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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Robert Glen Jones, Jr.,

Petitioner,

-vs-

Charles L. Ryan, et al.,

Respondents.

CV 03–0478–TUC–DCB

RESPONSE TO MOTION FOR RELIEF FROM JUDGMENT

Pursuant to this Court's Order of August 21, 2013 (Dkt. # 105), Respondents hereby respond to Petitioner Robert Glen Jones' Motion for Relief from Judgment filed pursuant to Federal Rules of Civil Procedure 60(b)(3) and (b)(6). (Dkt. # 104.) As discussed in the following Memorandum of Points and Authorities, Jones' motion constitutes a second or successive habeas petition, which this Court should dismiss for lack of jurisdiction. Alternatively, this Court should deny Jones' request, based on *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), to set aside the judgment under Rule 60(b)(6) because Jones has 1) failed to show extraordinary circumstances and 2) failed to state a substantial ineffective-assistance-of-trial-counsel claim. This Court should likewise deny Jones' motion to set aside the judgment under Rule 60(b)(3), because Jones' time limit for filing such a motion has expired, and because Jones has not shown that Respondents suppressed material exculpatory evidence during the habeas proceeding.

DATED this 30th day of August, 2013.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

In the summer of 1996, Petitioner Robert Glen Jones, Jr., murdered six people while robbing two Tucson businesses: the Moon Smoke Shop ("Smoke Shop") and the Firefighters' Union Hall ("Union Hall"). *State v. Jones*, 4 P.3d 345, 352–53, ¶¶ 1–11 (Ariz. 2000) ("*Jones I*"). In the 17 years since his crimes, Jones' convictions and sentences have been upheld—and his numerous claims for relief rejected—by the Arizona superior and supreme courts, this Court, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

On June 26, 2013, following the Supreme Court's denial of Jones' certiorari petition challenging the Ninth Circuit's rejection of his federal habeas claims, the Ninth Circuit issued its mandate, marking the conclusion of Jones' habeas proceeding. *See Ryan v. Schad*, __ U.S. __, 133 S.Ct. 2548, 2550 (2013) ("[O]nce [the Supreme] Court has denied a petition [for writ of certiorari], there is generally no need for further action from the lower courts."); *see generally* FRAP 41(d)(2)(D). On August 27, 2013, the Arizona Supreme Court issued an execution warrant, and fixed October 23, 2013, for Jones' execution.

In the present motion for relief from judgment, Jones seeks to reopen the habeas proceeding under Federal Rules of Civil Procedure 60(b)(3) and (b)(6) in order to litigate several claims never before raised. (Dkt. # 104.) This Court should deny Jones' motion.

I. JONES' RULE 60(B) MOTION IS A SECOND OR SUCCESSIVE HABEAS PETITION, WHICH THIS COURT LACKS JURISDICTION TO CONSIDER.

The Anti-terrorism and Effective Death Penalty Act ("AEDPA") significantly "restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." *Tyler v. Cain*, 533 U.S. 656, 661 (2001), and requires Jones to obtain authorization from the Ninth Circuit before filing such a petition. *See* 28 U.S.C. § 2244(b)(3)(A); Rule 9, Rules Governing § 2254 Cases; *Burton v. Stewart*, 549 U.S. 147, 152–53 (2007) (per curiam). This requirement is jurisdictional. *See Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001) ("'When the AEDPA is in play, the district court may not, in the absence of proper authorization from the court of appeals, consider a second or successive habeas application.'") (quoting *Libby v. Magnusson*, 177 F.3d 43, 45 (1st Cir. 1999)); *see also Burton*, 549 U.S. at 152–53 (determining that district court lacked jurisdiction to consider unauthorized successive habeas petition). In this case, Jones' motion constitutes a second or successive ("SOS") habeas petition that the Ninth Circuit has not authorized. This Court should therefore deny the motion for lack of jurisdiction.

A proper Rule 60(b) motion challenges "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). A Rule 60(b) motion is proper if "neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction." *Id.* at 533. If a motion simply "attacks the federal court's previous resolution of a claim on the merits," it "is effectively

indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief," and should be considered a second or successive habeas application. *Id.* at 532 (emphasis deleted); *see also Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) ("*Thompson II*") (treating habeas petitioner's Rule 60(b) motion as an SOS petition governed by AEDPA where the motion's factual predicate stated a claim for a successive petition).

In this case, Jones attempts to present, through Rule 60(b)(6) and *Martinez*, three ineffective-assistance-of-counsel ("IAC") claims that he concedes were not included in his amended habeas petition. (Dkt. # 104, at 2, 12–13; *see* Dkt. # 27.) Jones' Rule 60(b)(6) motion does not challenge a "defect in the integrity of the federal habeas proceedings," *Gonzalez*, 545 U.S. at 532, but instead asserts that Jones is entitled to habeas relief for substantive reasons. The motion is therefore an SOS petition. *See id.* at 531 ("Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts."); *Thompson v. Calderon*, 122 F.3d 28, 30 n.2 (9th Cir. 1997) ("*Thompson I*") ("[W]here a habeas petitioner tries to raise new facts or new claims not included in prior proceedings in a Rule 60(b) motion, such motion should be treated as the equivalent of a second petition for writ of habeas corpus.") (quotations omitted); *Lopez v. Ryan*, 2012 WL 1520172, *7 (D. Ariz. April 30, 2012) (aspect of Rule 60(b) motion asserting new claim for relief constituted an SOS petition). And because the Ninth Circuit has not authorized the petition,[1] this

[1] The Ninth Circuit almost certainly would not have authorized Jones' SOS petition had Jones asked it to do so. 28 U.S.C. § 2244(b)(2) permits successive petitions only if (1) the claim raised is based on a new, retroactively-applicable rule of constitutional law, or (2) the claim's factual predicate "could not have been discovered previously through the exercise of due diligence" and the "facts

(continued ...)

Court lacks jurisdiction to consider it. *See* 28 U.S.C. § 2244(b)(3)(A); Rule 9, Rules Governing § 2254 Cases; *Burton*, 549 U.S. at 152–53; *Cooper*, 274 F.3d at 1274.

Jones also seeks to reopen two habeas claims based on Respondents' alleged fraud during the habeas proceedings. (Dkt. # 38–44.) Although fraud under Rule 60(b)(3) may constitute a "defect in the integrity of the federal habeas proceedings," *Gonzalez*, 545 U.S. at 532 n.5, Jones has shown no fraud, as set forth in detail below. Instead, in an attempt to circumvent AEDPA's limitation on successive petitions, Jones presents new, substantive claims under the guise of Rule 60(b)(3). *See id.* at 531. Jones specifically claims that he is seeking to reopen habeas Claims II–A and II–C.[2] (Dkt. # 104, at 41–42.) As originally pleaded in both state and federal court, Claim II–A alleged IAC for failing to investigate David Nordstrom's conduct in jail, which Jones asserted bore on David's credibility. (Dkt. # 27, at 28–29; Dkt. # 104, at Exh. 17, pp. 26–27.) And Claim II–C alleged that counsel was ineffective for failing to investigate David's alibi for the Union Hall murders, which was based on data from his electronic-

(... continued)

underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Martinez* is an equitable rule and not a new rule of constitutional law. And, for the reasons set forth *infra*, Jones cannot show that his claim rests on newly-discovered evidence that he could not have discovered earlier through the exercise of due diligence.

[2] In his motion, Jones identifies the claims he seeks to reopen as Claims II–A and II–B. (Dkt. # 104, at Exh. 17, pp. 26–27.) Claim II–B, however, related to counsel's failure to investigate the prosecutor's presentation of allegedly false evidence relating to a kicked-in door at the Smoke Shop (Dkt. # 27, at 29), and Jones Rule 60(b)(3) argument bears no relationship to this claim. Further, the portion of the habeas petition Jones quotes in his motion relates to Claim II-C. (*Compare* Dkt. # 104, at 42 *with* Dkt. # 27, at 29.) Respondents therefore presume Jones seeks to reopen Claim II-C, not Claim II-B, and respond accordingly.

monitoring system ("EMS") and present 1) testimony, elicited at co-defendant Scott Nordstrom's trial, that David could have received an unrecorded curfew extension, which would explain the absence of a curfew violation on that date; and 2) present evidence from two witnesses who saw David outside of his home past his curfew on certain occasions. (Dkt. # 27, at 29–31; Dkt. # 104, at Exh. 17, pp. 27–30.)

In his Rule 60(b)(3) motion, Jones contends that Respondents engaged in fraud in litigating the above two claims by suppressing evidence in the possession of the EMS manufacturer, BI Incorporated, relating to the reliability of the EMS model used to monitor David Nordstrom. (Dkt. # 104, at 38–44.) But neither Claim II–A nor Claim II–C alleges that counsel was ineffective for failing to obtain records from BI to attack the reliability of David's system, or that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), for failing to disclose such records at trial. (Dkt. # 27, at 28–31.) By presenting such evidence now, Jones does not challenge a defect in the habeas proceeding's integrity, *Gonzalez*, 545 U.S. at 532 n.5, he transforms Claims II–A and II–C into new, unexhausted—and untimely, *see* 28 U.S.C. § 2244(d)—substantive claims for relief. *See Gonzalez*, 545 U.S. at 531. This Court should deem Jones' Rule 60(b)(3) motion an unauthorized successive habeas petition and dismiss it for lack of jurisdiction. *See* 28 U.S.C. § 2244(b)(3)(A); Rule 9, Rules Governing § 2254 Cases; *Burton*, 549 U.S. at 152–53; *Cooper*, 274 F.3d at 1274.

II. ASSUMING THIS COURT POSSESSES JURISDICTION OVER THE RULE 60(B) MOTION, JONES HAS FAILED TO SATISFY THE RULE'S REQUIREMENTS FOR REOPENING THE HABEAS PROCEEDING.

Jones first argues, under Rule 60(b)(6), that *Martinez* changed existing law in a manner that qualifies as an extraordinary circumstance, and that it warrants reopening the habeas proceeding to consider whether Jones can show cause to excuse the procedural defaults three newly-presented IAC claims. (Dkt. # 104, at

9–38.) Second, Jones contends that Respondents committed a fraud on an opposing party under Rule 60(b)(3) by purportedly withholding "exculpatory" evidence relating to David Nordstrom's monitoring system, which justifies reopening habeas Claims II-A and II–C. (*Id.* at 38–44.) Jones' arguments fail and this Court should reject them.

a. *Jones' has failed to show extraordinary circumstances that justify reopening the proceeding under Rule 60(b)(6).*

Rule 60(b)(6) permits this Court to relieve a party from a final judgment for "any … reason that justifies relief." No specific time limit governs a Rule 60(b)(6) motion, but a party should bring such a motion "within a reasonable time." Fed. R. Civ. P. 60(c)(1). And Rule 60(b)(6) requires a petitioner to show "extraordinary circumstances" to obtain relief. *Gonzalez*, 545 U.S. at 535 (quotations omitted). When a party, like Jones, argues that a change in the law constitutes an extraordinary circumstance, this Court considers several factors: (1) whether "the intervening change in the law … overruled an otherwise settled legal precedent"; (2) whether the petitioner was diligent in pursuing the issue; (3) whether "the final judgment being challenged has caused one or more of the parties to change his legal position in reliance on that judgment;" (4) whether there is "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief;" (5) whether there is a "close connection" between the original and intervening decisions at issue in the Rule 60(b) motion; and (6) whether relief from judgment would upset the "delicate principles of comity governing the interaction between coordinate sovereign judicial systems." *Phelps v. Alameida*, 569 F.3d 1120, 1133–40 (9th Cir. 2009) (quotations omitted). On balance, these factors weigh against Jones.

Change in the law: Jones contends that the first *Phelps* factor, whether the "the intervening change in the law … overruled an otherwise settled legal precedent," *Phelps*, 569 F.3d at 1133–40 (quotations omitted), weighs in favor of reconsideration because prior habeas counsel failed to present the three IAC claims

at issue in the habeas petition. (Dkt. # 104, at 34–35.) This failure, Jones continues, denied this Court the opportunity to find the claims procedurally defaulted and to conclude, consistent with pre-*Martinez* law, that PCR counsel's ineffectiveness did not constitute cause to excuse the procedural defaults. (*Id.*) But *Martinez* did not constitute a change in the law *applicable to this proceeding*: Jones' did not present the claims in question, this Court did not find them procedurally defaulted, and, as a result, Jones never attempted to show cause and prejudice through PCR counsel's ineffectiveness.

Whether this is attributable, as Jones suggests, to the ethical conflict of habeas counsel (who was also PCR counsel) is irrelevant. (Dkt. # 104, at 9–12.) Jones possessed no right to effective habeas counsel, and habeas counsel's decision not to withdraw does not constitute an extraordinary circumstance justifying relief under Rule 60(b)(6).[3] *See Towery v. Ryan*, 673 F.3d 933, 941 (9th Cir. 2012) (per curiam) ("A federal habeas petitioner—who as such does not have a Sixth Amendment right to counsel—is ordinarily bound by his attorney's negligence, because the attorney and the client have an agency relationship under which the principal is bound by the actions of the agent."); *Harris v. United States*, 367 F.3d 74, 77, 81–82 (2nd Cir. 2004) (existence of extraordinary "circumstances will be particularly rare where the relief sought [in a Rule 60(b)(6) motion] is predicated on the alleged failures of counsel in a prior habeas petition. That is because a habeas petitioner has no constitutional right to counsel in his habeas proceeding, and therefore, to be successful under Rule 60(b)(6), must show more than ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984)."") (citation and parallel citations omitted). Jones seeks to use *Martinez* and Rule 60(b)(6) as a

[3] Moreover, prior habeas counsel represented Jones diligently, raising numerous claims for relief before this Court and the Ninth Circuit.

vehicle to circumvent AEDPA and raise claims omitted from his habeas petition. *Phelps*' first factor weighs against reconsideration.

Diligence: This factor also weighs against Jones, as he filed the present motion—and alleged PCR counsel's ineffectiveness for the first time—17 months after *Martinez* was decided. *See Lopez (Samuel) v. Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012) (diligence factor weighed against petitioner where he raised IAC of PCR counsel claim for the first time after *Martinez*). Jones explains this delay by pointing to his prior habeas counsel's ethical conflict, and noting that that attorney failed to withdraw in a timely manner to allow *Martinez* claims to be raised. (Dkt. # 104, at 35–36.) At bottom, Jones presents a challenge to prior habeas counsel's effectiveness, and Jones possessed no right to the effective assistance of habeas counsel. *See Towery*, 673 F.3d at 941; *Harris*, 367 F.3d at 77, 81–82. And even if this factor weighs in Jones' favor, it does so only minimally.

Reliance: Jones contends that Respondents have not relied on this Court's judgment, that they may not carry out the death sentence "until all state and federal legal proceedings have ceased," and that the reliance factor therefore weighs in his favor. (Dkt. # 104, at 36.) Jones is incorrect. Jones' of-right legal proceedings are complete. *See Schad*, 133 S.Ct. at 2550. An execution warrant has issued. "The State's and the victim's interests in finality, especially after a warrant of execution has been obtained and an execution date set, weigh against granting post-judgment relief." *Samuel Lopez*, 678 F.3d. at 1136; *see also Styers v. Ryan*, 2013 WL 1149919, *7 (D. Ariz. Mar. 20, 2013) ("[R]eopening the case to permit relitigation of Claim 8 would further delay resolution of Petitioner's case and interfere with the State's legitimate interest in finality."). This is particularly true where Jones seeks to litigate new claims, never previously presented in any proceeding. This factor weighs heavily against Jones.

Delay: Jones argues that his Rule 60(b)(6) motion is "prompt under the circumstances" because his present counsel filed it within 4 months of his

appointment. (Dkt. # 104, at 36–37.) This may be true, but the motion (along with the first-ever allegation of PCR counsel's ineffectiveness) was still filed *17 months* after the *Martinez* decision. Moreover, as set forth below, the underlying claims of trial counsel's ineffectiveness are untimely by years. This factor therefore weighs against Jones. And if it weighs in his favor, it does so only minimally.

Degree of connection: Jones does not address this *Phelps* factor, likely because it militates against reopening the habeas proceeding. (Dkt. # 104, at 28–38.) *Martinez* holds that PCR counsel's ineffectiveness can constitute cause to excuse the procedural default of a trial-level IAC claim. 132 S.Ct. at 1316–18. Here, Jones did not present his claims in the habeas petition, and this Court did not find them procedurally defaulted. *See Samuel Lopez*, 678 F.3d at 1137 (claim that *Martinez* applied to PCR counsel's failure to develop factual basis of exhausted claim "does not present the sort of identity that [the Ninth Circuit] addressed in *Phelps*," and did not weigh in favor of Rule 60(b) relief). *Martinez* does not provide an avenue for prisoners whose habeas proceedings have concluded to reopen those proceedings and present claims never before raised. This factor weighs against reopening the habeas proceeding.

Comity: Jones again points to habeas counsel's ethical conflict, and contends that "[c]omity suffers no damage, in these limited circumstances where the change in the law also renders counsel conflicted." (Dkt. # 104, at 37–38.) But habeas counsel's ethical conflict does not explain his omission, in the first instance, of the trial-level IAC claims from the habeas petition. Further, in litigation spanning over a decade, the state and federal courts have considered Jones' claims for relief, which included several challenges to trial counsel's ineffectiveness. *See Samuel Lopez*, 678 F.3d at 1137 ("In light of [the Ninth Circuit's] previous opinion and those of the various other courts that have addressed the merits of several of Lopez's claims, and the determination regarding Lopez's lack of diligence, the

comity factor does not favor reconsideration."). This factor weighs against reopening the habeas proceeding.

Death penalty: Jones contends that his status as a death-penalty defendant weighs in favor of granting Rule 60(b) relief. (Dkt. # 104, at 38.) Jones cites no authority for this proposition, and it is illogical: were this Court to accept Jones death-sentenced status as a reason to reopen the habeas petition, every capital habeas petitioner could seek a second chance to raise habeas claims. Jones has had 17 years to develop and litigate his claims, and his capital sentences confers upon him no special privilege to reopen the present proceeding.

b. *Even if the* Phelps *factors weigh in favor of reopening the habeas proceeding, Jones' trial-level IAC claims are time-barred and, in any event, are not substantial under Martinez.*

Even if Jones' motion does not constitute an SOS petition, and even if *Phelps* factors militate in favor of granting Rule 60(b) relief, Jones' "underlying claim[s] do[] not present a compelling reason to reopen the case," *Samuel Lopez*, 678 F.3d at 1137, because they are 1) time-barred and 2) not substantial under *Martinez*. With respect to the time bar, Jones' convictions and sentences have been final for over a decade. *See* 28 U.S.C. § 2244(d). His habeas proceeding did not toll the 1-year limitations period. *See Rhines v. Weber*, 544 U.S. 269, 274–75 (2005). Any new ineffective-assistance claims are time-barred.

Untimeliness aside, to establish cause to excuse a procedural default under *Martinez*, Jones must 1) show that first PCR counsel was ineffective under *Strickland*, and 2) "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S.Ct. at 1318–19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (discussing standards for issuing certificate of appealability)); *see Cook v. Ryan*, 688 F.3d 598, 610 n.13 (9th Cir. 2012) (noting that, under *Miller-El*, a court should only assess claim's merits

generally and should not decline to issue certificate of appealability merely because it believes the applicant will not be entitled to relief).

However, "[i]n order to show ineffectiveness of PCR counsel, [a prisoner] must show that PCR counsel's failure to raise the claim that trial counsel was ineffective was an error 'so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment,' and caused [the prisoner] prejudice." *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012) (quoting *Strickland*, 466 U.S. at 687); *see also Samuel Lopez*, 678 F.3d at 1138 ("To have a legitimate IAC claim a petitioner must be able to establish both deficient representation *and* prejudice."). Because PCR "[c]ounsel is not necessarily ineffective for failing to raise even a nonfrivolous claim," he "would not be ineffective for failure to raise an ineffective assistance of counsel claim with respect to trial counsel who was not constitutionally ineffective." *Sexton*, 679 F.3d at 1157 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009)).

1. Failure to challenge admissibility of EMS evidence under *Frye*[4] and to renew foundational objection to that evidence.

Jones contends that trial counsel was ineffective for failing to move for a *Frye* hearing to determine the admissibility of the BI Model 9000 system the Arizona Department of Corrections ("ADC") used to monitor David Nordstrom, the records of which formed David's alibi for the Union Hall murders. (Dkt. # 104, at 17–19.) Jones also contends that counsel was ineffective for failing to renew his foundational objection to the trial court's admission of the EMS evidence, and that PCR counsel was ineffective for failing to exhaust these claims. (*Id.* at 19–24.) Jones has not shown trial counsel's ineffectiveness and, as a result, cannot show PCR counsel's ineffectiveness.

[4] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

a. *Frye*.

Jones argues that counsel was ineffective for failing to request a *Frye* hearing or object when the State purportedly failed to establish that 1) the BI Model 9000 "was generally accepted in the scientific community," 2) the techniques employed to secure the data it generated and recorded were accepted, and 3) the system used to monitor David Nordstrom was installed "consistent with BI's protocol." (Dkt. #104, at 17–19.) Relying on newspaper accounts and public records purportedly reflecting occasions on which the BI Model 9000 either failed or was defeated by an offender, Jones speculates that, if counsel had raised a *Frye* challenge, the EMS evidence would not have been admitted. (*Id.* at 17–19, Exhs. 6–11.)

But reasonable counsel could easily have declined to raise a *Frye* challenge, because *Frye* does not clearly apply to the EMS evidence. *Harrington v. Richter*, __ U.S. __, 131 S.Ct. 770, 790 (2011) (*Strickland*'s deficient performance inquiry focuses on whether counsel's decisions were objectively reasonable). At the time of Jones' trial, "Arizona courts used the *Frye/Logerquist* standard to determine the admissibility of expert opinions that relied on 'the application of novel scientific principles, formulae, or procedures developed by others.'" *State v. Benson*, __ P.3d __, 2013 WL 3929153, *3, ¶ 20 (Ariz. July 31, 2013) (quoting *Logerquist v. McVey*, 1 P.3d 113, 133, ¶ 62 (Ariz. 2000)). "By its own words, *Frye* applies to the use of *novel* scientific theories or processes to produce results." *Logerquist*, 1 P.2d at 118–19, ¶ 19 (emphasis added). "It is inapplicable when a witness reaches a conclusion by inductive reasoning based on his or her own experience, observation, or research." *Id.* at 133, ¶ 62. In such cases, "the validity of the premise is tested by interrogation of the witness," where, when *Frye* applies, the premise's validity "is tested by inquiring into [its] general acceptance." *Id.*

Jones assumes, but fails to prove, that the EMS recording system and the data it generated were, at the time of his trial, a novel scientific process or theory to

which *Frye* would apply. And that fact is not readily apparent. The system at issue here is distinct from, for example, the novel DNA testing methods that form the bulk of Arizona's *Frye* jurisprudence. *See, e.g.*, *State v. Bible*, 858 P.2d 1152, 1179–93 (Ariz. 1993). Reasonable counsel could have decided that electronic monitoring was not a new scientific process, determined that *Frye* did not apply, and declined to raise a *Frye* challenge. *See Benson*, 2013 WL 3929153, at *3, ¶ 20 (*Frye* does not apply if no novel scientific theories or processes are used; under these circumstances, admissibility is governed by Arizona Rules of Evidence 403, 702, 703).

And even if *Frye* applies, Jones has failed to show that the BI Model 9000 was not accepted in the scientific community, and has thus failed to carry his burden under *Strickland*. *Frye* does not require "that the scientific principle or process produce invariably accurate, perfect results." *State v. Velasco*, 799 P.2d 821, 827 (Ariz. 1990). And the "question is not whether the scientific community has concluded that the scientific principle or process is absolutely perfect, but whether the principle or process is generally accepted to be capable of doing what it purports to do." *Id.* "Any lack of perfection" goes to weight, not admissibility. *Id.*

Here, Jones claims that BI monitoring systems either malfunctioned or were defeated in certain other, unrelated cases. (Dkt. # 104, at 15–17.) But it is not clear from the material he supplies that these systems were the same model as the one used to monitor David. (*Id.* at Exhs. 6–13.) Assuming it was the same model, Jones fails to supply data about the number of BI Model 9000 units in use, in order to place in context the instances on which it failed or was compromised.[5] And evidence of the system's reliability was presented at trial: Parole Supervisor

[5] One of the newspaper articles upon which Jones' relies suggests that BI monitored 900 offenders in Florida alone. (Dkt. # 104, at Exh. 6.)

Rachel Matthews testified that the system was approximately 99% accurate, thereby conceding that it had a small failure rate. (Exhibit A, at 53.) The instances Jones now cites could easily represent the system's 1% failure rate. This claim is not substantial and does not justify reopening the habeas proceeding.

b. Foundation.

Jones contends that trial counsel was ineffective for failing to renew his foundation objection to the admission of the results of Matthews' test of the EMS device in David Nordstrom's home. (Dkt. # 104, at 19–24.) Jones suggests that the State failed to show that the EMS unit used for the test was the same one worn by Nordstrom. (*Id.*) He further notes that—despite the trial court's conditional admission of the results based on the prosecutor's avowal that Theresa Nordstrom would testify that the same phone used in the test was in use the night of the Union Hall crimes—the prosecutor failed to elicit such testimony and counsel failed to object. (*Id.*) This claim is not substantial and does not warrant Rule 60(b) relief.

Addressing Nordstrom's second contention first, as the PCR court found in connection with a related misconduct claim, Matthews' testified that the type of phone used is irrelevant to the system's function and thereby created sufficient foundation to admit the test results. (Exh. A, at 31, 38; Dkt. # 104, at Exh. 15, p. 10.) This Court and the Ninth Circuit found the PCR court's determination reasonable. (Dkt. # 79, at 23–25.) *See Jones v. Ryan*, 691 F.3d 1093, 1106 (9th Cir. 2012) ("*Jones II*"). Counsel's failure to object to the prosecutor's omission of Theresa Nordstrom's anticipated testimony was therefore neither deficient nor prejudicial.

Likewise, Jones can show neither deficient performance nor prejudice from counsel's failure to object to the foundation for Matthews' test results on the ground that the unit tested may not have been the same one David wore the night of the Union Hall murders. While Matthews was unsure whether the unit was the precise one David wore, she testified that it was the identical model. (Exh. A, at

33–34.) This fact affected the evidence's weight, not its admissibility, and the trial court would still have admitted it had counsel objected on foundation grounds. *See* Ariz. R. Evid. 901(a) ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."). Further, counsel cross-examined Matthews on her inability to state whether the unit used in the test was the same one David wore. (*Id.* at 48–49.) Jones has shown neither deficient performance nor prejudice.

2. Failure to call Steven Coats.

Jones argues that trial counsel should have impeached testimony from Jones' acquaintance Lana Irwin—who described having overheard Jones and another man, Stephen Coats, discuss obscure details of the murders for which Jones was convicted—with testimony from Coats. (Dkt. # 104, at 24–28.) *See Jones II*, 691 F.3d at 1098–99. Jones proffers a recent affidavit from Coats, in which Coats claims that Jones never discussed the murders with him and that Jones' trial counsel never interviewed him to test the veracity of Irwin's testimony. (*Id.* at Exh. 18.) But numerous strategic reasons could have supported trial counsel's decision not to involve Coats. *See Strickland*, 466 U.S. at 689–90 (counsel's decisions presumed to be strategic); *see also Richter*, __ U.S. __, 131 S.Ct. at 790. For example, Coats and Jones were jointly charged with murder in Maricopa County,[6] a highly-prejudicial fact that could have emerged at trial if Jones involved

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[6] Jones pleaded guilty to first-degree murder and numerous other counts, and was sentenced to natural-life imprisonment for the first-degree murder conviction. *See* http://www.courtminutes.maricopa.gov/docs/Criminal/022000/m0105938.pdf (Sentencing Minute Entry, filed 2/11/00) (accessed August 6, 2013). Coats also pleaded guilty to a number of counts, including first-degree murder, for which he was also sentenced to natural-life imprisonment. *See* http://www.courtminutes.maricopa.gov/docs/Criminal/012000/m0092821.pdf (Sentencing Minute Entry, filed 1/11/00) (accessed August 6, 2013).

Coats. And Coats was represented by counsel in the Maricopa County case, which would have impeded Jones' counsel's ability to interview him. This ineffective-assistance claim is not substantial.

3. Failure to challenge the sentencing judge's alleged use of causal-nexus screening test.

Jones contends that PCR counsel was ineffective for neglecting to challenge trial counsel's failure to object to the sentencing judge's purported refusal to consider Jones' difficult childhood, antisocial personality disorder, and history of substance abuse in mitigation absent a causal nexus to the offenses. (Dkt. # 104, at 28–33.) But the sentencing judge did not refuse to *consider* the above mitigation; instead, he permissibly gave it little *weight*. Accordingly, trial counsel was not ineffective for failing to object, and PCR counsel was not ineffective for failing to challenge trial counsel's performance.

Prior to discussing Jones' proffered non-statutory mitigation, the sentencing judge recognized that "[n]on-statutory mitigating circumstances include any factors proffered by either side relevant to whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record, and any of the circumstances of the offense." (Dkt. # 104, at Exh. 19, p. 25.) The judge thereafter expressly addressed each proffered mitigating factor. (*Id.* at 25–34.) The judge specifically found that Jones had proven that he had a difficult childhood, but found that factor not mitigating under the facts of this case:

> 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 elements 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 pp. 26–27.) With respect to Jones' mental-health issues and history of drug abuse, the judge expressly confirmed that he had "*carefully considered* the report and testimony of Dr. Jill Teresa Caffrey, *especially findings* that the defendant suffers from antisocial personality disorder, has a history of drug use, and a somewhat low IQ." (*Id.* at 32.) The judge noted the absence of "evidence of defendant's use of drugs at or near the time of these murders" and cited his statement to Dr. Caffrey that he "committed crimes both when he was and when he was not under the influence of drugs." (*Id.* at 32–33.) The judge concluded:

> Counsel has presented and the Court has found no evidence of any causal connection between any of these problems and the commission of the offenses in this case.
>
> This non-statutory mitigating circumstance is not proven.

(*Id.* at 33.) Before pronouncing sentence, the judge reaffirmed that he had considered *all* proffered mitigation:

> *The court has considered all mitigating factors* referenced above, both individually and collectively, whether statutory, non-statutory, or a combination thereof, as to each count for which the defendant stands convicted, to determine whether, considered individually or as a whole, there is sufficient mitigation to call for leniency as to any or all counts.
>
> The Court has weighed, both individually and collectively, all mitigating circumstances found by a preponderance of the evidence against the five aggravating circumstances applicable to each count.

(*Id.* at 34, emphasis added.)

"To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). During a capital penalty phase, the sentencer must be allowed to consider all relevant mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) ("Just as the State may not by statute preclude the sentencer from

considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.") (emphasis in original). A state sentencing scheme complies with the Eighth Amendment unless it places mitigation evidence "beyond the effective reach of the sentencer." *Graham v. Collins*, 506 U.S. 461, 474–76 (1993).

Although the sentencer must *consider* all mitigation, the Supreme Court has never held that it must find such evidence relevant, or afford it any mitigating weight. *See Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("Equally settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer."). Rather, so long as it considers mitigating evidence, the sentencer may afford such evidence whatever weight it deems appropriate. *See Eddings*, 455 U.S. at 113–14 ("The sentencer … 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*.") (emphasis added); *see also McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment) ("*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.").

Under these standards, the Ninth Circuit has "granted habeas relief when state courts have applied a causal nexus test as a *screening mechanism* to deem evidence *irrelevant or nonmitigating as a matter of law*." *Poyson v. Ryan*, 711 F.3d 1087, 1098 (9th Cir. 2013) (emphasis added) (citing *Williams (Aryon) v. Ryan*, 623 F.3d 1258 (9th Cir. 2010), and *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008)). But this Court has "refused to find a constitutional violation when the state court employed a causal nexus test as a *permissible weighing mechanism*." *Poyson*, 711 F.3d at 1098 (emphasis added) (citing *Towery*; *Schad v. Ryan*, 671 F.3d 708 (9th

Cir. 2011); and *Samuel Lopez*.) And under AEDPA, this Court may not presume from a silent or ambiguous record that a state court employed an impermissible causal-nexus test. *See Poyson*, 711 F.3d at 1099 ("We recognize the possibility that the Arizona Supreme Court applied an unconstitutional causal nexus test. The record, however, contains no clear indication that the court did so. We may not presume a constitutional violation from an ambiguous record.") Rather, "[a]bsent a clear indication in the record that the state court applied the wrong standard," this Court "cannot assume the [state] courts violated *Eddings*'s constitutional mandates." *Schad*, 671 F.3d at 724.

Here, the sentencing judge expressly stated that he had "*considered all mitigating factors*," both collectively and individually. (Dkt. # 104, at Exh. 19, pp. 34, emphasis added). This statement ends the inquiry. *See Parker v. Dugger*, 498 U.S. 308, 314 (1991) ("We must assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did."); *Lopez (Samuel) v. Ryan*, 630 F.3d at 1203 ("[T]here is no indication that the state court applied an impermissible requirement of a causal nexus between mitigating evidence and the crime. Indeed, the state court said the opposite—i.e., that it considered all the mitigating evidence on an independent review of the record and found that it did not warrant the exercise of leniency."); *Lopez (George) v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007) ("[A] court is usually deemed to have considered all mitigating evidence where the court so states."). And if the judge's general statement that he considered all mitigation were not enough, he also explicitly affirmed that he had had "carefully *considered*" Dr. Caffney's report and testimony, including her diagnosis of antisocial personality disorder and her opinion that Jones had a history of drug use. (*Id.* at 32.) After considering that mitigation, the judge found—consistent with *Lockett* and *Eddings*—that it was entitled to little or no weight in the sentencing calculus. (*Id.* at 33.) And the judge found that Jones

had proven that he had a dysfunctional family background, revealing that he necessarily *considered* that evidence in mitigation. (*Id.* at 26–27.)

Jones contends that the sentencing judge's special verdict "parrots the Arizona Supreme Court's ruling for which the Ninth Circuit granted the writ in *Styers*." (Dkt. # 104, at 32.) He further argues that the Arizona Supreme Court's "failure to consider similar evidence … led the [court to] grant the writ" in *Ayron Williams*. But these cases are readily distinguishable. In *Styers* and *Ayron Williams*, the state court "applied a causal nexus test as a *screening mechanism* to deem evidence *irrelevant or nonmitigating as a matter of law*." *Poyson*, 711 F.3d at 1098 (emphasis added). Conversely, here, the judge expressly stated that he had *considered all mitigation*.

Finally, Jones asserts that the Arizona Supreme Court violated *Eddings* by imposing a causal-nexus requirement during its independent review of the death penalty. (Dkt. # 104, at 32.) This claim is procedurally defaulted because Jones did not raise it in state court and now lacks a procedural vehicle for doing so. And *Martinez* cannot provide cause to excuse the claim's procedural default, because it is not a claim of trial counsel's ineffectiveness.[7] Jones' claim is not substantial and does not warrant Rule 60(b) relief.

a. *Jones' Rule 60(b)(3) motion is untimely, and he has failed to show that Respondents committed a fraud on an opposing party.*

Jones also seeks relief from judgment under Rule 60(b)(3), which applies in the case of "fraud …, misrepresentation, or misconduct by an opposing party."

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[7] Further, the Arizona Supreme Court did not impose a causal-nexus screening test. Rather, the court—like the sentencing judge—simply gave Jones' mitigation minimal weight because it was not causally connected to the offense. *Jones I*, 4. P.3d at 311–14, ¶¶ 67–81. The Supreme Court's constitutionally-compliant independent review further illustrates that Jones' claim is not substantial, as it cured any conceivable prejudice in the sentencing judge's verdict.

(Dkt. # 104, at 38–44.) A 1-year time period governs Rule 60(b)(3) motions. Fed. R. Civ. P. (c)(1). Jones' motion is untimely and, in any event, he has failed to establish fraud.

4. Jones' Rule 60(b)(3) motion is untimely.

Jones contends that he is entitled to relief under Rule 60(b)(3) based on a claimed *Brady* violation. (Dkt. # 104, at 38–44.) Although he acknowledges the 1-year statute of limitations for filing the motion, and seemingly agrees that his motion is untimely, he contends that "that statute [of limitations] is relaxed where a fraud has been committed on the court."[8] (*Id*. at 38.) Yet, the Tenth Circuit case Jones cites for this contention does not address the limitation period for filing a motion for relief from judgment pursuant to Rule 60(b), let alone "relaxing" that period for any reason. *See In re Pickard*, 681 F.3d 1201 (10th Cir. 2012). In fact, there is no authority permitting this Court to extend the limitations period for Jones' Rule 60(b)(3) motion. Instead, the limitation period is jurisdictional. *See Arrieta v. Battaglia*, 461 F.3d 861, 864–65 (7th Cir. 2006) (time limit in Rule 60(c) "is jurisdictional and cannot be extended"); *see also Scott v. Younger*, 739 F.2d 1464, 1466–67 (9th Cir. 1984) (Rule 60(b) motion filed almost 2 years after decision on habeas petition was untimely); *Keys v. Dunbar*, 405 F.2d 955, 957 (9th Cir. 1969) ("Rule 60(b) relief was foreclosed by limitations in that more than one year had elapsed from the entry of the order denying Keys's original petition for habeas corpus to the filing of his motion pursuant to Rule 60(b)."). This Court

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[8] While Rule 60(d)(3) provides that the court's power to "set aside a judgment for fraud on the court" is not limited, and therefore a statute of limitations does not apply to such a claim, Jones does not seek relief under that provision. Further, "[f]raud upon the court is typically limited to egregious events such as bribery of a judge or juror or improper influence exerted on the court, affecting the integrity of the court and its ability to function impartially." *Apotex Corp v. Merck & Co., Inc*., 507 F.3d 1357 (Fed. Cir. 2007). Jones has not alleged, let alone demonstrated, any such fraud here.

denied Jones' habeas petition on January 29, 2010. (Dkt. # 79.) Jones filed the instant motion seeking relief under Rule 60(b)(3) more than 3 years later, on August 19, 2013. Jones' request for Rule 60(b)(3) relief is, therefore, untimely, and this Court may not consider it. In any event, as discussed below, Jones' claim based on *Brady* lacks merit.

5. No *Brady* violation occurred.

Under *Brady*, the prosecution is required to disclose "evidence favorable to an accused … where the evidence is material either to guilt or to punishment [or impeachment], irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. "[E]vidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quotations omitted). "In order to comply with *Brady*, … the individual prosecutor has a duty to learn of any favorable evidence ***known to the others acting on the government's behalf in this case***, including the police." *Id*. at 280–81 (internal quotation marks omitted; emphasis added).

Here, Jones has failed to establish what the BI records would have shown, and his claim that those records are material and exculpatory is speculative and cannot form the basis for Rule 60(b) relief. Moreover, even assuming that the records would show what Jones suspects they would have, that information is not material and, in any event, Respondents had no duty to obtain it from BI.

a. The BI evidence was not material.

Jones contends that 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.'" (Dkt. #104, at 43.) But as stated above, Claims II–A and II–C are do not allege ineffectiveness for failing to obtain BI's records, and such records would have no bearing on their resolution. And Jones provides no explanation

why, if the BI evidence was so critical to his claims, he did not request it from Respondents or from BI itself, or even mention BI in his pleadings. Further, even if such records exist, and would demonstrate the failure of some of BI's units, this would have been irrelevant to impeach David Nordstrom's credibility and his statement that he believed there was no way to defeat the EMS unit. (Exh. B, at 114–16.) No records from BI or testimony from its representatives could have related to the truthfulness of this claim.

And even if the BI records were theoretically relevant to impeach David's credibility, "the abundance of damaging impeachment evidence presented at trial and defense counsel's aggressive use of it to attack David's credibility"—which this Court summarized in rejecting Claim II–A—made the BI records immaterial. (Dkt. # 79, at 31–33.) *See Jones*, 4 P.3d at 355 ("[T]he defense attacked David's credibility on every basis."). Cross-examining David, defense counsel elicited testimony that David routinely violated his parole conditions by consuming alcohol and illegal drugs, engaging in criminal activity, associating with felons, possessing a gun, and violating his curfew over 25 times. (Exh. B, at 159–64, 179.) Counsel also elicited testimony that David had falsified certain employment records he submitted to his parole officer, had accepted payment for his cooperation with police, had refused to cooperate without such payment, had intended to negotiate a larger sum of money, had initially used a false name when speaking to police, and had told police several different stories of the offenses, including one in which he was not involved in the Smoke Shop robbery. (*Id.* at 163–67, 170, 184–96.)

Counsel further suggested that David's ongoing drug use had affected his memory, and impeached him with his numerous prior felony convictions, including for giving false information to a police officer, forgery, burglary, and theft. (*Id.* at 168–71.) He established that David owned a black Stetson cowboy hat—similar to the one worn by the Smoke Shop robber that the State proposed was Jones—and that David's girlfriend informed him prior to a police interview

that the police had found that hat. (*Id.* at 177, 189, 192.) Counsel observed that the police were unable to locate the murder weapons at the location where David claimed they were discarded, and had not been able to locate the remnants of one victim's wallet at the location where David claimed Scott Nordstrom burned it. (*Id.* at 182–83.) And counsel highlighted David's plea agreement for his involvement as the getaway driver in the Smoke Shop murders, under which, instead of life in prison, the State would recommend that he receive a 5-year term. (*Id.* at 170.)

Further, David's stepmother, Theresa Nordstrom, called as a defense witness, testified that she considered David a "liar."[9] (Exh. C, at 55, 65–66.) And the parties stipulated that David's biological mother would have testified that David is "a manipulative and conniving person" and "is not a truthful person." (*Id.* at 84–85.) And the jury was aware, through Matthew, of the unit's reporting delay. (Exh. A, at 52, *See* Dkt. # 104, at 15.) Given that the jury apparently believed David notwithstanding the magnitude of this impeachment, records showing that BI EMS units may have malfunctioned or been susceptible to tampering would have made little difference, particularly where none of those records related specifically to the unit David wore.

Likewise, as this Court has already held in rejecting Claim II–C, Jones' counsel vigorously challenged the reliability of the David's electronic-monitoring system:

> Review of the trial record indicates that counsel cross-examined [parole officer] Ebenal and [supervisor]

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[9] Notably, Theresa, who lived with David, also testified that David never tried to "beat" the EMS device and that, on a date uncertain, Jones arrived at the Nordstrom residence late at night and had a discussion with David outside the home. (*Id.* at 60–63.) This testimony coincides with David's account of the night of the Union Hall murders, when he was awakened by Jones, who recounted the crimes in detail. *See Jones II*, 691 F.3d at 1097–98.

> Matthews on the reliability of the electronic monitoring system as well as the record keeping relating to it. Ebenal admitted that the system was not fool-proof. Matthews acknowledged that the system was not tested until 18 months after the night in question and that, although the same type of equipment was tested, it may not have been the same equipment in operation on June 13, 1996. During closing argument, defense counsel re-emphasized that the equipment was not fool-proof and that Matthews conceded during direct examination that the equipment works only 99 percent of the time. To bolster this argument, counsel noted that David testified he had a 5:30 curfew the day of the smoke shop murders, but that the system did not record a violation even though, by his own admission, he was present during those crimes and that they occurred after 6:00 p.m. Counsel also questioned whether a test on a system 18 months after the fact revealed anything about its reliability at the time of the Union Hall murders.

(Dist. Ct. Dkt. 79, at 35 (internal record citations omitted).) Any records from BI relating generally to the failure of its monitoring devices would have added little to the evidence set forth above. And it would have been much less compelling than David's own concession that he could have evaded curfew the night of the Smoke Shop murders. (Exh. B, at 178–79, 205.) Nor would records from BI showing that some units ***may have*** malfunctioned have "disprove[d] the Court's conclusion" that the evidence showed no "unrecorded curfew violations" as Jones contends, because the records would not have related to the specific unit Nordstrom used. (Dkt. # 104, at 43.)

b. Respondents were not required to obtain system information from BI.

As noted earlier, a prosecutor has a duty to "learn of any favorable evidence *known to the others acting on the government's behalf in this case*, including the police." *Strickler v. Greene*, 527 U.S. at 280–81 (internal quotation marks omitted; emphasis added). Here, BI was not "acting on the government's behalf" in Jones'

case merely by virtue of having a contract with the state to provide monitoring equipment. Therefore, Respondents had no duty to obtain BI's records, especially when those records did not relate specifically to Jones' case. *See, e.g., State v. Bernini*, 207 P.3d 789, 791, ¶ 8 (Ariz. App. 2009) (State had no obligation to obtain and disclose source code for Intoxilyzer 8000 because "the state has neither possession of the source code nor control over [the company]. Nor did the state have "better access than defendants to [the] source code."); *State v. West*, 279 P.3d 354, 359 (Or. App. 2012) ("*Brady* is not authority for a defendant obtaining evidence of unknown import to test whether it helps or hurts his case.").

Jones has not cited any law requiring the State to obtain information from those with whom it has contractual relationships. *See, e.g., Carriger v. Stewart*, 132 F.3d 463, 492 (9th Cir. 1997) (Kozinski, J., dissenting) ("*Brady* does not require the prosecutor to direct a counter-investigation to destroy its own case."). Further, even had Respondents attempted to obtain the requested information from BI, the company likely would have balked at producing it. *See Bernini*, 207 P.3d at 791, ¶ 8 (company refused to provide intoxilyzer source code "without protective conditions it sought to impose"). Jones admits as much when he states that "BI would produce those records if compelled by this Court to do so pursuant to a subpoena *duces tecum*," and his materials establish that, in at least one other case, BI obtained a protective order covering the type of records Jones seeks. (Dkt. # 104, at 44 & Exh. 8.) Respondents had no duty to investigate on behalf of Jones and obtain information from BI to aid his defense.

Further, "where the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a *Brady* violation by not bringing the evidence to the attention of the defense." *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (internal quotation marks omitted); *see also United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) ("The prosecution is under no obligation to turn over materials not under its control.

When, as here, a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government."). Here, Jones had the same information that was available to the State regarding possible failures in BI's monitoring equipment. Jones has attached to his motion news articles dated from 1996 through 1999, before his trial in this matter, in which it was alleged that BI's monitoring devices failed. (*See* Exhibits 6–9, 11, 12.) Because Jones had the same access to this public information that the State had, he cannot complain that the State violated *Brady* "by not bringing the evidence to the attention of the defense."

In any event, Respondents had no information, other than what they had already disclosed, that David's unit may have malfunctioned. Thus, even if, as Jones alleges, "Respondents had pretrial notice that [another user's] BI Model 9000[10] unit[] may have malfunctioned" (Dkt. # 104, at 41), Respondents had no duty to obtain information on how other units functioned or failed to function. Further, the State disclosed the supplemental report describing the reported malfunction Jones cites on June 14, 2002 (Dkt. # 104, at Exh. 21), yet Jones did not attempt to amend his then-pending PCR petition to allege newly-discovered evidence or raise a *Brady* claim. Nor did he raise any claims in his habeas petition related to the disclosure. Thus, for 11 years, he apparently believed the report to be immaterial. He may not now, in this untimely motion, claim that Respondents violated *Brady*.

III. CONCLUSION.

For the reasons set forth above, this Court should dismiss the Rule 60(b) motion for lack of jurisdiction, because it is an unauthorized SOS habeas petition.

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[10] Although the supplemental report provided by Jones establishes that both units were manufactured by BI, the model number of the unit used by the user, which unit allegedly malfunctioned, is not indicated in that report. (*See* Dkt. # 104, at Exh. 21.)

Alternatively, this Court should conclude that Jones has not shown the extraordinary circumstances necessary to reopen the case under Rule 60(b)(6), has not shown a substantial trial IAC claim under *Martinez*, and has not shown fraud under Rule 60(b)(3). This Court should also deny any request for evidentiary development in this matter.

DATED this 30th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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LIST OF EXHIBITS

Exhibit A: Excerpt from R.T. 6/24/98 (trial testimony of Rebecca Matthews).

Exhibit B: Excerpt from R.T. 6/23/98 (trial testimony of David Nordstrom).

Exhibit C: Excerpt from R.T. 6/25/98 (testimony of Theresa Nordstrom and stipulation regarding testimony of Cindy Wasserburger's testimony).