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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
REPLY TO RESPONSE TO MOTION FOR RELIEF FROM JUDGMENT

DEATH PENALTY CASE

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Robert Jones, through counsel replies to Respondents' opposition to his Motion for Relief from Judgment (hereinafter "Rule 60(b) Motion"). Mr. Jones treats Respondents points *seriatim*.

I. The Motion does not constitute a second or successive petition.

Respondents' argue that Mr. Jones is not entitled to relief from judgment because *Gonzalez v. Crosby*, 545 U.S. 524 (2005), so narrowly construes Rule 60(b) that the federal courts are *never* permitted to grant relief on a substantive federal constitutional claim pleaded in a motion for relief from judgment. Response at 4. That interpretation is the same one the *en banc* Eleventh Circuit embraced before being overruled in *Gonzalez*, *Id*. at 528. It would render Rule 60(b) inapplicable in *all* habeas corpus cases, a conclusion not intended by the *Gonzalez* Court or the Ninth Circuit in cases such as *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009).

In a federal habeas corpus case, motion for relief from judgment under Rule 60(b) ultimately seeks a grant of habeas corpus relief where the district court earlier denied such relief. It may be self-evident, but relief may only be granted on a claim that the petitioner is in custody in violation of the Constitutional or laws or treaties of the United States. *See* 28 U.S.C. § 2241(c)(3). While *Gonzalez* requires that a movant under Rule 60(b) identify "defects in the integrity of the federal habeas proceeding," 545 U.S. at 532, and Mr. Jones does so with respect to the ongoing violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a change in the Supreme Court's procedural jurisprudence also allows for consideration in Rule 60(b) of claims that were not earlier available to Mr. Jones. *See Phelps*, 569 F.3d 1120. Mr. Jones' proceedings were, in the sense contemplated by the Ninth Circuit, rendered defective by a change in the law that the Supreme Court has made retroactive to the entire class of federal habeas petitioners.

Contrary to Respondents' further assertion, at 4, Mr. Jones affirmatively

alleges defects in the integrity of the earlier proceedings and does not merely seek additional merits rulings either on the new claims or the ineffective assistance of counsel ("IAC") claim for which he alleges longstanding withholding of *Brady* material that denied him the proof necessary to prove the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In *In re Pickard*, 681 F.3d 1201, 1206 (10th Cir. 2012), the court recognized that its prior decision in *Spitznas v. Boone*, 464 F.3d 1213 (10th Cir. 2006), distinguished a second or successive petition from a Rule 60(b) motion. The court stated that "a Rule 60(b) motion in a habeas proceeding is a 'true' 60(b) motion if it 'challenges a defect in the integrity of the federal habeas proceeding, *provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior habeas petition*.'" *Id*. (*quoting Gonzalez*, 545 U.S. at 532) (emphasis added).

> Significantly, the court cautioned:
>
> [T]he words *lead inextricably* should not be read too expansively. They certainly should not be read to say that a motion is an improper Rule 60(b) motion if success on the motion would ultimately lead to a claim for relief under § 2255. What else could be the purpose of a 60(b) motion? The movant is always seeking in the end to obtain § 2255 relief. The movant is simply asserting that he did not get a fair shot in the original § 2255 proceeding because its integrity was marred by a flaw that must be repaired in further proceedings.

Id.

Mr. Jones did not get a "fair shot" in the § 2254 proceeding, first because he had meritable claims of IAC at the guilt and sentencing phases of trial that were procedurally defaulted because they were not raised in the state post-conviction relief ("PCR") proceedings. More to the point, the claims went uninvestigated in the § 2254 proceedings because his federal counsel, possessed with a disincentive to view his earlier PCR claims with circumspection, was rendered conflicted by *Martinez* where he represented Mr. Jones in state and federal collateral

proceedings. Mr. Jones was also deprived of a "fair shot" because, despite notice that Mr. Jones tried to undermine David Nordstrom's trial testimony from trial to the present §2254 proceeding, especially as it concerned Nordstrom's novel but untested electronic monitor system ("EMS") alibi, Respondents have failed to acquire or disclose evidence from BI, Inc. that would demonstrate the reliability of the units and whether they were accepted in the relevant scientific or technological community at the time of trial. BI had a contractual relationship with, and sold the EMS unit used to monitor Nordstrom to, Respondents. Mr. Jones permissibly "attacks, 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*, 545 U.S. at 532.

II. *Martinez* requires relief from judgment: the *Phelps* factors.

Extraordinary change in the law. As the Ninth Circuit noted, *Martinez* "forge[d] a new path for habeas counsel to use ineffective assistance of state PCR counsel as a way to overcome procedural default in federal habeas proceedings." *Lopez* (*Samuel*) *v. Ryan*, 678 F.3d 1131, 1133 (9th Cir. 2012). Under the *Phelps* analysis, the Ninth Circuit found that the change of the law in *Martinez* was a "remarkable development" that supported re-opening the district court's judgment in which it denied guilt and sentencing phase relief in an Arizona capital case. *Id.* at 1136. The change in the law weights heavily in favor of re-opening the judgment here.

Respondents would defend on this prong of *Phelps* on the basis that Mr. Jones § 2254 counsel failed to include in the federal petition the three new claims of IAC of trial counsel for which Mr. Jones seeks to re-open the judgment here. Resp. at 7-8. Respondents fail to discuss this Court's procedural order, Dkt. 79 at 3-4, the Supreme Court and Ninth Circuit case law it cites, Mr. Jones' additional citations to Supreme Court and Ninth Circuit precedent, or the orders of United

States District Court for the District of Arizona that similarly instruct that claims are procedurally defaulted, whether raised in the § 2254 petition or not, *if the state courts would now find them defaulted if the petitioner were to return to state court on an exhaustion petition*. *See* Rule 60(b) Motion, Dkt. 106, at 12-14.

Respondents' Response is also disingenuous because they presently argue in this Court in another capital habeas corpus case that a claim that was *not* included in the federal petition is procedurally defaulted. In April 2013, in *Greenway v. Ryan*, U.S.D.C. No. CV-98-25-TUC-RCC, in response to the petitioner's request for a stay and abeyance order, which he filed in order to return to state court to exhaust a claim of juror misconduct under *Rhines v. Weber*, 544 U.S. 269 (2005), Respondents argued at some length that the petitioner's return to state court would be denied as "futile" because "[b]y failing to present his juror misconduct claim on appeal, in his PCR petition or in his amended PCR petition, Greenway has waived the claim and it is prohibited by Rule 32.2(a)(3)[Ariz. R. Crim. P.], which precludes post-conviction relief on a claim "[t]hat has been waived at trial, on appeal, or in a previous collateral proceeding." Dkt. 184 at 4.

As Mr. Jones indicated in the Rule 60(b) motion, at 13, a request for a stay and abeyance under *Rhines* would doubtless be opposed by Respondents for the same reason they objected in *Greenway*, to wit, the claims are procedurally defaulted. *See McGill v. Ryan*, U.S.D.C. No. CV-12-01149-PHX-DGC, where, in June 2013, Respondents argue in an Answer to a § 2254 petition that a claim brought pursuant to *Napue v. Illinois*, 360 U.S. 264 (1959), is "technically exhausted, but procedurally defaulted" and it would be "futile for McGill to return to state court in an attempt to exhaust the claim." Dkt. 34 at 76 (*citing* Rules 32.2 & 32.4(a), Ariz. R. Crim. P., and three Ninth Circuit cases).

Respondents ultimately fail to respond to Mr. Jones' argument that, prior to *Martinez*, it was futile for a federal habeas petitioner to raise claims that were defaulted in the state PCR court and that equity demands that petitioners, post-

Martinez, be permitted to plead those claims now. Respondents also fail to discuss the federal cases cited in Mr. Jones' Motion (at 3, 10-11) that recognize the conflict of interest of § 2254 counsel that bars § 2254 counsel from raising claims of PCR counsel's ineffectiveness as cause to excuse PCR counsel's default where a petitioner is represented by the same counsel in both proceedings.

Instead of addressing these arguments, Respondents set up a straw man, the Supreme Court's line of "abandonment" cases, which Mr. Jones neither relies on nor cites in his Rule 60(b) Motion. Resp. at 8. Respondents even cite a pre-*Martinez* decision of the Ninth Circuit, *Towery v. Ryan*, 673 F.3d 933, 941 (9th Cir. 2012), for the proposition that Mr. Jones is bound by his § 2254 counsel's negligence based on "agency principles." Resp. at 8. *Towery* was decided a month prior to *Martinez*, and *Towery* applied *Holland v. Florida*, ___ U.S. ___, 130 S.Ct. 2549 (2010), and *Maples v. Thomas*, ___ U.S. ___, 132 S.Ct. 912 (2012), two cases that hold that it is virtually impossible to prove actual abandonment by counsel that will forgive a procedural default. It is clear why Respondents would rather have the Court decide Mr. Jones' Rule 60(b) motion as an abandonment case. In *Towery*, the Court ruled that Towery was not abandoned by his PCR counsel and therefore undeserving of Rule 60(b) relief. 673 F.3d at 941.

Diligence. Respondents' parenthetical purporting to explain why the Ninth Circuit's ruling in *Lopez*, 678 F.3d at 1136, militates in favor of a finding that Mr. Jones lacked diligence in bringing his claims pursuant to *Martinez* is misleading. While Lopez may have waited until *Martinez* was decided to ask for the stay and remand to raise PCR counsel's ineffectiveness as cause, the Ninth Circuit made abundantly clear that Lopez did so only after he was unsuccessful in arguing that counsel originally argued for merits consideration of his claims on the basis that Respondents "waived all procedural bars." *Id.* Mr. Jones has not posited any alternative theories here for why the Court should grant the Rule 60(b) motion and

reach the merits other than that *Martinez* confers an equitable right to establish ineffective assistance of PCR counsel as cause and that § 2254 counsel had a duty after *Martinez* to consider whether he could gain merits consideration of claims *he* defaulted in state court, based on the new procedural rule of *Martinez*. *United States v. Del Muro*, 87 F.3d 1078, 1080 (9th Cir. 1996), and *Abbamonte v. United States*, 160 F.3d 922, 925 (2d Cir. 1998), speak powerfully to the disincentive Mr. Maynard had to re-examine the record and claims he brought earlier in the PCR proceedings, claims that were merely coextensive with claims that were already rejected in the state PCR proceedings.

Respondents fail even to acknowledge the growing number of federal cases cited in the Rule 60(b) motion that recognize that § 2254 counsel is conflicted after *Martinez* and cannot represent his client in both state and federal collateral proceedings. *See Gray v. Pearson*, No. 12-5, 2013 WL 2451083 (4th Cir. June 7, 2013) at * 3; *Bergna v. Benedetti*, No. 3:10-CV-00389-RCJ, 2013 WL 3491276, at *2 (D.Nev. July 9, 2013. Respondents fail to cite a single post-*Martinez* case where this conflict has arisen where it was determined to be so *de minimis* as to not require a change of counsel. Mr. Jones' diligence after the substitution of counsel favors re-opening the judgment.

Reliance on the judgment. Respondents comingle this factor, which refers to whether the judgment has been executed or remains prospective, with Arizona's interest in finality. Resp. at 9. As noted in the Rule 60(b) Motion at 37, Respondents have not changed their legal position to any significant degree in reliance on the Court's judgment. *See Phelps*, 569 F.3d at 1137-38; *Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987), which was cited approvingly in *Gonzalez*, 545 U.S. at 534. The factor favors re-opening the judgment.

Arizona's interest in finality is blunted, as the *Gonzalez* Court noted, by the existence of legal vehicles available under Rule 60 whose express purposes are to re-open judgments. 545 U.S. at 529 ("The mere recitation of these provisions

shows why we give little weight to respondent's appeal to the virtues of finality.").

The degree of connection. As noted with respect to the extraordinary change in the law factor in subsection A *supra*, Mr. Jones' claims are procedurally defaulted. *Martinez* confers an equitable remedy to excuse such defaults where the petitioner can establish the IAC of PCR counsel for failing to exhaust such claims. The connectedness favors re-opening the judgment.

Comity. In defense of Mr. Jones' conflicted § 2254 counsel, Respondents cite *Lopez* for the proposition that because Mr. Jones brought "several challenges to trial counsel's ineffectiveness" in over a decade in federal court, comity cuts against Mr. Jones. Resp. at 10. This week, in *Detrich v. Ryan*, No. 08-99001, 2013 WL 4712729, at *8 (9th Cir. Sept. 3, 2013) (*en banc*), the plurality observed:

> The fact that some trial counsel IAC claims may have been properly raised by the allegedly ineffective state PCR counsel does not prevent a prisoner from making a *Martinez* motion with respect to trial-counsel claims that were not raised by that counsel. Nothing in *Martinez* suggests that a finding of "cause" excuses procedural default only when state PCR counsel raised no claims of trial-counsel IAC whatsoever. Rather, *Martinez* authorizes a finding of "cause" excusing procedural default of any substantial trial-counsel IAC claim that was not raised by an ineffective PCR counsel, even if some trial-counsel IC claims were raised.

Respondents further posit that the conflict of § 2254 counsel does not explain his failure to raise the new claims in the federal petition. Resp. at 10. In fact, it *does* explain those omissions. Mr. Jones cites in the section entitled "Diligence" *supra* Ninth and Second Circuit cases that speak to the disincentive of conflicted counsel ever to reconsider his earlier actions or to review the record to determine whether he failed adequately to represent his client. Reasonably competent counsel would have made the objections required to bar the admission of the EMS records that supported suspect David Nordstrom's alibi, would have interviewed the other party to the admissions of Mr. Jones to which prosecution

witness Lana Irwin testified, and would have objected to the sentencing court's reliance on an impermissible causal nexus test. Reasonably competent PCR and § 2254 counsel would have raised those meritable claims in the collateral proceedings. As the *Detrich* plurality noted, "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him." *Id*. at *8.

Death penalty. Respondents purport not to understand the relevance that a death penalty case holds in the consideration of the *Phelps* factors and chastises Mr. Jones for failing to cite a case to that effect. Resp. at 11. As the Ninth Circuit noted in *Phelps*, neither *Gonzalez* nor the Eleventh Circuit's decision in *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987), which was cited favorably by *Gonzalez*, "impose a rigid or exhaustive checklist." 569 F.3d at 1135. Mr. Jones rests on his argument (Motion at 38) that reliability is required in any process employed to sentence a person to death and re-opening this judgment would serve that purpose. *See Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (reliability in imposition of the death penalty requires lesser offense instructions in order to minimize risk of erroneous conviction of a capital offense).

III. The claims are substantial for *Martinez* purposes.

A. Timeliness.

Respondents argue only briefly in passing that Mr. Jones' three IAC claims would now be untimely if raised in federal court. Resp. at 11. Respondents ignore the Rule 60(b) Motion arguments of Mr. Jones that the equity conferred by *Martinez*, and the conflict of his § 2254 counsel, compel a return to the *status quo ante*, that is, that Mr. Jones must be restored to the position he occupied before the decision in *Martinez* and he must be allowed to plead his IAC claims and, if warranted, obtain merits relief were the Court to find PCR counsel to have

rendered IAC that constitutes "cause." Motion at 2-3.

The Supreme Court and the Ninth Circuit have tolled the one-year statute of limitations of the AEDPA for other equitable reasons. Mr. Jones should be permitted to plead his new claims as if he were proceeding with a first petition, without regard to the limitations on second or successive petitions under 28 U.S.C. § 2244(b)(2). A habeas petition filed subsequent to the litigation of a first petition pursuant to § 2254 does not necessarily constitute a second or successive petition and run afoul of the severe restrictions on the filing of second or successive petitions. *See Panetti v. Quarterman,* 551 U.S. 930, 943-44 (2007) (citations omitted). In addition, were the Court to grant the Rule 60(b) motion, an option available to Mr. Jones would be to permit him to amend his § 2254 petition pursuant to Fed. R. Civ. P. 15. *See United States v. Shabazz*, 509 Fed. Appx. 265-66 (4th Cir. 2013) (same Rule 15(a) standard applies to post-judgment requests to amend as apply pre-judgment); *Ahmed v. Dragovich*, 297 F.3d 201, 209 (3rd Cir. 2002) ("When a party requests post-judgment amendment of a pleading, a court will normally conjoin the Rule 60(b) and Rule 15(a) motions to decide them simultaneously, as it 'would be a needless formality for the court to grant the motion to reopen the judgment only to deny the motion for leave to amend.' 6 *Wright et al*., Federal Practice & Procedure § 1489, at 695)."

The Supreme Court has previously recognized that equity can toll the one-year statute of limitations of the AEDPA, which is not jurisdictional. *See McQuiggan v. Perkins*, ___ U.S. ___, 133 S.Ct. 1924 (2013) (actual innocence); *Holland v. Florida*, ___ U.S. ___, 130 S.Ct. 2549, 2560-66 (2010) (attorney professional misconduct); *Calderon v. United States Dist. Court for the Central Dist. of Cal.*, 163 F.3d 530 (9th Cir. 1998 (*overruled in unrelated part, Woodford v. Garceau*, 538 U.S. 202 (2003) (mental incompetence). *Martinez* and the resultant conflict of § 2254 counsel should serve to relax the statute of limitations

in 28 U.S.C. § 2244(d) so the claims may be presented.

B. The claims are substantial. In the alternative, and consistent with the holding in *Martinez* and recent Ninth Circuit and Arizona District Court practice, Mr. Jones requests evidentiary development to cure any defects.

Mr. Jones rests on the substantive arguments made in the Rule 60(b) Motion, at 17-33, except to reply briefly to specific arguments offered by Respondents with respect to the three new IAC claims.

1. Frye and the absence of foundation for admission of EMS.

Citing *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770 (2011), Respondents first speculate that "reasonable counsel could easily have declined to raise a *Frye* challenge, because *Frye* does not apply to the EMS evidence." Resp. at 13. *Harrington*, however, counsels that courts "may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *Id*. at 790 (*quoting from Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003)). Respondents fail to cite any case, article, pamphlet or technical bulletin that would have influenced Mr. Jones' trial counsel to not challenge the EMS evidence on *Frye* grounds. That speculation about counsel's "strategy" is belied by the fact counsel had been successful, at least for one day in barring the admission of that evidence on the basis the prosecution could not prove foundation. S*ee* Tr. 6/24/98 at 36. The EMS evidence was the most important evidence the prosecution had to attempt to convince the jury it was Mr. Jones and not David Nordstrom who shot and killed four persons at the Fire Fighters Union Hall, and the burden would have been on the prosecution to prove the acceptance of the BI Model 9000 in the relevant technological community. Reasonably competent defense counsel would clearly not have made a decision to forego an objection to the admission of the EMS on *Frye* grounds.

Respondents argue Mr. Jones cannot prove his claim of IAC of trial counsel

for failure to move for a *Frye* hearing to test the acceptance of BI, Inc.'s Model 9000 that was attached to suspect-turned-informant David Nordstrom. Resp. at 12-15. Respondents' arguments include that Mr. Jones cannot prove: 1) that "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"; 2) "that the Model 9000 was not accepted in the scientific community"; 3) that malfunctioning units identified by Mr. Jones were "the same model used to monitor David." Resp. at 13-14.

The remainder of Respondents' argument proves in large measure why Mr. Jones requires discovery pursuant to Rule 6 of the Rules Governing Section § 2254 Cases in the United States District Courts and other evidentiary development with which he can prove his IAC claim based on trial counsel's failure to challenge, on *Frye* grounds, the EMS evidence admitted at trial to prove David Nordstrom's alibi for the four Fire Fighters Union Hall homicides. He is caught in the bind recognized in *Banks v. Dretke*, 540 U.S. 668, 696 (2004), where the Supreme Court cautioned in the *Brady* context that "[a] rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." The BI evidence should have been gathered by the Pima County Attorney prior to trial from BI, Inc, the EMS manufacturer, and Arizona Department of Corrections, which contracted with the ADC, oversaw David Nordstorm's home monitoring, and whose personnel testified at trial to his alibi. BI had been sued in multiple jurisdictions and its officers were even made to testify in criminal proceedings that exposed flaws in its EMS units. BI now refuses to communicate with undersigned counsel and the ADC claims that its modest records retention policy has resulted in its no longer having records pertaining to its contracts with BI and purchase, repair, and other records concerning BI's EMS equipment sold to ADC. For these reasons and those outlined in the Rule 60(b) Motion, Mr. Jones requests that the Court grant Mr. Jones' requests for Discovery.

2. Foundation.

Mr. Jones raised in the PCR and § 2254 petitions claims of prosecutorial misconduct based on improper vouching by Deputy Pima County Attorney White to the trial court that Teresa Nordstrom, David's step-mother, would testify the following day and identify the phone in the Nordstrom home when David was monitored as being the same one later tested prior to trial to establish foundation for the admissibility of the EMS system used to monitor David Nordstrom's compliance with his curfew. Dkt. 79 at 23-25. Respondents argue Mr. Jones' IAC claim is not substantial for *Martinez* purposes because the state PCR court, and later this Court, ruled that foundation was unnecessary because ADC's parole supervisor Rebecca Matthews testified the EMS unit would work the same with any phone. Resp. at 15.

In theory, it may be that various brands and styles of telephones that could be connected to the BI Model 9000 units are fungible. That was not the view taken by the trial court when it conditioned admissibility of the EMS records on evidence that the particular phone used on Nordstrom was the precise one later tested by Ms. Mathews and Detective Brenda Woolridge. *See* Tr. 6/24/98 at 36; Rule 60(b) Motion at 22. Contrary to his avowal on June 24, 1998, that he would call Ms. Nordstrom the following day to elicit testimony it was the same phone, Mr. White failed to call Ms. Nordstrom on June 25, 1998, and, when the defense called her, he cross-examined her but not with respect to the phone. Tr. 6/25/98 at 57-58. Mr. White knew Ms. Nordstrom would not supply the necessary foundation because she testified eight months earlier at Scott Nordstrom's trial that the phone tested at her residence was *not* the phone used with David Nordstrom. The state PCR court's later ruling that the foundation was unnecessary appears to be a *post hoc* justification to justify the failure to grant relief on the prosecutorial misconduct claim.

Respondents further argue trial counsel's performance was not deficient where he failed to renew his objection to the admission of the EMS evidence one day after the trial court ruled it was not admissible in the absence of testimony that David Nordstrom's phone and the test phone a year later were identical. That is simply a specious argument. It is the equivalent of counsel saying he preferred to roll the dice and allow the jury to hear evidence that corroborated the co-defendant's alibi when he could have blocked the admission of the evidence with an objection the trial court already promised to sustain. *Harrington* does not confer on Respondents c*arte blanche* to engage in fantasy with respect to defense counsel's strategic decisions.

Finally, Respondents assert that the lack of foundation only "affected the evidence's weight, not its admissibility." Resp. at 16. That is incorrect, as "[t]rial courts have always had a gatekeeping function for opinion evidence" even before *Daubert v. Merrrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 597 (1993), replaced the "*Frye* gatekeeping test." *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010).

3. Stephen Coats.

Respondents again engage in rank speculation that trial counsel *could have had numerous strategic reasons* not to call Lana Irwin's live-in boyfriend, Stephen Coats, to refute her testimony that Mr. Jones made admission concerning homicides in Tucson. Resp. at 16. Respondents speculate that another criminal act committed by Mr. Jones with Mr. Coats might have been admitted had Mr. Coats testified, and that Mr. Coats' counsel may have "impeded Jones' counsel's ability to interview him." Resp. at 17.

Mr. Coats avers he was not interviewed by Mr. Jones' counsel prior to trial, but he would have testified if he had been called at trial. Motion Ex. 18 at ¶ 3. The failure of Mr. Jones' counsel even to interview such a critically important

witness casts doubt on all of the other speculation in which Respondents engage as to why Mr. Jones' counsel failed to call Mr. Coats to testify. If counsel does not know what the witness will say because he has not investigated, he has not made a strategic judgment as to whether to call the witness at trial. *See Rompilla v. Beard*, 545 U.S. 374, 395 (2005); *Wiggins*, 539 U.S. at 527-28.

Four distinct provisions within Arizona's Rules of Evidence protect a defendant from the unfair prejudice of other crimes evidence is ever admissible: 1) the evidence must have a proper purpose; 2) the evidence must be relevant; 3) the danger of unfair prejudice must not outweigh the evidence's probative value; and, 4) a limiting instruction may be given to ameliorate the harsh effects of the admission of the evidence. *State v. Williams*, 183 Ariz. 368, 377, 904 P.2d 437, 446 (1995). Without Respondents' further speculation as to how the evidence would arise as trial, it is impossible to know what its chances of admissibility.

4. The causal nexus claim.

Mr. Jones largely rests on the arguments he made in the Rule 60(b) Motion, at 28-33, primarily because Respondents fail to treat in depth the Ninth Circuit decisions in *Williams* (*Aryon*) *v. Ryan*, 623 F.3d 1258, 1271 (9th Cir. 2010), and *Styers v. Schriro*, 547 F.3d 1026, 1034-36 (9th Cir. 2008) (*per curiam*), which are critical to this Court's consideration of Mr. Jones' causal nexus claim because, as in *Jones*, they are cases in which the state sentencing court or state supreme court described the defendant's proffered mitigation but then stated either it would not consider it because it bore no causal nexus to the crime or it was not mitigating. *Tennard v. Dretke*, 542 U.S. 274 (2004), holds that mitigating evidence such as that proffered in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), need not bear any causal nexus to the crime to be mitigating. Mr. Jones cites the Supreme Court's robust mitigation jurisprudence, which includes evidence of troubled childhood, drug addiction, physical and sexual abuse, and mental illness, as mitigating evidence in the Rule 60(b) Motion at 32-33.

Respondents rely heavily on the Ninth Circuit's decision in *Poyson v. Ryan*, 711 F.3d 1087 (9th Cir. 2013), in which a split panel denied Poyson, another Arizona capital habeas petitioner, causal nexus relief. Resp. at 19. What Respondents omit is the fact that *Poyson* is pending rehearing, with suggestion for rehearing *en banc*, based on the tension between *Poyson* and *Styers*. *See* Petition for Panel Rehearing and Petition for Rehearing En Banc, *Poyson v. Ryan*, Ninth Cir. No. 10-99005, Dkt. 69-1, April 12, 2013. Rehearing has been pending for almost five months owing, without doubt, to Judge Thomas' compelling and exceptionally well-reasoned dissent on this claim. *See Poyson*, 711 F.3d at 1104-09 (Thomas, J., dissenting in part).

Respondents offer the Court no real analysis to distinguish *Jones* from *Styers* or *Williams*. With respect to those two cases, Respondents make only the conclusory statement that those cases are "readily distinguishable" from *Jones*. Resp. at 21. They are not, for the reasons set forth in the Rule 60(b) Motion at 28-33. The Court should re-open the judgment and order that the writ issue based on the IAC of trial counsel for not objecting to the sentencing court's invocation of the impermissible causal nexus test to screen from its consideration non-statutory mitigating evidence of Mr. Jones longstanding drug abuse history, exposure to physical abuse of him and his mother, and his diagnosed personality disorder.

IV. The *Brady* Claim.

A. Clarification as to basis for the Court's jurisdiction and concession that Rule 60(d)(3) does not apply.

Mr. Jones requests relief from judgment, as the argument heading states, due to the continued suppression of *Brady* material in his § 2254 proceedings. Motion at 38. The basis of the Court's jurisdiction initially alleged by Mr. Jones was Rule 60(b)(6) and the fraud provision of Rule 60(d)((3). In his Rule 60(b) Motion, Mr. Jones mentioned Rule 60(b)(3), which allows for relief from judgment where a party has committed a fraud on a federal court, and stated that it would constitute a

basis for the Court's jurisdiction except that it contains a one-year statute of limitations. *Id*. At one point, Mr. Jones conflated Rule 60(b)(3) and (d)(3) and regrets the error. *See* Motion at 42. That error may have led Respondents in two subheadings to refer to Mr. Jones' having brought a "Rule 60(b)(3) Motion." Resp. at 21, 22. Mr. Jones at no time refers to his having filed a "Rule 60(b)(3) Motion" and at no point in argument asked for relief on that basis.[1]

In response to Respondents' footnote, Resp. at 22, and the case cited therein, and undersigned counsel's additional research since filing the Rule 60(b) Motion, Mr. Jones now withdraws as a basis for relief from judgment fraud on the court under Rule 60(d)(3). That leaves as the sole basis for the Court's consideration of the *Brady* claim Rule 60(b)(6).

B. Reply to Respondents' substantive arguments.

Substantively, Respondents argue no *Brady* violations occurred because the BI evidence of system malfunctions was not material and because Respondents were not required to obtain system information from BI. Resp. at 23-28.

1. Materiality of the BI evidence.

Respondents argue the BI evidence would have no bearing on the claims pleaded in the § 2254 petition that raised trial counsel IAC claims based on the failure to more thoroughly attack David Nordstrom's credibility and the accuracy of his electronic alibi. Resp. at 23. Respondents further argue that, if the BI evidence were important, trial counsel should have requested it. *Id.* As will be seen below, defense counsel made a formal discovery request prior to trial as to all persons involved in the electronic monitoring of Nordstrom. Reply Exhibit 1. The

[1] The paragraph in the Motion on statutes of limitations, Motion at 38, was to have been consecutive to the block quote setting out the provisions of Rule 60 on p. 33. The *Brady* claim was originally part of the more general Rule 60(b)(6) discussion that immediately follows the block quote on the top of p. 34. Late in the editing process the *Brady* claim was placed in its own section, ostensibly for purposes of clarity. *See* Motion at 38. Undersigned counsel apologizes for any confusion.

Pima County Attorney replied that only ADC personnel Fritz Ebenal and Rebecca Matthews were involved in the monitoring. Reply Ex. 2. That is now known to be false, as ADC's July 2013 response to undersigned counsel states that BI was doing the electronic monitoring. Motion Ex. 5.

Defense counsel, lacking any discovery that would call into question the accuracy of BI's records and assuming the prosecution would turn over exculpatory evidence, including any evidence that would discredit a prosecution witness, lacked notice that anything was amiss with respect to the EMS records. While BI was not a vendor of the Pima County Attorney, it did sell EMS units to the ADC, an agency the Pima County Attorney solicited for assistance in proving David Nordstrom's alibi.

Respondents further argue that impeachment of Nordstrom with evidence his EMS unit malfunctioned would be immaterial due to the amount of impeachment that was brought against Nordstrom at trial and the vigorous challenge Mr. Jones mounted to that evidence at trial. Resp. at 24-26. The impeachment of Nordstrom could be viewed as nibbling around the edges, but the jury was still free to find him sufficiently credible to justify the conviction of Mr. Jones for the four Fire Fighters homicides because the impeachment evidence only went to observations, perceptions and memory.

Evidence that David's particular EMS unit was infirm and falsely recorded he was in compliance with his curfew on June 13, 1996, or evidence that substantially undermined the accuracy in the transmission or recording of data concerning BI EMS units, theories that may still be provable with BI's records were the Court to order them disclosed, would have caused the jury to believe he was not at home and likely was at the Fire Fighters with his brother Scott, and that Mr. Jones may not have been there. That would have been consistent with Mr. Jones' protestations that the witnesses and prosecution mistook him for David Nordstrom, with whom he shared some physical characteristics, including red hair

and, at times, similar clothing. Such evidence would call into question the rulings of the PCR court and this Court that evidence showed no "unrecorded curfew violations."

2. Duty to acquire *Brady* material.

Respondents concede the prosecution has a duty to learn of evidence favorable to the defense that is known to others acting on the government's behalf. Resp. at 26-27. Respondents posit that BI was not acting on the government's behalf "in Jones' case merely by having a contract with the state to provide monitoring equipment." *Id*.

As noted above, BI did far more than merely supply the equipment. As ADC representative Mary Ondreyco avers:

> In regard to your request for monitoring reports or data generated by or in connection with the EMS worn by inmate Nordstrom, the inmate *was monitored electronically by BI and the monitoring system was maintained electronically by BI*. ADC has no records responsive to this request.

Motion Ex. 5, Dkt. 106 at 64 (emphasis supplied).

Given BI's hands-on involvement in the day-to-day monitoring of Mr. Nordstrom, an appropriate response should have been made to Mr. Jones trial counsel prior to trial when he filed a discovery motion that sought, *inter alia*:

> 15. All electronic monitor officers responsible for monitoring David Nordstrom.

Reply Ex. 1. What trial counsel received from the Pima County Attorney was a response that stated:

> 15. E-M officers for D. Nordstrom: Fritz Evenal (sic), Rebecca Matthews, of the Department of Corrections.

Reply Ex. 2.

ADC apparently was actually working hand-in-glove with BI to monitor ADC's parolees, including Mr. Nordstrom. The failure of ADC to disclose, over

the entire period of the § 2254 proceedings, the fact that BI personnel actually monitored David Nordstrom constitutes an ongoing *Brady* violation. Contrary to Respondents' further assertion, BI's records may, in fact, have pertained to the unit used to monitor Mr. Nordstrom. Evidentiary development is required to ascertain what records BI maintains.

Respondents assert that they were in no position to obtain information from BI because BI "likely would have balked at producing it." Resp. at 27. Respondents further assert that Mr. Jones "admits as much" because he pleaded that a subpoena *duces tecum* might be required to compel such production. *Id*. BI's potential recalcitrance did not absolve Respondents from acquiring the records in the § 2254 proceedings. Respondents misunderstand the power of this Court to compel production of information necessary to satisfy *Brady* obligations. As Mr. Jones notes in the Rule 60(b) Motion (at 15), BI *was* forced to testify to the malfunctions of its EMS systems in a Florida murder case. That BI obtained an order sealing the proceeding in which its representative testified does not mean that relevant evidence cannot be produced pursuant to subpoena here.

Respondents cite Ninth Circuit cases for the proposition that where the defendant is aware of "essential facts enabling him to take advantage of any exculpatory evidence," the government does not violate *Brady*. Resp. at 27. Respondents also assert there is no *Brady* violation where Mr. Jones "had the same information that was available to the State regarding possible failures in BI's monitoring equipment." Resp. at 28.

The argument ignores that Mr. Jones' counsel requested prior to trial the identity of those who electronically monitored David Nordstrom, but he was only told that two ADC employees did so. That was false and misleading. In addition, Nordstrom was monitored in 1996. The relatively sparse records accumulated by the FPD in 2013 were obtained from internet research, a tool not even available to

undersigned counsel in his legal work in the mid-1990s. BI had a lucrative contractual relationship with Respondents to sell them EMS units in the 1990s. BI would have produced records if requested by Respondents or would have been compelled to do so by a state or federal court. On the other hand, Mr. Jones, until recently, could not have even made the argument that he can demonstrate "good cause" under Rule 6 of the Rules Governing Section 2254 Cases to compel the production of BI's records.

Finally, Respondents assert that the State finally did disclose an investigative report of Pima County Attorney Investigator Steve Merrick in 2002, and PCR counsel failed to amend the PCR petition with a *Brady* claim. Resp. at 28. *See* Motion Ex. 21. Respondents omit the fact that the interview took place prior to trial in 1997 and was not disclosed for five years. In addition, Mr. Merrick's report largely refuted the allegations a witness made that she evaded EMS detection when in violation of her curfew. *Id*. at 413. A parole officer told Mr. Merrick that grace periods were built into the EMS that were unknown to the parolee, so the parolee would believe they were in violation when, in fact, their late return home did not register as a violation. *Id*. That is likely why the Pima County Attorney failed to disclose it in 1997 and why it may not have drawn significant attention from Mr. Jones' PCR counsel in 2002. Notwithstanding the Pima County Attorney's belief that the witness' report could be explained away and did not constitute *Brady* material, it clearly *was Brady* material if the above explanation was required to be given.

Information currently in possession of BI must be produced to determine whether Respondents have continued to withhold *Brady* material. Rule 60(b)(6) is the appropriate vehicle for re-opening the judgment with respect to the *Brady* claim Mr. Jones alleges in the Motion for Relief from Judgment. While undersigned counsel had encountered difficulty finding Ninth Circuit or other circuit authority that address the applicability of Rule 60(b)(6) to a *Brady* violation

in the prosecution of a § 2254 petition, one district court has re-opened a judgment and remanded for a determination of materiality where the prosecution acknowledged after judgment that *Brady* material had been withheld. *See Andazola v. Woodford*, No. C-07-6227-PJH, 2009 WL 4572773, at *1 (9th Cir. Dec. 4, 2009).

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.

Respectfully submitted this 6th day of September, 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 6th day of September, 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

Reply Exhibit 1

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PCC No. 33485
Attorney for defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, -vs.- ROBERT JONES Defendant.	No. CR-57526 MOTION FOR DISCOVERY Judge Tinney Division 4

COMES NOW the defendant, ROBERT JONES, by and through his counsel, ERIC A. LARSEN, and moves pursuant to Rule 15 of the Arizona Rules of Crim. Procedure, for an order regarding discovery. Counsel, after beginning his review of the file, requests that the court order the State to produce the following information.

1. The statement that David Nordstrom gave to defense counsel in State of Arizona v. Scott Nordstrom.

2. Scott Nordstrom's statement, if any.

3. Christine Davis's statement, if any.

4. Joe Wick's statement, if any.

5. Holly Pritchard's statement, if any.

6. A priors check on all civilian witnesses.

56

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7. A witness list pursuant to Rule 15, with addresses or methods of contact.

8. Specifically, a priors check on David Nordstrom, Scott Nordstrom and Robert Jones.

9. The May 30, 1996, stolen gun report from Tucson Medical Center parking lot .

10. Any Motor Vehicle Department registration of Robert Jones to a pick-up truck.

11. The composite drawings broadcast by the media.

12. Any scientific reports regarding tire impressions.

13. Any statement from Cynthia Inman.

14. Any employment records of David Nordstrom.

15. All electronic monitor officers responsible for monitoring David Nordstrom.

16. The electronic monitor records of June 13, 1996, regarding David Nordstrom.

17. The actual polygraph sheets which recorded David Nordstrom's physical responses.

18. The David Nordstrom probation file, including the personal notes of his supervising probation officer.

19. The parole file for David Nordstrom with any notes of any parole officer.

20. Any detective notes of statements made by David Nordstrom.

57

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21. All statements of David Nordstrom made prior to January 16, 1997. Counsel has received a number of statements post January 16, 1997. They are replete with references to pre January 16, 1997, statements.

22. Color copies of all photographs of both the Fire Fighter Hall and Moon Smoke Shop crime scenes.

23. Any immunity letters given to David Nordstrom, specifically regarding prosecution on a gun charge as well as homicide or other related charges.

24. The name of David Nordstrom's parole officer and a copy of his conditions of parole.

25. Any Tucson Police Department reports that the business known as, Master Cleaners, located on Country Club and Glenn, was subject to a burglary\robbery in 1996.

26. The David Nordstrom free-talk diagram referred to in his free-talk.

27. All cell-phone and pager records of David Nordstrom's telephone calls to Robert Jones after May 30, 1996.

28. All employment records from the Fire-Fighters Hall, for David Nordstrom, Scott Nordstrom, and their mother.

29. All membership records of the Fire-Fighters Hall relating to any witness in the case at bar.

Counsel believes he is specifically entitled to all of the information listed above pursuant to Rule 15 of the Arizona Rules of Crim. Procedure. All of this information is

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within the control of the State and must be disclosed to defense counsel. Counsel therefore respectfully requests this court order the State to provide the above by a date certain.

RESPECTFULLY SUBMITTED this 27 day of September, 1997.

ERIC A. LARSEN
Attorney for defendant

A copy foregoing
mailed\deliverd this__
day of September, 1997, to:

David White
Deputy County Attorney
Pima County Attorney's Office
32 N. Stone Ave., 14th Floor

Honorable William Tinney
Division 4
Pima County Superior Court
110 W. Congress
Tucson, AZ 85701

David Braun, Esq.
2221 E. Broadway Blvd., #109
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Co-counsel for Mr. Jones

59

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Reply Exhibit 2

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FILED
JAMES N. CORBETT
CLERK SUPERIOR COURT

97 OCT 14 PM 3:47

M. BARRIOS, DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff,

vs.

ROBERT JONES, Defendant.

No. CR-57526

RESPONSE TO MOTION FOR DISCOVERY

Assigned: Div. IV^R

THE STATE OF ARIZONA, by and through the Pima County Attorney, BARBARA LAWALL, and her Deputy, DAVID R. WHITE, hereby responds to the Defendant's Motion for Discovery, as more specifically set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted this 14th day of October, 1997.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

David R White

DAVID R. WHITE
Deputy County Attorney

Copy mailed/delivered this
14th day of October, 1997, to:

Hon. William Tinney,
Division IV

Eric Larsen, Esq.
Attorney for Defendant

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37

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MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

The Defendant was arraigned in this case on July 22, 1997. The State made its initial disclosure, consisting of approximately 2,200 pages of materials, on July 28, 1997. The State has made supplemental disclosure thereafter. Despite Rule 15.2 of the Arizona Rules of Criminal Procedure, which requires the defendant to make his disclosure within 20 days of arraignment, Defendant has made absolutely no disclosure in the almost three months since his arraignment.

The State is aware of the volume of material defense counsel has to review and therefore is not, at this time, invoking Rule 15.7. The State does put the Defendant on notice, however, that State-disclosure (other than Brady material) will cease if the Defendant does not comply with Rule 15.2 in a reasonably timely fashion.

As to Defendant's Motion for Discovery, the State is under the belief that all the items that exist and that Defendant is entitled to have been disclosed to him. To ensure complete initial disclosure, however, the State will re-disclose certain items, as set out below.

The State has some objections to some of the specific requests made by Defendant. Those objections are noted as set out below.

1. D. Nordstrom's Defense Interview: Previously

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disclosed.

2. S. Nordstrom's Statement: Previously disclosed. Will re-disclose.

3. Christine Davis' Statement: See response to Number 2 above.

4. Joe Wick's Statement: See response to Number 2 above.

5. Holly Pritchard's Statement: See response to Number 2 above.

6. Priors Check on Civilian Witnesses: Over 125 potential witnesses have been interviewed in this case so far. Less than a third of that number will be called as witnesses. The State will not run priors checks until those persons who will likely be trial witnesses are identified.

7. Witness List Pursuant to Rule 15: The State will provide such a list after Defendant has made his disclosure pursuant to Rule 15.2.

8. Priors on S. & D. Nordstrom & Defendant: Defense counsel has the same access as the State to the criminal history of the Nordstroms via their previous pre-sentence reports. The State is compiling a criminal history on Defendant and will disclose it in the reasonable future, after Defendant complies with Rule 15.2.

9. Stolen Gun Report: See response to Number 2, above.

10. MVD Registration of Pick-Up: None available.

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11. Composite Drawings: See response to Number 2.

12. Reports re Tire Impressions: None.

13. Statement from C. Inman: See response to Number 2.

14. Employment Records of D. Nordstrom: See response to Number 2, above.

15. E-M Officers for D. Nordstrom: Fritz Evenal, Rebecca Matthews, of the Department of Corrections.

16. E-M Records for 6/13/96: See Response to Number 2.

17. Polygraph Sheets: The State objects to disclosure of this material. Polygraph evidence is not admissible in Arizona courts absent stipulation and the State does not stipulate to any polygraph evidence in this case.

18. D. Nordstrom Probation File: The State is not in possession of this "file." The Defendant has equal ability to obtain that material from the Adult Probation Department.

19. D. Nordstrom Parole File: See Response to Number 2.

20. Detective's Notes of D. Nordstrom Statements: Any notes taken by the detectives re D. Nordstrom have been incorporated into their supplements, which have been disclosed.

21. D. Nordstrom Statements prior to 1/16/97: See response to Number 2.

22. Color Copies of Photographs: There are hundreds of photographs in this case, all of which are available for inspection by defense counsel. The State will be happy to have copied at

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Defendant's expense any or all of these photographs.

23. Immunity Letters to D. Nordstrom: None exist.

24. Identity of D. Nordstrom's Parole Officer: See response to Number 2.

25. TPD Reports re Robbery of Cleaners: See response to Number 2.

26. D. Nordstrom Free Talk Diagram: To the extent that such exists, it will be disclosed.

27. D. Nordstrom calls to R. Jones post 5/30/96: The State has no such records.

28. FireHall Employment Records: Exist only as to Nordstroms' mother. Those have been previously disclosed and the State will re-disclose.

29. FireHall Membership Records: Defendant seeks all membership records of "any witness" in the case at bar. This request is far too broad, and not calculated to lead to any material evidence. In addition, it imposes a large burden on the State to conduct investigation the Defendant should conduct. The witnesses the State will call at the trial in this matter who are associated with the FireHall are clearly indicated as such. No more than that should be required.

(Added verbally) 30. S. Nordstrom letter to Defendant: See response to Number 2.

For the reasons that the items requested by the Defendant have either been provided or are items not subject to Rule 15.1

75

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disclosure, the State requests the Defendant's Motion for Discovery be denied.

Respectfully submitted this 14th day of October, 1997.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

David R White

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Deputy County Attorney

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