurally defaulted"; *Gulbrandson v. Stewart*, U.S.D.C. No. CV-98-2024-PHX-SMM, Dkt. 46 at 4 (August 30, 2000) (same). As is true here after *Martinez*, a petitioner with a technically exhausted and procedurally defaulted claim must show cause and prejudice for the federal courts to reach the merits. *See Ortiz*, 149 F.3d at 931. In theory, the federal courts might allow Mr. Jones a stay of his § 2254 case and hold it in abeyance in order to permit him to return to the state courts to exhaust these three claims, *see Rhines v. Weber*, 544 U.S 269 (2005), but the Arizona courts would now find the claims defaulted under Ariz. R. Crim. P. 32.2(a)(3).

In recent oral arguments, judges have asked whether Arizona has changed its practice to accommodate the new rule in *Martinez* and allow claims of ineffective assistance of trial counsel to be brought in a successive Rule 32 petition. *Dickens*, Ninth Cir. No. 08-99017 (oral argument of June 24, 2013; question from Judge Kozinski); *Spreitz v. Ryan*, Ninth Cir. No. 09-99006 (oral argument of July 11, 2013; question from Judge Berzon). Undersigned counsel is unaware of any change in Arizona practice. *Martinez* does not require state court conformity. To the contrary, *Martinez* indicates state courts are free not to conform their practices to accommodate its new equitable rule, whereas a constitutional rule would have required state court conformity. 132 S.Ct. at 1319-20. However, if the state courts

are unwilling to modify default rules, the federal courts are compelled to consider the ineffective assistance of state PCR counsel to determine whether the petitioner is entitled to review of his defaulted claims.

Mr. Jones has alleged three substantial procedurally defaulted claims:

1.

Trial counsel rendered ineffective assistance for failure to challenge David Nordstrom's EMS "alibi" on *Frye* grounds or to renew an inadequate foundation objection to the court's "conditional" admissibility of the evidence; PCR counsel rendered ineffective assistance for failing to exhaust the claim.

a. David Nordstrom's alibi.

David Nordstrom admitted he participated in the Moon homicides, but only as the getaway driver. Tr. 6/23/98 at 110. He denied any participation in the four homicides at the Fire Fighters, testifying that he was home at the time of those offenses because of his parole curfew. *Id*. at 119. To bolster Nordstrom's veracity, the prosecution presented testimony to the effect that the EMS system showed Nordstrom not to have been in violation on June 13, 1996, the date of the Fire Fighters homicides. Testimony was elicited from: 1) Nordstrom, that there was no way to remove the EMS bracelet and that there was no way to get around the system used on him. *Id*. at 115; 2) Fritz Ebenal, David's parole officer who described the EMS system, how it worked, and the alarm reports (or lack thereof) generated on Nordstrom by the system at the time of the homicides. *Id*. at 242-259, attached here as Ex. 14; 3) Rebecca Matthews, the ADC parole supervisor with responsibility over the parole of Nordstrom, who described the EMS system generally and a test of the system at Nordstrom's house in the fall of 1997. Tr. 6/24/98 at 29-47; and, 4) Detective Woolridge, who participated in the aforementioned test of the EMS system. Tr. 6/25/98 at 29.

b. Evidence of the unreliability of the BI EMS systems that existed prior to Mr. Jones' trial.

BI pioneered the technology after manufacturing it to monitor cows. Ex. 5 at 1. By 1994, BI was responsible for the manufacture of 65 to 70% of the units in use, which monitored 45 to 50% of inmates on EMS nationwide. *Id*.

In November 1996, a 14-year-old girl was run over by her 16-year-old boyfriend as she walked down a road in Jupiter Farms, Florida. Ex 6. Her boyfriend, who was charged with second degree murder, was monitored by a BI EMS system. BI was quoted as saying its EMS system functioned properly when it reported no violation for the offender that evening. *Id*. Yet, two jail inmates reported the offender confessed he killed the girl, and an acquaintance of the offender said he, too, was able to "leave his residence and go out of range [of the EMS] undetected for short periods of time." *Id*. When questioned by investigators, BI acknowledged that there was a "default feature" in the system that allowed for offenders to be out of range for a period of time it would not specify. *Id*. at 2. A Florida DOC spokesperson stated that the DOC was not even aware that BI built a reporting delay into the system until the inmates reported the confession. Ex. 7 at 1.

On June 6, 1998, BI moved, successfully, to seal the portions of trial where testimony would be given how offenders could slip out of the BI EMS ankle bracelets. Ex. 8 at 1. That did not prevent the prosecutor from telling jurors in opening statement on July 10, 1998, that all the offender needed to do to slip out of the BI ankle bracelet was step into a bucket of water, use a dinner spoon to snap off the monitor, and the water would block the signal from going to house-arrest supervisors. Ex. 9 at 1. "The monitor, which is fooled into 'thinking' it is still connected to the bracelet, stays at home while the offender can stray as far and as long as he wishes." *Id*. She also stated that an offender could leave his residence for up to seven minutes before a signal was transmitted. *Id*.

In a Security and Exchange Commission ("SEC") filing, BI reported that in April 1995, a lawsuit was filed in Cook County, Illinois, against BI, the county sheriff, the county corrections department, and parolee Gerald Hodges alleging wrongful death based on malfunction of a BI EMS system used to monitor Hodges. Ex. 10 at 3. The case involved the murder of Seke Willis by Hodges in a gang-related incident. *See* Brief of Defendant-Appellant, *People v. Hodges*, No. 1-95-1093, 1996 WL 33651749 (Ill.App. 1st Dist. Jan. 25, 1996). The BI violation report showed Hodges was out of compliance with his curfew at 10:32 p.m., shortly before the shooting. *Id*. However, a prosecution witness testified that the offender was actually present at a party near the murder scene even prior to that time, although no violation report was generated. *Id*. at *13 n. 8. SEC documents fail to specify whether the civil case against BI was settled or dismissed. Ex. 10.

In August of 1996, an intoxicated offender subject to BI electronic monitoring by the Missouri Department of Corrections drove his vehicle across the center line, striking the oncoming vehicle of Gary Trout, killing both the offender and Mr. Trout. *Trout v. Gen. Sec. Servs. Corp.*, 8 S.W.3d 126, 130-31 (Mo. Ct. App. 1999). The offender was out past his curfew pursuant to the home arrest system. *Id*. On May 6, 1997, suit was brought against several entities, including BI for faulty manufacturing. Ex 10 at 9. At trial, it was determined that the system correctly registered the violation of curfew but testimony of a parole officer indicated other problems with the system, notably the existence of signals that incorrectly noted the offender's absence depending on the placement of the equipment within the offender's residence. *Trout*, 8 S.W.3d at 130-31. BI was no longer a party to the litigation when the matter was appealed. *Id*. at 129.

In October 1996, a Pennsylvania teen sued the Allegheny County Monitoring Program, its supervisor and the unnamed EMS manufacturer after the EMS system falsely reported him to be in violation, which resulted in a detention that caused him to miss 24 days of high school. Ex. 11 at 1. The manufacturer

later tested the unit and acknowledged it malfunctioned. *Id*. SEC filings indicate that BI was the manufacturer. Ex. 10 at 9. On January 29, 1998, BI settled the suit. *Id*. at 12.

During the pendency of Mr. Jones' PCR proceedings, a 1999 Florida newspaper article reported that during a trial for the a rape and murder of a 19-year-old woman, an installer of BI EMS units in Charlotte County, Florida, described a type of pliers that could be bought at a hardware store that could be used to remove an ankle bracelet without it transmitting a violation. Ex. 12 at 1. A BI spokeswoman, apparently seriously, pointed out for that article that "the devices are only as good as the state's will to enforce the penalties for violators." *Id*.

Mr. Jones' evidentiary support, which includes news accounts, reported cases, and legally-compelled SEC filings by BI, is by no means complete. BI has not responded to Mr. Jones' request for relevant records. He requests assistance from the Court to compel BI's compliance with his request for its records of their units' malfunction, including in Arizona.

c. Trial counsel rendered deficient performance for failing to challenge the admission of the EMS evidence based on F*rye*.

At the time of Mr. Jones' trial, Arizona adhered to the test of *Frye*, 293 F. 1013, governing admissibility of new scientific evidence. *See State v. Bible*, 175 Ariz. 549, 580, 858 P.2d 1152, 1183 (1993). The *Frye* test required satisfaction of two preliminary conditions for the admissibility of such evidence: (1) general acceptance in the relevant scientific community of the principle being applied; and, (2) general acceptance of the techniques used in the application of the principle. *State v. Lehr*, 201 Ariz. 509, 515-16, 38 P.3d 1172, 1178-79 (2002) (citations omitted), *death sentence vacated pursuant to Ring*, 536 U.S. 584, in Supplemental Opinion, 205 Ariz. 107, 67 P.3d 703 (2003). If those conditions were met, *Frye* required a distinct foundational showing that the procedures followed in a given case were correct. *Id*.

Despite the negative treatment of the BI Model 9000 nationally at the time of Mr. Jones' trial, and the fact that there was no published decision in Arizona that the BI Model 9000 was generally accepted in the scientific community, or that the techniques employed to secure the data it generated and recorded were accepted, trial counsel failed to move for a *Frye* hearing. The prosecution failed to move for a hearing or otherwise prove general acceptance in the scientific community of the BI Model 9000 in use in Pima County when Nordstrom was monitored. The prosecution did not prove the acceptance of the techniques used in the application of the BI Model 9000. In the absence of a showing of acceptance of the principle at issue, to wit, the reliability of an EMS system premised on use of an ankle bracelet with transmitter, monitor, modem and phone line, the evidence was not admissible under *Frye*. The record fails to establish further that BI's techniques in securing and generating data had gained acceptance at the time of Mr. Jones' trial. If anything, a pattern emerged that BI was encountering difficulties with the techniques it was employing. Trial counsel's performance was deficient because had he moved for a *Frye* hearing, the prosecution could not have produced evidence of general acceptance of the BI Model 9000 used to monitor David Nordstrom.

In *Bible*, the Arizona Supreme Court indicated that "[t]he foundation needed when *Frye* is satisfied relates to the expert's qualifications, proper application of testing techniques, and accurate recording of test results." 858 P.2d at 1184. With respect to the DNA evidence sought to be admitted the Arizona Supreme Court found "the state made a proper foundational showing (as opposed to, and distinct from, the *Frye* finding discussed below) for the performance of DNA testing. The laboratory personnel had adequate qualifications, the test used was that described by the Cellmark testing protocol, and the results were properly recorded." *Id*.

In *Jones*, there was no testimony that BI's system was installed on David Nordstrom and in his residence consistent with BI's protocol. In fact, Parole Officer Ebenal stated in his transcribed pretrial interview that he had not even seen BI's training manual but has "looked over some of their things that have come down from time to time." Ex. 16 at 47. The name "BI" was never even mentioned at trial. Detective Woolridge and Parole Supervisor Matthews failed to identify the system as one manufactured by BI or testify that the test they ran on EMS equipment was consistent with BI's protocol for testing that unit. As Ms. Matthews acknowledged, at a minimum, the ankle bracelet and transmitter were unrelated to the equipment employed with respect to David Nordstrom. There is no showing the other equipment that comprised that EMS system tested was actually used to monitor Nordstrom. For the reasons that follow, the evidence presented did not even meet the less stringent foundational requirements for admissibility under Arizona evidence law.

d. Trial counsel rendered deficient performance for failing to renew his foundational objection to the EMS evidence.

In 1997, just a year before Mr. Jones' trial, the Arizona Court of Appeals noted "[n]o appellate court in this state has had occasion to examine the foundational requirements for the admission of evidence received from an electronic device used to monitor persons on home arrest." *State v. Rivers*, 190 Ariz. 56, 59, 945 P.2d 367, 370 (Ariz. Ct. App. 1997). The court, which did not indicate whether the EMS at issue was a BI Model 9000, ruled that Rivers waived a *Frye* claim because a challenge to admissibility based on lack of general acceptance in the scientific community was not alleged at trial. 945 P.2d at 371 n. 3. *Rivers* cited a Texas appellate court case, *Ly v. State*, 908 S.W.2d 598 (Tex.App.1995), that considered the foundation question and agreed that the evidence related to EMS, including the use of printout data and testimony of the defendant's parole officers regarding the system, was admissible. *Id*.

The *Rivers* and *Ly* Courts found that foundation was proved because there was testimony that the *actual equipment used on the defendants in those cases* was tested and shown to be reliable. In *Rivers*, testimony showed that the parole officer who actually installed the EMS on the defendant and in his home tested it to make sure it was functioning appropriately. A second parole officer testified that the system appeared to be working and that in 200 to 300 other cases, he did not recall ever getting "incorrect information" from the equipment. 945 P.2d at 369-70. The court found this testimony to constitute proof of "the equipment's general accuracy and reliability." *Id*.

In *Ly*, as in *Rivers*, the person responsible for monitoring the defendant's EMS compliance testified to the reliability and accuracy of EMS used to monitor the defendant. The witness testified that, "on the day of the alleged violation, she contacted the company that manufactured and sold the electronic-monitoring equipment to verify the equipment was operating properly." *Rivers*, 945 P.2d at 370 (*quoting Ly*, 908 S.W.2d at 600-01). Thus, the *Rivers* court concluded, the jury could "reasonably conclude that the monitoring equipment was functioning properly" at the relevant time in that case. *Id*. There has been no Arizona court decision subsequent to *Rivers* suggesting that examination of the actual equipment is not a crucial foundational element for admissibility of EMS testimony.

Here, there was no evidence or testimony that in any way related to the use or testing of the actual equipment used to monitor Nordstrom, other than Nordstrom's own self-serving testimony that he could not get around the system. Contrary to the parole officer's testimony in *Rivers* that he never received incorrect EMS information in 200 to 300 cases, Mr. Ebenal conceded in his testimony that mistakes can be made with respect to the EMS. Ex. 14 at 262-63. Mr. Ebenal also testified that codes would be transmitted to his pager to report activities of parolees, but "after hours," the codes would be reported to "Central Communications." *Id*. at 247. Mr. Ebenal did not explain what he meant by the

term "after hours" or whether a violation, for example, at 9 p.m. on June 13, 1996, the time and date of the Firefighters homicides, would have gone to him or Central Communications. No one from Central Communications testified to whether a violation was reported on June 13, 1996, or if, how or when those codes would be sent to Mr. Ebenal. Mr. Ebenal also testified that Mr. Nordstrom's curfew could be changed to accommodate his activities, including employment and AA meetings or to give him "personal time." *Id*. at 253-54. Nordstrom testified he violated curfew and falsified his employment records while on parole. Tr. 6/23/98 at 162-63. This, apparently, was not a hard and fast curfew.

Unlike in *Ly*, no one testified to having checked with the manufacturer to make sure the system was operating properly on June 13, 1996, the date of the Fire Fighters homicides. BI's name was not even mentioned at trial, and there is no indication the prosecution or defense ever contacted BI to obtain purchase, repair or tracking records for the device used on Nordstrom or on the BI Model 9000 generally. Presumably it could have been tracked, as Mr. Ebenal testified that it bore a specific serial number. *Id*. at 245. There is no evidence that ADC, whose Parole Division monitors the EMS defendants, ever contacted BI to learn whether there were incorrect information reports generally with respect to the BI Model 9000 around May 30 and June 13, 1996, when David Nordstrom was suspected in the six homicides. The ADC representative, Ms. Ondreyco, indicates in her letter of July 29, 2013, that "the inmate was monitored electronically by BI and the monitoring system was maintained electronically by BI." Ex. 5 at 1. That appears to conflict with the trial testimony of Mr. Ebenal that ADC's Parole Division monitored David Nordstrom. Ex. 14 at 244 (the unit "calls *us* and tells *us* that he's there and it's hooked up and whether or not it's a good connection or not.") (italics added).

Parole Supervisor Rebecca Matthews testified she conducted a test in 1997, the year after the homicides, on a field monitor device ("FMD") and ankle bracelet

of the same type used to monitor Nordstrom, but she conceded she did not know whether the ankle bracelet she tested was actually the one worn by Nordstrom. Tr. 6/24/98 at 33-34. She was not asked whether the FMD was the same one in use on Nordstrom. The system depended on a properly functioning telephone line, but Ms. Matthews did not know whether the test was conducted on the actual phone at the Nordstrom residence that was in use at the time David was being monitored. *Id*. at 35.

When the trial court indicated that the prosecution's failure to provide evidence it was the same phone line would cause a foundation problem with admission of Nordstrom's EMS alibi, and defense counsel objected on relevance grounds, Prosecutor White told the court, "Terri Nordstrom [David's step-mother] is going to testify. I'll avow she will testify it's the same phone." *Id*. at 36. Ms. Nordstrom was not called by the prosecution. She was called as a defense witness the following day and testified to David's poor reputation for truthfulness. Tr. 6/25/98 at 55. Defense counsel failed to ask Ms. Nordstrom anything about the phone line in her residence at the time David was being monitored and failed to renew his foundation objection. And while Ms. Nordstrom was asked on cross if David was on EMS when he came home from prison, Prosecutor White never asked whether the phone in her home in 1996 was the one later tested by Ms. Matthews and Detective Woolridge in 1997. *Id*. at 57-58. Prosecutor White had good reason not to ask that question, as Ms. Nordstrom testified at Scott Nordstrom's earlier trial that the phone line tested by officers in 1997 was *not* the same phone line that was used to monitor David the year earlier. *See* Tr. 11/19/97 at 67-70, *State v. Scott Nordstrom*, Pima Co. No. CR-55947. Mr. White was clearly not going to prove foundation at Mr. Jones' trial with her testimony. Thus, the foundation required by the trial court for admissibility of the EMS evidence was never proved.

The false avowal/phone line prosecutorial misconduct claim was ruled to be precluded by the PCR court because it was not objected to at trial and not raised on direct appeal. Ex. 15 at 3. The court denied relief under fundamental error review. *Id*. at 4. The court later noted trial counsel's failure to object and found any error to have been harmless because of the admission of Parole Supervisor Matthews' testimony that the EMS would work no matter what phone line was employed. *Id*. at 10. Yet, Ms. Matthews' testimony was infirm for the reasons described above, to wit, her 1997 test did not have as its subject the actual EMS unit used to monitor David Nordstrom. Her testimony failed to establish foundation for the admission of the EMS evidence.

Notwithstanding the absence of foundation, the prosecutor clearly implied that the test showed that the monitoring system used on Nordstrom was functional and accurate. He asked Detective Wooldridge whether she participated in a test of "that monitoring system," to which she replied "Yes, I did." *See e.g.* Tr. 6/25/98 at 28. Her testing of "that system" implied it was Nordstrom's unit. Mr. Jones' trial counsel failed to object to Detective Woolridge's testimony on relevance grounds, and failed to renew the foundation objection of the previous day for which Prosecutor White misled the trial court as to Ms. Nordstrom's prospective testimony about the phone line.

In spite of clear precedent in *Rivers*, just a year before Mr. Jones' trial, and the utter lack of information presented at trial related to the actual equipment used to monitor Nordstrom at the time of the homicides, trial counsel failed to request a *Frye* hearing to determine whether the evidence should be admitted. Additionally, despite the conditional nature of the trial court's ruling that testimony regarding the test of the equipment was admissible, trial counsel failed to move to exclude the evidence when the court's conditions were not met by the prosecution. These failures clearly amount to deficient performance. PCR counsel's failure to raise a claim of ineffective assistance of trial counsel despite the above referenced clear

evidence of ineffective assistance also constituted deficient performance under *Strickland*, 466 U.S. 668.

Mr. Jones was prejudiced by the admission of the EMS evidence such that, in its absence, there is a reasonable probability that Mr. Jones would not have been convicted. *Strickland*, 466 U.S. at 694. David Nordstrom's EMS alibi for the Fire Fighters rendered more credible his testimony that he did not participate in those four homicides, and it bolstered his testimony he merely drove a getaway car at the Moon rather than participated in the homicides inside the building. Bolstering David Nordstrom's testimony rendered less likely the jury would believe Mr. Jones' defense that he was innocent, the Nordstroms committed all six homicides, and witnesses confused the two red-haired co-defendants, Mr. Jones and David Nordstrom. *See Jones*, 4 P.3d at 355.

The Arizona Supreme Court called Nordstrom "the state's key witness." *Jones*, 4 P.3d at 355. That would be an apt characterization of a testifying co-defendant who, in this case, stood to avoid the death penalty for his testimony against his co-defendants. The court found harmless the admission of Nordstrom's prior consistent statement to Toni Hurley, his girlfriend and conduit through which he channeled his words to police to obtain reward money, finding that "all of David's testimony about Jones' involvement and admissions would have been admissible." *Id*.

2.

Trial counsel rendered ineffective assistance under *Strickland* for failure to call Stephen Coats to rebut the prejudicial and false testimony of Lana Irwin, including with respect to Mr. Jones' purported admissions about a "kicked-in door"; PCR counsel rendered ineffective assistance for failing to introduce the testimony of Mr. Coats to rebut inculpatory statements Ms. Irwin attributed to Mr. Jones at the guilt phase of trial.

Lana Irwin testified that she overheard a conversation between Mr. Jones and Stephen Coats in which Mr. Jones stated that they kicked in a door at the Moon. Tr. 6/19/98 at 47. Detective Woolridge testified that Ms. Irwin told her prior to trial that Mr. Jones told Irwin the back door to the Moon had been kicked in. Tr. 6/25/98 at 38. Detective Woolridge also testified that no testimony came out at Scott Nordstrom's earlier trial that the door had been kicked in. *Id*. Detective Joseph Godoy testified that there was damage to the back door of the Moon when he arrived there. Tr. 6/18/98 at 96. In closing argument, Assistant County Attorney David White stated that Ms. Irwin testified that Mr. Jones told Mr. Coats a door was kicked in, and a door was, in fact, kicked in, which bolstered her guilt phase testimony. Tr. 6/25/98 at 130. Mr. White also argued that there was no testimony at Scott Nordstrom's trial about a door being kicked in. *Id*.

As this Court is aware, Detective Woolridge's testimony and Prosecutor White's closing argument were found by the state PCR court to have been false, and Detective Godoy's testimony to have been inconsistent with his testimony eight months earlier at Scott Nordstrom's trial that *police* kicked in the door. *See* Ex. 15 at 4-7. In the state PCR petition, Mr. Maynard alleged prosecutorial misconduct for eliciting the false testimony to bolster Ms. Irwin's testimony that the suspects kicked in the door. Ex. 17 at 4-10. Mr. Maynard also alleged counsel rendered ineffective assistance by failing to impeach Ms. Irwin's testimony with the inconsistencies in the testimony of Godoy and Woolridge that could have been gleaned from their testimony at Scott's trial and from police reports. Id. at 27.

In denying relief, the PCR court noted there was no objection by Mr. Jones' trial counsel to their false trial testimony and the error was harmless:

> [t]estimony about the kicked-in door was but one of many correlations between Jones' statements overheard by Irwin and the facts of the crimes. It is highly probable that the great weight of evidence elicited at trial would have resulted in Petitioner's conviction even if Irwin had not testified about the kicked-in door. In the overall context of

> the evidence presented at trial, the Court is convinced that the testimony concerning the kicked-in door likely did not prejudice the Petitioner nor affect the verdicts. Therefore the claim is rejected on the merits.

Ex. 15 at 5-6.

Significantly, the PCR court also rejected the ineffective assistance claim because "[t]he kicked-in door was but one of the dozen or so correlations with the facts of the crime that were adduced from the testimony of Lana Irwin about the conversations she overheard between Jones and Coats. The court is not convinced that, had an issue been made of the kicked-in door, it would have shaken the credibility of Irwin or changed the outcome of the trial." *Id*. at 19. This Court agreed the kicked in door was "but one of a dozen or so correlations with facts of the crime that were adduced from the testimony of Lana Irwin about the conversations she overheard between Jones and Coats." Dkt. 79 at 33.

The testimony of Mr. Coats, who lived with Ms. Irwin, would have refuted the "dozen or so correlations." Mr. Coats would have testified that Irwin erred in testifying that she overheard Mr. Jones describe Tucson murders, a kicked-in door, a red room, that women were not supposed to be there, and other details to which she testified. Motion Ex. 18 at ¶ 5. The prosecutor improperly prepped Irwin so she would testify to an account of a door being kicked in, which was false but was later bolstered by the false testimony of the two detectives. Mr. Coats' testimony would have rendered Ms. Irwin's testimony with respect to other "correlations" just as dubious. Trial counsel failed to contact him to inquire as to the veracity of the testimony of Lana and Brittany Irwin. *Id*. at ¶ 3.

Counsel's failure to interview Mr. Coats was deficient under *Strickland's* first prong because it violated a basic duty required of trial counsel, the duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *See Strickland*, 466 U.S. at 691. *See also* Guideline 10.7, ABA Guidelines. Trial counsel rendered deficient performance

under *Strickland* because reasonably competent counsel would, at the very minimum, have interviewed the other party to the purported prejudicial conversations with his client.

Similarly, PCR counsel rendered deficient performance for failure to perform a similar investigation. PCR counsel in Arizona "shall be familiar with *and guided by*" the 2003 ABA Guidelines. *See* Rule 6.8(c)(4), Ariz. R. Crim. P. (emphasis added). The Guidelines apply "from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including . . . post-conviction review." Guideline 1.1(B). As such, PCR failed in his duty of investigation described with respect to trial counsel's dereliction above. *See* Guideline 10.7(A).

Ms. Irwin's testimony was already suspect. She claimed to have met Mr. Jones at her Phoenix residence in early May, 1996, three weeks prior to the Moon offenses – which was contrary to the prosecution's theory that they met *after* the offenses at the two Tucson crime scenes. Tr. 6/19/98 (a.m.) at 42. She was using marijuana and methamphetamine from early to late summer 1996. *Id*. at 58. She testified she suffered from bipolar disorder, for which she was medicated with three psychotropic medications. *Id*. at 56-57. She testified that Mr. Jones claimed to have one partner, but she changed that to two partners on a leading question from Prosecutor White. *Id*. at 46-47. She had criminal charges dismissed, was granted immunity and had her relocation expenses paid by Pima County. *Id*. at 58-61. She told the detectives she overheard Mr. Jones say the women victims at the bar in Tucson were raped and that victims were shot "right between the eyes," which was contrary to the evidence. *Id*. at 67.

In the absence of Lana Irwin's testimony, there is a reasonable probability that Mr. Jones would not have been convicted of the six homicides. *Strickland*, 466 U.S. at 694. The PCR court relied heavily on the credibility of Ms. Irwin to deny relief on claims of ineffective assistance of trial counsel that were premised

on the failure to object to multiple instances of prosecutorial misconduct. Ex. 15 at 5, 19. Misconduct acknowledged by the PCR court included eliciting false testimony from law enforcement to the effect the defendants kicked in a back door at one crime scene, which bolstered the testimony of Ms. Irwin that she overheard Mr. Jones admit perpetrators kicked in a door, and the prosecutors opening statement and closing argument that referenced the door. The court acknowledged that the testimony of police was false, that police had actually kicked in the door, but found that "[t]he kicked-in door was but one of the dozen or so correlations with the facts of the crime that were adduced from the testimony of Lana Irwin about the conversations she overheard between Jones and [Irwin's friend Stephen] Coats. The court is not convinced that, had an issue been made of the kicked-in door, it would have shaken the credibility of Irwin or changes the outcome of the trial." *Id*. at 19.

There was no conclusive eyewitness identification of Mr. Jones at the Moon, nor were murder weapons recovered, tested or admitted at trial. There was no fingerprint evidence recovered at either crime scene that connected Mr. Jones to the offenses. Apart from the EMS evidence, this was a case that turned primarily on the jury's assessment of Irwin and other witnesses who attributed words to Mr. Jones. The testimony of the other prosecution witnesses was otherwise an insufficient basis upon which to find that guilt had been proved beyond a reasonable doubt.

3.

Trial counsel rendered ineffective assistance at the capital sentencing hearing for failing to object to the trial court's application of an unconstitutional causal nexus test to omit from its consideration Mr. Jones' proffered non-statutory mitigation; PCR counsel rendered ineffective assistance for failing to raise the claim that trial counsel rendered ineffective assistance for failing to object to the application of the causal nexus test.

In announcing its sentencing judgment, the trial court set forth the non-statutory mitigating factors proffered by Mr. Jones in his sentencing memorandum. Ex. 19 at 26. The court found that Mr. Jones presented evidence of his dysfunctional family, including that he and his mother were physically and emotionally abused by his step-father, Ronald O'Neil. *Id*. The court also noted that Mr. Jones presented evidence his mother physically abused him, that they moved often and he dropped out of school. *Id*. The court also found photos of Mr. Jones were admitted that depicted him as "a happy child in a normal childhood circumstance." *Id*.

The court concluded:

> Overall the evidence established that the defendant's childhood was marked by abuse, unhappiness and misfortune. However, there seems to be no apparent causal connection between any of the defendant's dysfunctional childhood and these murders which he committed at age 26.
>
> This non-statutory circumstance has been proven by a preponderance of the evidence, *but the Court finds it is not mitigating.*

Id. at 26-27 (emphasis added).

The court noted that it "independently reviewed" the trial record and presentence report for the presence of additional statutory and non-statutory mitigating evidence and made findings that included that Dr. Jill Teresa Caffrey found that Mr. Jones "suffers from antisocial personality disorder, has a history of drug use, and a somewhat low IQ." *Id*. at 32. The court noted that the personality disorder was "exhibited by his inability to live successfully in accord with society's rules." *Id*. The court also stated:

> Concerning defendant's substance use history, Dr. Caffrey based her findings entirely on the defendant's own statements, found he began drug use as a child, that amphetamines are his drug of choice, and that

> his drug use continued to the present. There is no evidence of defendant's use of drugs at or near the time of these murders.
>
> In fact, Dr. Caffrey quotes the defendant as candidly reporting to her he committed crimes both when he was and when he was not under the influence of drugs.
>
> Counsel has presented and the Court has found no evidence of any causal connection between any of these problems and the commission of the offense in this case.
>
> *This non-statutory mitigating circumstance is not proven.*

Id. at 33 (emphasis added).

Yet, the non-statutory mitigation described above *was* mitigating and it *was* proven. *Eddings*, 455 U.S. 104, required that it be considered in the weighing process. The Ninth Circuit has ordered that the writ issue on the basis of a violation of *Eddings* where the Arizona state courts similarly identified the non-statutory mitigating evidence but indicated they were barred from considering it in mitigation because it bore no causal nexus to the offense for which the defendant was convicted. *See Williams*, 623 F.3d at 1271; *Styers*, 547 F.3d at 1035. In *Styers*, the Arizona Supreme Court vacated a statutory aggravating factor on direct appeal and purported to reweigh aggravating and mitigating evidence, as permitted under *Clemons v. Mississippi*, 494 U.S. 738, 748-49 (1990), to determine whether to affirm the death sentence. 547 F.3d at 1035. In so doing, the Arizona Supreme Court stated that it had "considered all of the proffered mitigation." *Id*.

The Ninth Circuit disagreed, finding that the court's "analysis prior to this point indicates otherwise." *Id*. The Circuit quoted the Arizona Supreme Court with respect to the PTSD Styers developed as a result of time spent in Vietnam:

> This could also, in an appropriate case, constitute mitigation. *See State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989). . . *However*, two doctors who examined the defendant could not connect defendant's condition to his behavior at the time of the conspiracy and

> the murder. *State v. Styers*, 177 Ariz. 104, 116, 865 P.2d 765, 777 (1993) (italics added).

Styers, 547 F.3d at 1035. The Ninth Circuit further stated that "[t]he court's use of the conjunctive adverb 'however,' following it acknowledgment that such evidence 'could' in certain cases constitute mitigation, indicates that this was not such a case." *Id*. at 1035 (italics added). The Ninth Circuit included a footnote that quoted Webster's New World College Dictionary (4th ed. 2006) as defining "however" as including "nevertheless; yet; in spite of that; all the same." *Id*. n.10.

The Ninth Circuit further noted that the Arizona Supreme Court in *Styers* cited *Bilke, supra*, to the effect that PTSD would constitute mitigation if that new psychological evidence "specifically tied [the defendant's] disorder to his criminal acts." *Id*. Whether PTSD constituted "causation" for the murder was the reason *Bilke* was remanded to the trial court. *Id., citing Bilke*, 162 Ariz. at 53. The Ninth Circuit cited other Arizona Supreme Court cases decided over nearly a 20-year period for the same "causation" proposition. *See State v. Hoskins*, 199 Ariz. 127, 152, 14 P.3d 997, 1022 (2000), *State v. Vickers*, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981). The Court concluded that:

> [i]n applying this type of nexus test to conclude that Styers post traumatic stress disorder did not qualify as mitigating evidence; the Arizona Supreme Court appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body. *Smith v. Texas*, 543 U.S. 37, 45 (2004) (*citing Eddings*, and stating that nexus test is a test "we never countenanced and now have unequivocally rejected," and that this holding was "plain under our precedents"); see *Eddings*, 455 U.S. at 114-15 ("The sentencer, and the [appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.") As such the [state supreme] court could not have fully discharged its obligations under *Clemons. Id*.

Styers, 547 F.3d at 1035.

The sentencing court's ruling in *Jones* parrots the Arizona Supreme Court's ruling for which the Ninth Circuit granted the writ in *Styers*. The state supreme court in *Jones* also violated *Eddings* by applying the same unconstitutional nexus test in its independent review of aggravation and mitigation in Mr. Jones' direct appeal opinion. *See State v. Jones*, 197 Ariz. 290, 311-13, 4 P.3d 345, 366-68 (2000). The Court should reach the merits of this claim and order that the wit issue because trial counsel was in a position to object and obtain correction of the sentencing court's erroneous interpretation of Supreme Court precedent. He rendered deficient performance in failing to do so. *See Strickland*, 466 U.S. at 687. Mr. Maynard also rendered deficient performance by failing to raise this patently meritorious claim, and the related claim that direct appellate counsel was similarly ineffective under *Strickland* in the PCR petition. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000).

Mr. Jones was prejudiced within *Strickland* by the sentencing court's refusal to consider as mitigation his history of drug abuse. It was the court's failure to consider similar evidence that led the grant the writ in *Williams*, 623 F.3d 1258. Mr. Jones had a history of property crimes and crimes against persons, including robberies, that were motivated by a desire to acquire drugs. Thus, the sentencing court's erroneous application of *Eddings* further prejudiced Mr. Jones because it should have served to diminish the aggravating effect of his prior crimes. *See Rompilla v. Beard*, 545 U.S. 374, 387-90 (2005).

In addition, evidence of family dysfunction is the type of mitigation the Court identified as compelling in *Eddings*. 455 U.S. at 115. The evidence of physical and emotional abuse screened by the sentencing court from its consideration in *Jones* is precisely the type of evidence for which the Supreme Court found counsel to have rendered ineffective assistance for failing to investigate and present in *Wiggins v. Smith*, 539 U.S. 510, 516-17 (2003), and *Williams (Terry) v. Taylor*, 529 U.S. 362, 395 (2000). Evidence an accused was

exposed to domestic violence, as occurred to Mr. Jones, is also mitigating, and failure to present it constitutes ineffective assistance of counsel. *See Sears v. Upton*, 130 S.Ct. at 3259, 3262 (2010); *Porter v. McCollum*, 132 S.Ct. 447, 449 (2009); *Rompilla*, 545 U.S. at 391-92. Finally, in Arizona, evidence of a personality disorder, even antisocial personality, is considered mitigating in capital sentencing. *See State v. Hoskins*, 199 Ariz. 127, 151, 14 P.3d 997, 1021, 1051 (2000).

But for counsel's failure to object to the sentencing court's screening out of non-statutory mitigation there is a reasonable probability the court would have imposed a sentence of life instead of death. *See Strickland*, 466 U.S. at 694. The same reasonable probability of a different outcome attaches to PCR counsel's failure to present this claim in the Rule 32 proceedings.

C. The Court should grant relief from judgment pursuant to rule 60(b) based on *Martinez*.

Rule 60(b) states:

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

1. The change of law in *Martinez* favors reopening the judgment.

In *Phelps*, the Ninth Circuit ruled that a change in the law may constitute a basis for reliving a federal habeas corpus petitioner from judgment. 569 F.3d at 1132. The court set forth the test to be employed when a federal habeas petitioner

seeks relief from judgment pursuant to Rule 60(b)(6) based on a change in the law. *Phelps* and *Gonzalez* both involved an interpretation of the statute of limitations under 28 U.S.C. § 2244(d). *Phelps* noted, "As the Sixth Circuit rightly held when applying *Gonzalez*, 'the decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policy of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts.'" *Phelps*, 569 F.3d at 1133, *citing Stokes v. Williams*, 475 F.3d 732, 736 (6th Cir. 2007) (internal quotation marks omitted). The *Phelps* Court noted that the factors cited in *Gonzalez* and in *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987), which it noted was "cited favorably by the Supreme Court in *Gonzales*," were not a "rigid or exhaustive checklist." *Id*. at 1135.

Mr. Jones sets forth the factors identified in *Phelps* that derive from *Gonzalez* and *Ritter*, and demonstrates why they favor relief from judgment:

(a)

> **Whether the district court's interpretation of then-prevailing circuit precedent was correct or, put another way, whether the intervening change in the law "overruled an otherwise settled legal precedent."** *Phelps*, 569 F.3d at 1135 (*quoting Gonzalez*, 545 U.S. at 536).

Martinez did not "overrule an otherwise settled legal precedent," and this factor cuts in favor of Rule 60(b) relief from judgment. Due to Mr. Maynard's failure to present the three claims of ineffective assistance of counsel to this Court, the Court was denied an opportunity to apply pre-*Martinez* prevailing circuit precedent. As noted above, the claims are procedurally defaulted, and prevailing circuit precedent would be the Ninth Circuit's decision in *Martinez v. Schriro*, 623 F.3d 731, 736 (9th Cir. 2010), which ruled there is no constitutional right to counsel in PCR proceedings and, therefore, there is no constitutional right to effective PCR counsel that serves as "cause" to excuse a procedural default." The

Supreme Court noted, as did the Ninth Circuit in the same case, that *Coleman* "left open . . . whether a prisoner has a right to effective counsel in collateral proceedings *which provide the first occasion to raise a claim of ineffective assistance at trial*." *Martinez*, 132 S.Ct. at 1315 (emphasis added).

Thus, Ninth Circuit precedent actually recognized the "open question" from *dicta* in *Coleman* and that a decision finding the right in "an initial review collateral proceeding" would have been justified. It could have found "cause" for the reasons it acknowledged were suggested in *Coleman*, but it rejected the petitioner's "cause" argument in a manner that was found to be erroneous by the Supreme Court.

(b)

Whether the change of law was less extraordinary due to the petitioner's lack of diligence in pursuing review. *Phelps*, 569 F.3d at 1135-36.

This factor also cuts in Mr. Jones' favor. While 17 months have passed since *Martinez* was decided, that amount of time is not significant in the history of a capital case.

More importantly, any lack of diligence is the result of having conflicted counsel with a disincentive to re-evaluate the record and the claims he earlier brought in the PCR proceedings or to perform any additional investigation beyond what was performed in the PCR proceedings. Mr. Maynard raised no claim in the § 2254 petition beyond those he raised in the PCR petition. The disincentive discussed in *Del Muro*, 87 F.3d at 1080, and *Abbamonte*, 160 F.3d at 925, explains why Mr. Maynard did not move to withdraw after the decision in *Martinez*, when it was clear Mr. Jones' only path to consideration of the defaulted claims would be proof that Mr. Maynard rendered ineffective assistance under *Strickland*. *See Gray v. Pearson*, 2013 WL 2451083 at *3 (ordering termination of PCR lawyer's appointment because"[w]e see no material difference between an ethical prohibition on a lawyer's attempt to *investigate or advance* her own potential

errors, on the one hand, and a like prohibition on her attempts to *identify and produce a list* of her own errors giving rise to a "substantial claim" on the other hand") (italics in original).

Newly-appointed, non-conflicted counsel has moved as expeditiously as possible for Rule 60(b) relief, given counsel's recent appointment after the Ninth Circuit's affirmance of the denial of habeas relief was already on certiorari to the Supreme Court at the time of that appointment.

(c)

Whether granting the motion would undo the past, executed effects of the judgment. *Id*. at 1137-38.

This factor cuts in Mr. Jones' favor. Respondents have not "changed [their] legal position in reliance on [the] judgment." *Id*. at 1138. Respondents are unable to execute the effects of judgment which, in this case is Mr. Jones' execution, until all state and federal legal proceedings have ceased. This is not a case, to use the example in *Phelps*, where property was already transferred in reliance on the district court's judgment when the change of law occurred. *Id*. at 1137.

(d)

Whether there has been delay between the judgment and the motion for Rule 60(b) relief. *Id*. at 1138.

The *Phelps* Court found motions for reconsideration in the Eleventh and Ninth Circuits in *Ritter* and *Phelps* filed nine months and four months, respectively, after an initial adverse judgment to constitute short delays that cut in favor of petitioners seeking relief from judgment. *Id*. Here, newly-appointed, non-conflicted counsel has filed this Rule 60(b) Motion three and one-half months after appointment. Counsel has done so after entering appearances in the Ninth Circuit and Supreme Court, reading the entire trial transcript and reviewing the entire state

and federal court records, and filing a reply to Respondents' Brief in Opposition to the Petition for Writ of Certiorari in the Supreme Court.

It must further be remembered that *Martinez* was only decided 17 months ago and its contours continue to be ascertained by the Supreme Court. *See e.g. Trevino v. Thaler*, ___ U.S. ___, 133 S.Ct. 1911 (2013), and the Ninth Circuit in various panel opinions and orders, and its *en banc* consideration of *Dickens*, *supra*. Mr. Jones has drawn the Court's attention above to numerous Ninth Circuit cases, including published decisions and pending docket items, that apply *Martinez* to pending capital habeas corpus appeals. The present Rule 60(b) motion is prompt under the circumstances. This factor cuts in favor of granting Rule 60(b) relief.

(e)

Whether the principle of comity would be impermissibly damaged by the grant of habeas relief. *Phelps*, 569 F.3d at 1139.

The *Phelps* Court stated that comity is damaged where a petitioner seeks relief from a judgment on the merits, but that concern is eliminated where judgment is foreclosed in the first instance by a rule that bars the federal courts from reaching the merits of the claim. *Id*. The court expressed concern that the petitioner in that case stood to have none of the claims presented in a first federal habeas petition considered on the merits, *id*., and Mr. Jones concedes that should always be a grave concern.

Mr. Jones had some claims considered in a first federal petition. *Martinez* conferred on him a right in federal habeas corpus to raise claims of ineffective assistance of trial counsel that were defaulted in the PCR proceedings but it required representation by counsel who would assess the performance of prior counsel in investigating and presenting those claims. Mr. Maynard could not perform as that counsel because he dwelled under an actual conflict of interest because he had a disincentive to reevaluate the record for claims of constitutional error and challenge his prior performance. *See Del Muro,* 87 F.3d at 1080. After

Martinez, he would have been barred from doing so. *See Gray*, 2013 WL 2451083 at * 3; *Bergna*, 2013 WL 3491276, at *2. Comity suffers no damage, in these limited circumstances where the change in law also renders counsel conflicted. This factor cuts in favor of relief from judgment.

Phelps and *Ritter* permit evaluation of additional factors. One factor that cuts compellingly in Mr. Jones' favor is that he stands to suffer death if the Court does not grant relief from judgment. "[D]eath is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida,* 430 U.S. 349, 357 (1977). Although the courts have not generally created distinct rules that apply to capital habeas proceedings, they have noted that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), as well as a heightened scrutiny in reviewing such a decision, *see Cartwright v. Maynard,* 822 F.2d 1477, 1483 (10th Cir.1987) (*reh'g en banc*), *aff'd,* 486 U.S. 356 (1988). The Court's review of Mr. Jones' additional, substantial claims would enhance the reliability of the process employed to sentence Mr. Jones to death. That review presupposes that he obtain the evidentiary development outlined above that would be necessary to a fair presentation of his claims.

III.

THE VIOLATION OF *BRADY* IN THE § 2254 PROCEEDINGS REQUIRES RELIEF FROM JUDGMENT.

A. The law with respect to disclosure in federal habeas corpus.

Rule 60(b)(3) allows for relief from judgment where there has been a fraud committed on the court. While a one-year statute of limitations applies to the Rule 60(b)(1) through (3), that statute is relaxed where a fraud has been committed on the court, Rule 60(d)(3), such as a *Brady* violation in a federal collateral proceeding. *See Pickard,* 681 F.3d at 1206.

In a case with striking similarities to this one, *In re Pickard*, 681 F.3d 1201, the Tenth Circuit applied that provision to afford relief from judgment to § 2255 petitioners who requested disclosure in the collateral proceeding of all Government agencies involved in the investigation of their drug case, especially with respect to an informant who testified at trial. The Government asserted that it knew of no involvement by agencies other than the DEA. The district court denied discovery and relief. However, the return on petitioners' FOIA request showed the informant was also investigated by the FBI and IRS, and the petitioners moved for relief from judgment under Rule 60(b). *Id*. at 1203-04.

The Tenth Circuit ruled that the petitioners were entitled to additional proceedings to prove the existence of the *Brady* material and that they would be entitled to relief on the trial *Brady* claim. The Rule 60(b) motion did not run afoul of *Gonzalez*, 545 U.S. 524, because the petitioners did not seek merely to prove with additional evidence the original *Brady* claim for which they were already denied relief. As the Tenth Circuit framed it, the petitioners claimed "that the prosecutor's statement prevented their discovery of the involvement of other agencies and, most pertinent to their § 2255 claim, thereby prevented them from showing that those agencies had additional information about [the informant] that could have been used to impeach him at trial." *Id*. at 1205. The court agreed with the petitioners that "the matter should be heard by the district court because Defendants' claim challenges the integrity of the § 2255 proceedings and is therefore properly presented under Rule 60(b)." *Id*.

Pickard is persuasive authority for the claims Mr. Jones' raised in the district court that he is entitled to further proceedings on his claim that trial counsel rendered ineffective assistance for failing to impeach, with additional evidence and testimony, David Nordstrom's credibility or alibi. While Mr. Jones did not make a formal request for *Brady* material with respect to documents in the possession of BI that would undermine the quality of David Nordstrom's "alibi," Respondents

had a contractual relationship with BI and a condition of that relationship and those contracts must have been that BI would appear in court as necessary should questions of this type arise – just as it has been made to do in other jurisdictions.

Respondents' failure to obtain from BI and disclose *Brady* material in the federal proceeding also violated the rule set forth in *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992). There, a federal habeas petitioner claimed violations of *Brady* and *Strickland* based on his semen not having been DNA tested prior to his sexual assault trial. The claims were defaulted for failing to raise them in state PCR proceedings, and the district court denied relief. The Ninth Circuit ruled that the petitioner was entitled to the DNA testing in order to attempt to prove the miscarriage of justice exception to the rules of procedural default. The court stated, "We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding." *Id*. at 749. While it might not have recognized a freestanding *Brady* claim raised for the first time in federal court ("past duty"), it did recognize a present duty under *Brady* to disclose exculpatory evidence for another purpose.

The Supreme Court has also ruled there is no right to assert a freestanding *Brady* claim for the first time in federal habeas corpus in a case where a petitioner sought DNA testing and the opportunity to allege its results as evidence of his actual innocence. *See Dist. Attorney's Office v. Osborne*, 557 U.S. 52 (2009). *Osborne* assumed the fairness of the underlying conviction that occurred before the DNA testing became available. *Id*. at 69. Thus, *Osborne* may not have eliminated the state's obligation to disclose exculpatory information once the case has reached federal habeas corpus where either the trial was *unfair* or where the *Brady* evidence is relevant to a purpose other than pleading a habeas claim in the first instance.

B. The *Brady* violation requires relief from judgment.

Here, Respondents had pretrial notice that BI Model 9000 units may have malfunctioned. A relative of one of the Fire Fighters victims informed the prosecution that she evaded EMS detection in Pima County and David Nordstrom might unfairly avoid responsibility for the Fire Fighters homicides. Ex. 20 at 2. In August 2009, prior to Scott Nordstrom's resentencing, she signed a sworn affidavit to that effect, and a Tucson newspaper reported it. *Id*. Pima County Attorney Investigator Steve Merrick had investigated her complaint and noted in a June 16, 1997, report that the witness was admitted to house arrest by Pima County in May 1997 and she was monitored by a BI system. Ex. 21at 1, 5. At that point, the Pima County Attorney also knew that David Nordstrom was monitored by a BI system.

On June 24, 1997, at the office of Respondents' counsel, Parole Officer Ebenal was questioned by Prosecutor White and defense counsel. Ex. 16 at 1. Mr. Ebenal testified that David Nordstrom's house arrest was monitored by a VI (sic, BI) Model 9000. *Id*. at 43. No mention was made in the 140 page interview of the victim relative's complaint, which appears to mean the complaint and the Pima County Attorney's investigation of it were not disclosed prior to trial.

Respondents have long had notice of Mr. Jones' post-conviction attempts to impeach the guilt phase testimony and electronic "alibi" of David Nordstrom. Mr. Jones pleaded in his § 2254 petition two distinct claims that trial counsel rendered ineffective assistance at the guilt phase for failing to adequately impeach the credibility of David Nordstrom and his "alibi." Dkt. 27 at 28 – 32, Claims II-A and B. The same claims were pleaded in the PCR petition. *See* Ex. 17 at 26-30.

In Claim II-A, Mr. Jones alleged actions by David Nordstrom that proved his dishonesty. First, a Pima County Jail inmate told officers he received correspondence from Nordstrom to the effect that he wanted to stage an incident in which another inmate assaulted him, so he could sue the county. *Id*. at 28. A

handwriting expert found the writing to be that of Nordstrom. A second inmate, in a transcribed interview, corroborated Nordstrom's discussion of his plan to sue the county and added that Nordstrom said he committed the homicides. *Id*. (*citing* Ex. 30 of the PCR petition, in which the inmate stated that Nordstrom acknowledged he had red hair, "but said he was gonna put it [on a friend who looks like him and has red hair]."). The § 2254 petition alleged this evidence proved David was inclined to "manipulate" evidence and documents in the case. *Id*.

> Claim II-B alleged:
> The Fire Fighters allegedly took place past the time of David's curfew. David's alibi held up because Mr. Jones' trial counsel failed to adequately investigate and present evidence to contradict this.

Dkt. 27 at 29. The petition alleged that trial counsel failed to employ transcripts from Scott Nordstrom's trial to further attack the testimony of ADC's Ms. Matthews and Mr. Ebenal, and could have called additional witnesses. *Id*. at 29-30. The petition further alleged defense counsel could have introduced testimony of a woman for whose friend's child David babysat while on EMS and eliciting from David's employer that David was out past his curfew on various occasions. The claim further alleged, "This would have been significant evidence to present to the jury in Mr. Jones' trial, especially in light of the state's considerably weaker case against Mr. Jones and the additional attacks on David that were available." *Id*. at 30. The claim concluded, "Here, trial counsel's failure to properly investigate David's alibi was not a reasonable decision and likely impacted the verdict." *Id*. at 31.

In response, Respondents argued the testimony would have been immaterial to establishing violations of curfew and did not undermine the reasonableness of the state PCR court's finding that it would not speculate on whether calling these witnesses would have been more effective. Dkt. 34 at 35. Significantly for Rule 60(b)(3) purposes, Respondents asserted:

> Moreover, there is *no evidence* trial counsel was unfamiliar with Parole Department record-keeping or the practices of parole officer Fritz Ebenal specifically that could have been used to attack David Nordstrom's alibi for the Fire Hall crimes.

Id. at 37 (italics in original).

Of course the allegation and response were misguided, as Mr. Jones and Respondents could only discuss the witnesses and their record-keeping, not the BI Model 9000, because Respondents failed to make the inquiry of BI that would produce substantial impeachment of its EMS systems. That BI was concerned about the publication of those malfunctions or ways to evade detection is no more evident than in the Florida murder case discussed *supra* in which BI moved to close the proceeding. What should have been available to Mr. Jones in *these* proceedings, as well as in the state PCR proceedings, was material that indicated that BI's systems malfunctioned regardless of the quality of the technicians who installed or monitored the units, or recorded the data they generated.

Mr. Jones submits he needed BI's records of system malfunctions in order to prove the prejudice prong of the claim of ineffective assistance of trial counsel for failing to undermine David Nordstrom's credibility and the accuracy of his electronic "alibi." As this Court noted in denying relief on the claim of trial counsel's ineffectiveness for not more effectively impeaching the "alibi" evidence, the claim ultimately failed because the additional evidence "does not establish that there were *unrecorded* curfew violations." Dkt. 79 at 35 (emphasis in original). Mr. Jones' seeks evidence that would disprove the Court's conclusion.

Mr. Jones has established good cause under Rule 6 of the Rules Governing Section 2254 Cases for the BI evidence he seeks from ADC and BI. Evidence of the performance of BI Model 9000 in this case or in Arizona cases generally around the time of the June 1996 Fire Fighters homicides, including the period in which David Nordstrom was monitored between January 25, 1996, and his August 1996 arrest in this case (Tr. 6/23/98 at 115), would have been uniquely within the

possession of the two parties to the contract. ADC continued to purchase BI Model 9000s until 2005. Mot. Ex. 5 at 1. ADC kept various purchase and contract records for period of six years past the end of the fiscal year in which the contract was fulfilled. Ex. 5 at 1, 3. It may have kept records of the contract and purchase orders for the units that included Nordstrom's well beyond that, as it was required to do so until the expiration of "foreseeable official proceedings such as . . . lawsuits and investigations." *Id*. at 2. ADC continues to search the State Archives for the BI information requested by Petitioner. BI maintains records that are the potential subject of litigation. BI would produce those records if compelled by this Court to do so pursuant to a subpoena *duces tecum*.

Conclusion

For the foregoing reasons, Mr. Jones respectfully requests that the Court grant his Motion for Relief from Judgment. In the alternative, he requests that the Court order evidentiary development, including the discovery of the EMS records and other relevant information described above that reside with BI, Inc., the Pima County Attorney, and the Arizona Department of Corrections' Parole Division, and order an evidentiary hearing on his claims.

Respectfully submitted this 19th day of August, 2013.

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

By s/Timothy M. Gabrielsen
TIMOTHY M. GABRIELSEN
Counsel for Petitioner-Appellant

Certificate of Service

I hereby certify that on this 19th day of August, 2013, I electronically transmitted the attached document to the Clerk's office of the United States Court of Appeals for the Ninth Circuit using the CM/ECF System for filing and transmitted a Notice of Electronic Filing to the following registrants:

Ms. Lacey Stover Gard
Arizona Assistant Attorney General
Attorney General's Office
1275 West Washington
Phoenix, Arizona 85007-2997

s/Teresa Ardrey
Teresa Ardrey
Legal Secretary
Capital Habeas Unit

Index of Exhibits

Exhibit 1	Records Request of Pima County Attorney's Office
Exhibit 2	Records Request of BI Incorporated
Exhibit 3	Records Request of Arizona Department of Corrections
Exhibit 4	Declaration of Timothy M. Gabrielsen
Exhibit 5	Letter from Arizona Department of Corrections dated July 29, 2013
Exhibit 6	The Palm Beach Post, October 22, 1997 article entitled Teen's Monitor was Working Properly, Company Says
Exhibit 7	Sun-Sentinel, October 24, 1997 article entitled Ankle Device Not a Jail Cell, Experts Find – '96 Hit –and-Run Case Reveals Time Lapses
Exhibit 8	Sun-Sentinel, June 6, 1998 article entitled Monitor Company Petitions to Keep Its Secrets Sealed
Exhibit 9	Sun-Sentinel, July 10, 1998 article entitled House-Arrest Faults Exposed in Killing Trial-Inmate May Have Fooled Device, Prosecutors Say
Exhibit 10	Securities and Exchange Commission Form 10-K, Excerpts of BI, Inc., June 20, 1995 through June 30, 2000
Exhibit 11	Pittsburgh Post-Gazette, October 23, 1996 article entitled Man Sues Over Faulty Monitor
Exhibit 12	De Soto Sun, August 5, 1999 article entitled Ankle Monitors Can't Guarantee Criminals Won't Walk, Ex-Technician Says – Demonbruen Faced Repeat Offenders During Stint Installing Home-Arrest Bracelets

Exhibit 13	The Denver Post, October 2, 1994 article entitled Device Revolutionizes Penal Industry Home Arrest Saves Space and Money
Exhibit 14	Trial Testimony of Fritz Ebenal, *State v. Jones*, June 23, 1998
Exhibit 15	Minute Entry, *State v. Jones*, Pima Co. No. CR-57526, September 18, 2002
Exhibit 16	Pretrial Interview of Fritz Ebenal, June 24, 1997
Exhibit 17	Memorandum in Support of Petition for Post-Conviction Relief, *State v. Jones*, Pima Co. No. CR-57526, February 15, 2002,
Exhibit 18	Declarations of Stephen Coats and John Castro
Exhibit 19	Sentencing Hearing Transcript, *State v. Jones*, Pima Co. No. CR-57526, December 7, 1998
Exhibit 20	Tucson Weekly, August 17, 2009 article entitled Compromised Conviction?
Exhibit 21	Investigative Report Supplement of Steve Merrick, June 6, 1997