

No. 13-16928

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT GLEN JONES, JR.,

Petitioner - Appellant,

v.

CHARLES L. RYAN, et al.,

Respondents - Appellees.

On Appeal from the United States District Court
District of Arizona, No. CV 03-00478-DCB

EXCERPTS OF RECORD TO OPENING BRIEF
VOLUME 2

JON M. SANDS
Federal Public Defender

TIMOTHY M. GABRIELSEN (NV Bar No. 8076)
Assistant Federal Public Defender
407 West Congress Street, Suite 501
Tucson, Arizona 85701-1310
Telephone: (520) 879-7614
Facsimile: (520) 622-6844 (facsimile)
tim_gabrielsen@fd.org

COUNSEL FOR PETITIONER-APPELLANT

Volume 1

- ER 1 Order Dismissing Motion for Relief from Judgment filed September 24, 2013 (Dist. Ct. Doc. 116)
- ER 11 Notice of Appeal filed September 24, 2013 (Dist. Ct. Dkt. No. 117)
- ER 14 Memorandum of Decision and Order filed January 29, 2010 (Dist. Ct. Doc. 79)
- ER 82 9th Circuit Opinion Jones v. Ryan, 691 F.3d 1093 (9th Cir. 2012) decided August 16, 2012
- ER 101 Letter filed in the Supreme Court June 17, 2013 denying Writ of Certiorari No. 12-9753
- ER 102 Direct Appeal Opinion, State v. Jones, 4P.3d 345 (Ariz. 2000) decided June 15, 2000
- ER 138 Minute Entry, *State v. Jones*, Pima Co. No. CR-57526, September 18, 2002
- ER 171 Arizona Supreme Court Order denying Petition for Review, State v. Jones, AZ S. Ct. No. CR-03-0002-PC.

Volume 2

- ER 172 Motion for Relief from Judgment filed August 21, 2013 (Dist. Ct. Doc 106)
- ER 224 Exhibit 1 – Records Request of Pima County Attorney’s Office dated June 25, 2103 and August 2, 1013
- ER 227 Exhibit 2 – Record Requests of BI Incorporated dated June 28, 2013
- ER 230 Exhibit 3 – Records Request of Arizona Department of Corrections dated July 2, 2013
- ER 233 Exhibit 4 - Declaration of Timothy M. Gabrielsen dated August 19, 2013
- ER 235 Exhibit 5 - Letter from Arizona Department of Corrections dated July 29, 2013
- ER 245 Exhibit 6 – The Palm Beach Post, October 22, 19097 article titled Teen’s Monitor was Working Properly, Company Says

- ER 248 Exhibit 7 – Sun-Sentinel, October 24, 1997 article titled Ankle Device Not a Jail Cell, Experts Find – ’96 Hit –and-Run Case Reveals Time Lapses
- ER 252 Exhibit 8 – Sun-Sentinel, June 6, 1998 article titled Monitor Company Petitions to Keep Its Secrets Sealed
- ER 254 Exhibit 9 – Sun-Sentinel July 10, 1998 article titled House-Arrest Faults Exposed in Killing Trial-Inmate May have Fooled Device, Prosecutors Say
- ER 257 Exhibit 10 - Securities and Exchange Commission From 10-K, Excerpts of BI, Inc., June 20, 1996 through June 30, 2000
- ER 276 Exhibit 11 - Pittsburgh Post-Gazette, October 23, 1996 article titled Man Sues Over Faulty Monitor
- ER 278 Exhibit 12 - De Soto Sun, August 5, 1999 article titled Ankle Monitors Can’t Guarantee Criminals Won’t Walk, Ix-Technician Says – Demonbruen Faced Repeat Offenders During Stint Installing Home-Arrest Bracelets
- ER 282 Exhibit 13 – The Denver Post, October 2, 1994 article titled device Revolutionizes Penal Industry Home Arrest Saves Space and Money
- ER 285 Exhibit 14 – Trail Testimony of Fritz Ebenal, *State v. Jones*, June 23, 1998
- ER 312 Exhibit 15 – Minute Entry, *State v. Jones*, Pima Co. No. CR-57526, September 18, 2002
- ER 346 Exhibit 16 – Pretrial Interview of Fritz Ebenal, June 24, 1997

Volume 3

- ER 487 Exhibit 17 – Memorandum in Support of Petition for Post-Conviction Relief, *State v. Jones*, Pima Co. No. CR-57526, February 15, 2002
- ER 529 Exhibit 18 – Declarations of Stephen Coats and John Castro
- ER 533 Exhibit 19 – Sentencing Hearing Transcript, *State v. Jones*, Pima Co. No. CR-57526, December 7, 1998

ER 579 Exhibit 20 – Tucson Weekly, August 17, 2009 article titled
Compromised Conviction?

ER 582 Exhibit 21 – Investigative Report Supplement of Steve Merrick,
June 6, 1997

ER 590 Response to Motion for Relief from Judgment filed September 6, 2013 (Dist. Ct.
Dkt. No. 110)

ER 622 Exhibit A – Excerpts of Reporter’s Transcript June 24, 1998

ER 666 Exhibit B – Excerpts of Reporter’s Transcript June 23, 1998

Volume 4

ER 802 Exhibit C – Excerpts of Reporter’s Transcript June 25, 1998

ER 821 Reply to Response to Motion for Relief from Judgment filed September 9, 2013
(Dist. Ct. Dkt. No. 114)

ER 856 District Court Docket

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

Attorneys for Petitioner

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Robert Glen Jones, Jr.,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

No. CV 03-478-TUC-DCB

**MOTION FOR RELIEF
FROM JUDGMENT**

DEATH PENALTY CASE

TABLE OF CONTENTS

Relief Lies Pursuant to *Martinez* 2

Relief Lies Pursuant to *Brady*..... 3

I. INTRODUCTION..... 5

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

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

B. Mr. Jones claims are procedurally defaulted. 12

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

a. David Nordstrom’s alibi. 14

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

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

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

2.	Trial counsel rendered ineffective assistance under <i>Strickland</i> for failure to call Stephen Coats to rebut the prejudicial and false testimony of Lana Irwin, including with respect to Mr. Jones’ purported admissions about a “kicked-in door”; PCR counsel rendered ineffective assistance for failing to introduce the testimony of Mr. Coats to rebut inculpatory statements Ms. Irwin attributed to Mr. Jones at the guilt phase of trial.	24
3.	Trial counsel rendered ineffective assistance at the capital sentencing hearing for failing to object to the trial court’s application of an unconstitutional causal nexus test to omit from its consideration Mr. Jones’ proffered non-statutory mitigation; PCR counsel rendered ineffective assistance for failing to raise the claim that trial counsel rendered ineffective assistance for failing to object to the application of the causal nexus test.....	28
C.	The Court should grant relief from judgment pursuant to rule 60(b) based on <i>Martinez</i>	33
1.	The change of law in <i>Martinez</i> favors reopening the judgment.....	33
(a)	Whether the district court’s interpretation of then-prevailing circuit precedent was correct or, put another way, whether the intervening change in the law “overruled an otherwise settled legal precedent.” <i>Phelps</i> , 569 F.3d at 1135 (<i>quoting Gonzalez</i> , 545 U.S. at 536).	34
(b)	Whether the change of law was less extraordinary due to the petitioner’s lack of diligence in pursuing review. <i>Phelps</i> , 569 F.3d at 1135-36.	35

(c) Whether granting the motion would undo the past, executed effects of the judgment. <i>Id.</i> at 1137-38.....	36
(d) Whether there has been delay between the judgment and the motion for Rule 60(b) relief. <i>Id.</i> at 1138.	36
(e) Whether the principle of comity would be impermissibly damaged by the grant of habeas relief. <i>Phelps</i> , 569 F.3d at 1139.....	37
III. THE VIOLATION OF <i>BRADY</i> IN THE § 2254 PROCEEDINGS REQUIRES RELIEF FROM JUDGMENT.	38
A. The law with respect to disclosure in federal habeas corpus.....	38
B. The <i>Brady</i> violation requires relief from judgment	41
Conclusion	44

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

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

Relief Lies Pursuant to *Martinez*

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

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

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

Relief Lies Pursuant to *Brady*

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

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

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

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

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

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

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

MEMORANDUM IN SUPPORT

I.

INTRODUCTION

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

¹ Scott Nordstrom’s death sentence was vacated pursuant to *Ring v. Arizona*, 536 U.S. 585 (2002), and he was re-sentenced to death by a jury. *See State v. Nordstrom*, 206 Ariz. 242, 77 P.3d 40 (2003).

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

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

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

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

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

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

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

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

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

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

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

II.

CHANGE OF LAW IN *MARTINEZ* REQUIRES RELIEF FROM JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

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

B. Mr. Jones claims are procedurally defaulted.

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

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

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

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

Mr. Jones has alleged three substantial procedurally defaulted claims:

1.

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

a. **David Nordstrom's alibi.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.

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

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

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

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

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

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

Ex. 15 at 5-6.

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

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

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

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

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

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

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

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

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

3.

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

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

The court concluded:

Overall the evidence established that the defendant's childhood was marked by abuse, unhappiness and misfortune. However, there seems to be no apparent causal connection between any of the defendant's dysfunctional childhood and these murders which he committed at age 26.

This non-statutory circumstance has been proven by a preponderance of the evidence, *but the Court finds it is not mitigating.*

Id. at 26-27 (emphasis added).

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

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

his drug use continued to the present. There is no evidence of defendant's use of drugs at or near the time of these murders.

In fact, Dr. Caffrey quotes the defendant as candidly reporting to her he committed crimes both when he was and when he was not under the influence of drugs.

Counsel has presented and the Court has found no evidence of any causal connection between any of these problems and the commission of the offense in this case.

This non-statutory mitigating circumstance is not proven.

Id. at 33 (emphasis added).

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

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

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

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

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

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

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

Styers, 547 F.3d at 1035.

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

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

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

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

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

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

Rule 60(b) states:

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

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

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

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

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

(a)

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

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

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

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

(b)

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

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

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

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

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

(c)

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

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

(d)

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

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

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

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

(e)

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Claim II-B alleged:

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

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

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

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

Id. at 37 (italics in original).

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

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

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

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

Conclusion

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

Respectfully submitted this 19th day of August, 2013.

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

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

Certificate of Service

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

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

s/Teresa Ardrey
Teresa Ardrey
Legal Secretary
Capital Habeas Unit

Index of Exhibits

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

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

Exhibit 1

Records Request of Pima County Attorney's Office

Office of
FEDERAL PUBLIC DEFENDER
for the District of Arizona
Capital Habeas Unit

COPY

Jon M. Sands
Federal Public Defender

Direct line: (520) 879-7570
email: tim_gabrielsen@fd.org

June 25, 2013

Ms. Kellie Johnson
Chief Criminal Deputy County Attorney
Pima County Attorney's Office
32 N. Stone, Suite 1400
Tucson, Arizona 85701

Re: State of Arizona v. Robert Glen Jones, CR-57526

Dear Ms. Johnson,

Our office was recently appointed to represent Mr. Jones in the U.S. Supreme Court and in any additional federal habeas proceedings. These proceedings stem from his capital murder conviction in Pima County in 1998.

We request an opportunity to review the Pima County Attorney's case files, pursuant to your office's open file policy, so that we may identify and duplicate any and all documents or items that we do not currently have for our files.

Please contact me at 520-879-7570 or Andrew Sowards, my lead investigator at 520-879-7654, with any question regarding this request. We hope to schedule a mutually convenient time to view the file as soon as possible. Thank you in advance for your cooperation and assistance in this matter.

Sincerely,



Tim Gabrielsen
Assistant Federal Public Defender

Cc: Lacey Stover Gard

407 W. Congress Street, Suite 501, Tucson, Arizona 85701
(520) 879-7614 / (800) 758-7054 / facsimile (520) 622-6844

Office of
FEDERAL PUBLIC DEFENDER
for the District of Arizona
Capital Habeas Unit

Jon M. Sands
Federal Public Defender

Direct line: (520) 879-7570
email: tim_gabrielsen@fd.org

August 2, 2013

Ms. Kellie Johnson
Chief Criminal Deputy County Attorney
Pima County Attorney's Office
32 N. Stone, Suite 1400
Tucson, Arizona 85701

Re: State of Arizona v. Robert Glen Jones, CR-57526

Dear Ms. Johnson,

Recently you granted our office the opportunity to review the Pima County Attorney's case files for both Robert Jones and Scott Nordstrom. I thank you for setting aside time for our investigator, Andrew Sowards, to be able to come to your offices and review that material.

In review of the case files, we did not notice any documents pertaining to communication between your office and BI, Incorporated, the company that manufactured the BI Model 9000 electronic monitoring units in use by the Arizona Department of Corrections and its Parole Department in 1996, the period of time Mr. Jones' co-defendant David Nordstrom was connected to the EMS device while on parole. You may know the EMS records served as David's alibi for four of the six Pima County homicides for which he was a suspect. You may know that there were complaints against BI, Inc. in several jurisdictions for parolees or detainees evading detection when in violation of curfew, who committed sometimes violent crimes.

We are attempting to obtain records in the possession of BI, Inc. and Arizona DOC, law enforcement and prosecuting agencies that document sales, maintenance and repairs of BI Model 9000 EMS units used to monitor Arizona parolees or detainees in the period that included 1996. I respectfully ask that your office review its files to determine whether such correspondence or other records exist. If they do, I would ask that your office contact me.

Thank you again for your continued assistance in facilitating access to a complete copy of the case file.

Sincerely,



Tim Gabrielsen
Assistant Federal Public Defender

Cc: Lacey Stover Gard

407 W. Congress Street, Suite 501, Tucson, Arizona 85701
(520) 879-7614 / (800) 758-7054 / facsimile (520) 622-6844

Exhibit 2

Records Request of BI Incorporated

Office of
FEDERAL PUBLIC DEFENDER
for the District of Arizona
Capital Habeas Unit

Jon M. Sands
Federal Public Defender

Direct line: (520) 879-7570
email: tim_gabrielsen@fd.org

June 28, 2013

BI Incorporated
6400 Lookout Road
Boulder, CO 80301

Re: State of Arizona v. Robert Glen Jones, Pima County No. CR-57526

To Whom It May Concern,

Our office was very recently appointed to represent Mr. Jones in the U.S. Court of Appeals for the Ninth Circuit in federal habeas corpus appeals. We have also entered an appearance for Mr. Jones in the U.S. Supreme Court. These proceedings stem from his capital murder convictions in Pima County, Arizona, in 1998. The State of Arizona has requested an execution date by the state supreme court. We respectfully inform you that time is of the essence.

A co-defendant, David Nordstrom, was suspected in the homicides for which Mr. Jones was convicted and sentenced to death. He pleaded guilty to lesser charges in exchange for his testimony against Jones. Nordstrom was on parole at the time of the homicides and being monitored through the Arizona Department of Corrections my means of a BI 9000 Series Offender Electronic Monitoring system. That EMS system was employed as an alibi by Mr. Nordstrom to deflect suspicion that he was involved in the homicides at one of two crime scenes in Tucson on June 13, 1996. He acknowledged being present at a first homicide scene on May 30, 1996.

We seek to review the effectiveness of the BI 9000 units in use by the Arizona Department of Corrections and its Parole Department, and Arizona county law enforcement and courts between January 25, 1996, the date Nordstrom was connected to the EMS, and June 13, 2013, as reflected in, but not limited to, records of sales of the units to those offices, units returned to BI for maintenance or repair, complaints received about defective products, or other correspondence received from Arizona authorities with respect to the BI 9000. We also seek forms or reports generated by BI that reflect the collection or gathering of that data. If available, we also seek data from BI with respect to data gathered from other entities nationally that reflect the performance of the BI 9000 during that period.

407 W. Congress Street, Suite 501, Tucson, Arizona 85701
(520) 879-7614 / (800) 758-7054 / facsimile (520) 622-6844

We ask that you provide the Capital Habeas Unit with a complete, accurate and legible copy of all files pertaining to BI 9000 Series Offender Electronic Monitoring system. We also request a cover letter certifying that you are providing us with a complete and accurate copy of all requested records. If records have been destroyed due to a records retention policy, please so indicate. If your office withholds any materials, please provide us with a list of materials withheld and a written explanation identifying the basis for that withholding.

We appreciate your expediency in processing this request.

Please call me at (520) 879-7570 or e-mail me at tim_gabrielsen@fd.org to advise me of the costs associated PRIOR TO STARTING ANY DUPLICATION. Our office cannot process any payments without prior authorization. Thank you for your cooperation.

Sincerely,



Tim Gabrielsen
Assistant Federal Public Defender

Exhibit 3

Records Request of Arizona Department of Corrections

Office of
FEDERAL PUBLIC DEFENDER
for the District of Arizona
Capital Habeas Unit

COPY

Jon M. Sands
Federal Public Defender

Direct line: (520) 879-7570
email: tim_gabrielsen@fd.org

July 2, 2013

Mr. Charles Ryan, Director
Arizona Department of Corrections
1601 West Jefferson
Phoenix, AZ 85007

Mr. Paul O'Connell
Operations Manager
Community Corrections
Arizona Department of Corrections
1601 West Jefferson
Phoenix, AZ 85007

Re: Robert Glen Jones, ADC #070566,
State of Arizona v. Robert Glen Jones, Pima County No. CR-57526;

David Nordstrom, ADC #097612
State of Arizona v. David Nordstrom, Pima County No. CR-55947

Dear Director Ryan and Mr. O'Connell:

Our office very recently was appointed to represent Robert Jones in his death penalty appeals in the U.S Court of Appeals for the Ninth Circuit. We also just notified the Arizona Supreme Court that we will represent Mr. Jones with respect the motion filed by the State of Arizona for a warrant of execution, which was filed on June 25, 2013.

We respectfully request all parole records, including all electronic monitoring records, on David Nordstrom, Robert Jones' co-defendant in two homicides for which Mr. Jones was convicted and sentenced death in the above-captioned Pima County case. Time, obviously, is of the essence. The offenses took place at The Moon Smoke Shop in Tucson on May 30, 1996. Mr. Nordstrom pleaded to lesser offenses, testified against Mr. Jones and his brother, Scott Nordstrom, in their separate trials, served time in prison, and was released by ADC.

407 W. Congress Street, Suite 501, Tucson, Arizona 85701
(520) 879-7614 / (800) 758-7054 / facsimile (520) 622-6844

ER 230

Director Ryan/Operations Manager O'Connell letter
July 2, 2013
Page 2

David Nordstrom was suspected of four additional homicides with Mr. Jones and his brother Scott on June 13, 1996, at the Firefighters Union Hall in Tucson. His alibi for those offenses was that he was on home arrest for a prior conviction at the time of those homicides and was monitored by the ADC's parole department. We believe Nordstrom was monitored by means of a BI 9000 Series Offender Electronic Monitoring system, which was manufactured by BI, Inc., a Colorado company. He was connected to the unit on January 25, 1996.

We seek to review the information in your possession with respect to BI 9000 units in use by ADC and its Parole Department between January 1, 1996, and June 30, 2013, as reflected in, but not limited to, ADC's records of purchase of EMS systems from BI, reports of units returned to BI for maintenance or repair, complaints issued by ADC to BI regarding defective or malfunctioning products, or other correspondence sent to BI with respect to the BI 9000 or other BI EMS systems in use in Arizona at the time if Nordstrom was, in fact, monitored by some other model. We also seek forms or reports generated by ADC that reflect the collection or gathering of data in Arizona concerning BI's EMS systems.

We appreciate your expediency in processing this request.

Please call me at (520) 879-7570 or e-mail me at tim_gabrielsen@fd.org to advise me of the costs associated PRIOR TO STARTING ANY DUPLICATION. Our office cannot process any payments without prior authorization. Thank you for your cooperation.

Sincerely,



Tim Gabrielsen
Assistant Federal Public Defender

Exhibit 4

Declaration of Timothy M. Gabrielsen

DECLARATION OF TIMOTHY M. GABRIELSEN

I, Timothy M. Gabrielsen, declare the following to be true to the best of my information and belief:

1. I am counsel for Robert Glen Jones, Jr., in *Jones v. Ryan*, U.S.D.C. No. CV-03-00478-TUC-DCB.
2. After sending correspondence to the Arizona Department of Corrections, I had phone contact twice with Ms. Mary Ondreyco at ADC. She followed up the second conversation with a letter that is attached to this Rule 60(b) Motion as Exhibit 5.
3. She agreed to assist me in obtaining parole records for David Nordstrom. She also stated that she would contact BI, Inc., to attempt to obtain records in their possession on the functioning of electronic monitoring units purchased by ADC for use in monitoring parolees in Arizona. She indicated BI would likely not respond to requests for records without a subpoena. She confirmed that the units purchased from BI and used on Nordstrom were the Model 9000.
4. I have twice written to Ms. Kellie Johnson, Chief Criminal Deputy County Attorney at the Pima County Attorney's Office. Those letters are attached as Exhibit 1. I requested access to the files of Mr. Jones and, after Ms. Johnson made the files available, she accommodated the request of my investigator, Andrew Sowards, to produce the files for Nordstrom as well. After review of those files, and due to the absence of correspondence with BI relative to the EMS unit used on Mr. Nordstrom, I wrote Ms. Johnson to ask that files be checked for correspondence with BI concerning the units used on Mr. Nordstrom.
5. Ms. Johnson called in response to the second letter to indicate that she could not locate any files outside the case files for Mr. Nordstrom that bore EMS records. She said she contacted Investigator Steve Merrick, who was the investigator during the trials of Mr. Jones and the Nordstroms and who is still employed by her office. She said she asked Mr. Merrick to see whether any such files may exist. As of this date, I have not heard anything more from Ms. Johnson about the existence of EMS files at her office.
6. I wrote to BI, Inc., to request information on the functioning of its units in Arizona during the period of time relevant to this matter. The letter is attached to the Rule 60(b) Motion as Ex. 2. BI has not responded.

Signed this 19th day of August, 2013, in the State of Arizona.


Timothy M. Gabrielsen

Exhibit 5

Letter from Arizona Department of Corrections dated July 29, 2013



JANICE K. BREWER
GOVERNOR

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov



CHARLES L. RYAN
DIRECTOR

July 29, 2013

Tim Gabrielsen
Office of the Federal Public Defender- District of Arizona
407 W. Congress, Suite 501
Tucson, Arizona 85701

Re: Public Records Request - Robert Glenn Jones, ADC #070566, State of Arizona v. Robert Glen Jones, Pima County No. CR 57526-David Nordstrom, ADC #097612, State of Arizona v. David Nordstrom, Pima County No. CR 55947

Dear Mr. Gabrielsen:

I am responding on behalf of Director Ryan and Paul O'Connell to your written request dated July 2, 2013. The Arizona Department of Corrections (ADC) does not have any responsive records. ADC ceased using the BI 9000 electronic monitoring system in 2005. Under ADC's record retention schedule, contracts and requests for purchases are retained for six years after the fiscal year the contract was fulfilled, canceled or revoked. Similarly, purchase order records issued under contract are retained for six years after the fiscal year created or received. Per your request, I have enclosed a copy of the applicable policies. ADC is checking with archives to see if there are stored records responsive to your request. I will forward any responsive records if located by the records management center at the Arizona State Library Archives, and Public Records. A minute entry from the Pima County Superior Court dated April 23, 1997, indicates that inmate Nordstrom's parole records were provided to his attorney Laura Udal. I have enclosed a copy of the minute entry for your convenience.

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. Please let me know if you have any questions. I can be reached me at 602-542-4916.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary Ondreyco".

Mary Ondreyco
Legal Support Unit Supervisor

Enclosures as stated

cc: Paul O'Connell, Director Community Corrections
Jeff Zick, Division Chief Capital Appeals, Assistant Attorney General
Dawn Northup, General Counsel
CLR 83107287



Arizona State Library, Archives and Public Records

General Records Retention Schedule for All Public Bodies Purchasing/Procurement Records

Schedule Number:
000-11-54

Authorization and Approval

Pursuant to ARS §41-151.12, the retention periods listed herein are both the minimum and maximum time records may be kept. Keeping records for a time period other than their approved retention period is illegal. However, records required for ongoing or foreseeable official proceedings such as audits, lawsuits or investigations, must be retained until released from such official proceedings, notwithstanding the instructions of this schedule. If it is believed that special circumstances warrant that records should be kept longer or shorter times than the time period listed in this schedule or that any of these records may be appropriate for transfer to the State Archives, please contact the Records Management Division to inquire about a change to the retention period. Only the Arizona State Library, Archives and Public Records has the authority to extend records retention periods. Public records, including electronic records, not listed in this schedule are not authorized to be destroyed.

A handwritten signature in cursive script, appearing to read "G. Wells".

Gladys Ann Wells, Director
Arizona State Library, Archives and Public Records

Date Approved: 8/30/11

**Records Retention Schedule for
All Public Bodies
Purchasing/Procurement Records**

<u>Item #</u>	<u>Records Series</u>	<u>Retention (Yrs.)</u>	<u>Remarks</u>
1.	Contract and Lease Records (including Requests for Quotes (RFQ)/ Requests for Purchase (RFP)/ Requests for Information (RFI), recap sheets, scores, awards, bonds, certificates of insurance, W-9 forms, and other related records)	6	After fiscal year contract fulfilled, canceled or revoked
2.	Unsuccessful Bids (if filed separately from contract records)	3	After fiscal year received but no more than 6 years after fiscal year contract fulfilled, canceled or revoked
3.	Late Received Bids (including modifications, withdrawals and other related records)	1 month	After vendor notified (Bids may be returned to vendor in lieu of destruction)
4.	Canceled Solicitation Records	1	After fiscal year canceled but not more than 5 years after fiscal year canceled
5.	Vendor Lists (including active, potential or registered vendors)	-	After superseded or obsolete
6.	Purchase Order Records (if issued under contract)	6	After fiscal year created or received
7.	Protest Records (if filed separately from contract records)	5	After fiscal year resolved
8.	Credit Memos	5	After fiscal year created or received
9.	Oral and Written Quotations (for purchases for which a contract is not required)	5	After fiscal year created or received

GladysAnn Wells, Director 
Arizona State Library, Archives and Public Records

Page 1 of 2

**Records Retention Schedule for
All Public Bodies
Purchasing/Procurement Records**

<u>Item #</u>	<u>Records Series</u>	<u>Retention (Yrs.)</u>	<u>Remarks</u>
10.	Vendor Records (records about vendors and suppliers providing goods and services to the agency including name and address of vendor or company, description of goods and services provided, catalogs, promotional and advertising materials, product specification sheets, copies of price quotations, and other related records)	5	After fiscal year superseded or obsolete

Supersedes schedule dated May 16, 2011

GladysAnn Wells, Director 
Arizona State Library, Archives and Public Records

Page 2 of 2

RECORDS RETENTION AND DISPOSITION SCHEDULE

PAGE 1

TO:
RECORDS MANAGEMENT CENTER
1919 WEST JEFFERSON STREET
PHOENIX, ARIZONA 85009

FROM:
STATE AGENCY OR POLITICAL SUB. Department of Corrections *ADP*
ORGANIZATIONAL UNIT Purchasing *ADA*

SUBMITTED BY Michael Veit TITLE Manager
x Michael Veit TELEPHONE 255-5612

NO.	RECORD SERIES	RETENTION PERIOD			REMARKS
		Total	Files	Records	
1.	Bid Files	7	7	6	After Fiscal Year received or created
2.	Capital Expenditure Requests	3			After Fiscal Year created
3.	Contracts	6			After Fiscal Year fulfilled, expired, cancelled or revoked
4.	Purchase Order Files	3	3	2	After Fiscal Year created
5.	Vendor Files	3			After Fiscal Year received or created

APPROVED BY:

Sharon Lurgord Date June 12, 1984
DIRECTOR, DEPT. OF LIBRARY, ARCH. & PUB. RECORDS

Coordinated with
Auditor General -
Financial Audit
June 6, 1984

DLAPR-RMC-2 R1/84

9/16/12
FILED
4-23 1997

JAMES N. CORBETT, Clerk
M. Mieler Deputy

15

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE PROTEM: HON. MICHAEL J. CRUIKSHANK CASE NO. CR-55947

COURT REPORTER: Liz Lumia

DATE: April 23, 1997

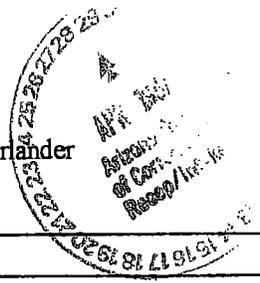
STATE OF ARIZONA

Barbara Catrillo appearing for David White

VS.

DAVID MARTIN NORDSTROM
SCOTT DOUGLAS NORDSTROM

Laura Udall
Richard Bock and Harley Kurlander



MINUTE ENTRY

HEARING ON PENDING MATTERS AND MOTIONS:

Defendant Scott Nordstrom present, in custody; defendant David Nordstrom not present, in custody; his presence is waived by Ms. Udall.

The Court indicates that this hearing is being held to consider defendant Scott Nordstrom's Motions for Deposition as to Toni Hurley and as to the parole officers for Scott Nordstrom, David Nordstrom, and Robert Jones and defendant Scott Nordstrom's Motion to Release Department of Corrections' Parole Records as to Scott and David Nordstrom and Robert Jones.

Ms. Catrillo advises that her instructions from Mr. White are to proceed only with the issues of depositions of parole officers and release of parole records from the Department of Corrections. He has not sent instructions about any other issues, and she is not prepared to proceed as to any other matters.

Based on the representations of counsel,

IT IS ORDERED granting defendant Scott Nordstrom's Motion for Deposition of Toni Hurley, subject to Mr. White being granted leave to file an objection to same.

Counsel for defendant Scott Nordstrom are directed to contact Toni Hurley for the purpose of setting a date and time for the deposition, and they are to submit an order for the Court's signature containing the agreed upon date and time.

APR 24 1997

Mary Mieler
Deputy Clerk

6-A

MINUTE ENTRY

Page: 2

Date: April 23, 1997

Case No: CR-55947

Ms. Catrillo represents that Mr. White has no objection to release of the requested parole records from the Department of Corrections nor to the taking of depositions of the various parole officers as long as the State receives a copy of anything provided to defense counsel and so long as Mr. White is allowed to be present at the depositions.

Ms. Udall makes statements to the Court, joins in the motions on behalf of defendant David Nordstrom, and moves that Fritz Evenueal be added to the list of parole officers to be deposed.

IT IS ORDERED granting Ms. Udall's request, and Fritz Evenueal shall be included in the Motion for Deposition of parole officers, subject to Mr. White filing an objection to same.

All counsel argue to the Court regarding defendants' Motions for Depositions and Release of Parole Records by the Department of Corrections.

IT IS ORDERED granting defendants' Motion to Release Department of Corrections Records and Motion for Depositions of parole officers to the following extent:

1. The Department of Corrections shall produce to Laura Udall, counsel for David Nordstrom, the parole records pertaining to him.

2. Fred Gust and Fritz Evenueal, parole officers for David Nordstrom, shall give a deposition to Ms. Udall at a date and time to be determined by a later Order of the Court. Ms. Udall is directed to submit an Order for the Court's signature containing the date and time she has arranged with said parole officers.

3. The Department of Corrections shall produce to Richard Bock, counsel for Scott Nordstrom, the parole records pertaining to him.

4. Debra Hegedus, parole officer for Scott Nordstrom, shall be deposed by defense counsel regarding her knowledge of this matter at a date and time to be determined by further Order of this Court. Mr Bock is directed to submit an Order for the Court's signature containing the date and time he has arranged with Ms. Hegedus.

Mary Mieler
Deputy Clerk

MINUTE ENTRY

~~Page 3~~

~~Date: April 23, 1997~~

~~Case No. CR-55947~~

5. The Department of Corrections shall provide parole files and records to respective defense counsel by not later than 5:00 p.m. on April 30, 1997.

As to the issue of disclosure of parole records and deposition of parole officer pertaining to Robert Jones,

THE COURT FINDS that in any further discovery requests pertaining to Robert Jones, counsel for the Department of Corrections, Bernard Lopez, Esq. and counsel for Robert Jones, being Michael Edwards, Esq. should be noticed regarding said requests.

IT IS ORDERED setting a Status Conference regarding defendants' discovery requests pertaining to Robert Jones on April 28, 1997 at 3:00 p.m. in Division MC.

Counsel for Robert Jones is to communicate with the Court, by written motion or telephonically and prior to the above hearing date, in order to lodge objections he may have regarding disclosure of the parole records of Robert Jones and to taking the deposition of his parole officer, Ron Kirby.

As to the issue of the State being allowed to attend all depositions,

IT IS ORDERED that any counsel may be present at a deposition if the witness/person being deposed requests his/her presence; however, counsel have no right to be present if his/her appearance has not been requested.

Mr. Kurlander moves, on behalf of defendant Scott Nordstrom, to extend Rule 16 motion for two weeks.

IT IS ORDERED that the motion is denied.

Mr. Kurlander moves that copies of the three sets of parole records (Scott and David Nordstrom and Robert Jones) be provided to the Court for in-camera inspection and subsequent review for the possibility of further disclosure.

Ms. Udall joins in the motion.

Mary Mieler
Deputy Clerk

MINUTE ENTRY

Page: 4

Date: April 23, 1997

Case No: CR 55947

IT IS SO ORDERED, and the Department of Corrections shall provide copies of the parole records of the individuals listed above to the Court for in-camera inspection.

Mr. Kurlander advises the Court that defendant Scott Nordstrom will be filing motions as to suggestive identification procedures and to suppress the search of the defendant's house.

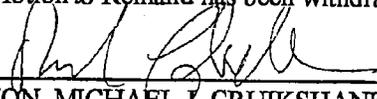
Given the Rule regarding filing of motions 20 days prior to trial, Mr. Bock questions whether a face motion can be filed with the substance of the motion to follow at a later date.

The Court advises that a cover motion may be filed; however, if the late filing of the substance of the motion is prejudicial to the State, further hearings may be necessary.

Mr. Bock further advises the Court that a motion will be forthcoming as to the testimony of an eyewitness identification expert. Counsel is directed to file a written motion including the fees of such an expert, conforming as closely as possible to Pima County Indigent Defense Guidelines, and submit it to the Court.

IT IS ORDERED that the above motion shall be heard at the Pending Motions hearing set on April 28, 1997.

Ms. Udall advises that defendant David Nordstrom's Motion to Remand will be heard on that date as well, and Mr. Bock advises that defendant Scott Nordstrom's Motion to Remand has been withdrawn.


HON. MICHAEL J. CRUIKSHANK

cc: Hon. Michael J. Cruikshank

Criminal Calendaring

County Attorney--David White, Esq.

Sheriff

Richard Bock, Esq.

Harley Kurlander, Esq.

Laura Udall, Esq.

Gregory Kuykendall, Esq.

Bernard Lopez, Esq. Discovery Counsel, Department of Corrections

James Morrow, Esq. (Phx)

Maricopa County Legal Defender--Michael Edwards

(Counsel for Robert Jones)

Mary Mieler

Deputy Clerk

Exhibit 6

The Palm Beach Post, October 22, 1997 article titled Teen's Monitor was Working Properly, Company Says



America's News

English ▾

Other NewsBank Products

[Search History](#) [Saved Articles](#)

Search Results for **"BI inc"** in All Text

United States - Selected Source Types

[Edit Search](#) | [New Search](#)

[Show Help](#)

[Back To Results](#)

Previous Article 15 of 43 Next

Save this Article

TEEN'S MONITOR WAS WORKING PROPERLY, COMPANY SAYS

The **Palm Beach Post** - Wednesday, October 22, 1997

Author: Christine Stapleton ; Palm Beach Post Staff Writer

The electronic ankle bracelet that monitored the house arrest of Ralph Jamie Hayes didn't report his absence the night that deputies say he stole a car, ran over his girlfriend, abandoned the car and made his way back home.

On Tuesday, a day after Hayes' arrest on a second-degree murder charge, the makers of the monitor device and the probation officials who strapped it on Hayes in July 1996 said the device worked fine.

"The equipment functioned as it was supposed to," said Anita Pedersen, marketing communications manager at **BI Inc.**, the company that monitors all 900 of the Department of Corrections' house-arrest offenders. "It did not fail."

If the device is supposed to ensure that offenders on house arrest don't leave home when they aren't supposed to, why didn't it report Hayes' alleged absence?

"It is not in the public's best interest to understand the intricate workings of these systems," Pedersen said. "Many people would enjoy knowing how to defeat the system."

Donald Monroe, a DOC administrator in Palm Beach County, agreed. There are 150 other offenders on house arrest in Palm Beach County and "we don't want other folks getting any weird ideas," Monroe said.

Hayes, 16, told two jail inmates that he killed 14-year-old Kathleen "Kady" Wilt on a Jupiter Farms road Nov. 9 because he believed Wilt was pregnant and cheating on him, the arrest report said. The night of the hit-and-run, Hayes was on house arrest from a 1995 burglary case.

Investigators questioned Hayes on Nov. 27 - a week after he was arrested for violating his probation by hiding a bag of marijuana in his sock at Jupiter High School - but he was ruled out as a suspect because of the house arrest.

Hayes denied knowing anything about Wilt's death but asked investigators if Wilt had been pregnant. He looked "bewildered" when the investigator told him that Wilt was not, the arrest report said.

The monitoring reports of Hayes' house arrest seemed to confirm Hayes was at home at the time of the hit-and-run. But another teen who knew Hayes and had also been on house arrest told an investigator that Hayes confessed to the killing and that Hayes was able to commit the crime by "fooling his house arrest."

The teen also told the investigator that when he was on house arrest he, too, had been able "to leave his residence and go out of range undetected for short periods of time," the

0 Saved Articles
 this article

[Email](#)

[Print](#)

[Bibliography \(export\)](#)

Quick Links

[Find articles by Christine Stapleton ; Palm Beach Post Staff Writer](#)
[Find more articles from page 1B](#)
[Find more from section "LOCAL"](#)
[Find all articles from October 22, 1997](#)

police report said.

Investigators then began testing the ankle monitors, about the size of a beeper, supplied by BI Inc . The company "identified a default feature" of the equipment that "allows for an out-of-range within a short period of time to be undetected," the report said.

On Tuesday, a spokesperson for BI Inc . refused to describe the "default feature" or discuss how long or far away a house-arrest offender could be away from home before their monitors in Boulder, Colo., detected an absence.

Monroe also declined to discuss the "default feature" but said he had no doubt that Hayes had the time to commit the crimes.

"Is it probable he could have committed this crime?" Monroe said. "Yes."

Caption: PHOTO (B&W) & GRAPHIC (B&W)

1. ERIN MORONEY/Staff Photographer Justin Farah (left), 16, and Kevin Zimmer, 15, look at a memorial to Kady Wilt Tuesday. Zimmer was Wilt's neighbor and was one of the first on the accident scene. 2. ROB BARGE/Staff Artist What happened 1) Ralph Hayes' home 2) Kady Wilt's home 3) 6:05-6:10 p.m., Nov. 9: Neighbor's car last seen in driveway 4) 6:15 p.m., Kady Wilt hit and killed by car 5) 9:37 p.m., Neighbor reports car stolen 6) 6:45 a.m., Nov. 10: Abandoned car found Source: Palm Beach County Sheriff's Office

Memo: Ran all editions.

Edition: FINAL

Section: LOCAL

Page: 1B

Index Terms: TEENAGER WPB JUVENILE MURDER CHARGE PRODUCT

Record Number: PBP10220782

Copyright 1997 Palm Beach Newspapers, Inc.

To bookmark this article, right-click on the link below, and copy the link location:

[TEEN'S MONITOR WAS WORKING PROPERLY, COMPANY SAYS](#)

[Back To Results](#)

Previous Article 15 of 43 Next

Exhibit 7

**Sun-Sentinel, October 24, 1997 article titled Ankle Device Not a Jail Cell, Experts
Find – '96 Hit –and-Run Case Reveals Time Lapses**



America's News

English

Other NewsBank Products

Search History Saved Articles

Search Results for "BI inc" in All Text

United States - Selected Source Types

Edit Search | New Search

Show Help

Back To Results

Previous Article 13 of 43 Next

Save this Article

ANKLE DEVICE NOT A JAIL CELL, EXPERTS FIND - '96 HIT-AND-RUN CASE REVEALS TIME LAPSES

Sun-Sentinel - Friday, October 24, 1997

Author: SARAH LUNDY Staff Writer

To the delight of politicians and taxpayers, judges have been using ankle bracelets to monitor some criminals on house arrest instead of sending them to expensive prisons.

And taxpayers have assumed that the electronic gizmos alerted officials as soon as an offender stepped out of the house.

But news this week that a teen-ager wearing an ankle device took a neighbor's car, ran down his former girlfriend and returned home without being detected has shed light on the limitations of the technology.

Despite public perception, ankle devices are not designed to alert officials the moment an offender steps outside his or her home. There's a time lapse. Wily offenders could take off and never be detected, as long as they returned in time

Detectives investigating the Nov. 9, 1996, hit-and-run death of Kathleen "Kady" Wilt said that when they checked the monitoring logs on Ralph Jamie Hayes, 16, on the night Wilt was killed, nothing indicated he had left his home a few blocks from the scene.

At the time, Hayes was under house arrest for a 1995 burglary.

"After we saw the daily logs, it would appear on the surface that he was at home at the time," said Palm Beach County Sheriffs Investigator David Rander.

Officials of the Florida Department of Corrections handed over all information they had on the device to investigators, who were surprised to learn the monitor was not set to alert the company the moment Hayes left his home.

Instead, the DOC said the devices send an alert only when an individual wanders out of range for a specific period of time.

"Early on, we were not aware of any type of default time, and it was only after receiving the information from the inmates that we dug further," Rander said.

Two inmates at the Palm Beach County Jail told investigators that Hayes had said he ran over his former girlfriend with a car.

"I'm not going to comment on the default time," Rander said.

Nor will BI Inc . of Boulder, Colo., which supplies and monitors the devices. The company monitors the signals 24 hours a day, seven days a week, from offices in Indiana and Colorado.

Related Articles

Tell us what you think...

10 young offenders face monitors

DRAGGING-DEATH PROBE TURNS TO FLAWS OF HOUSE ARRES...

2ND YOUTH CHARGED IN DRAGGING DEATH

TEEN'S MONITOR WAS WORKING PROPERLY, COMPANY SAYS

JUVENILE'S CASE SHOWS HOUSE-ARREST MONITOR SYSTEM ...

HOUSE ARREST UNDER SCRUTINY- MURDER TRIAL OF TEEN ...

MURDER TRIAL SHOWS RE-EVALUATION OF HOUSE-ARREST S...

HOUSE-ARREST MONITORS ARE PUT ON TRIAL- DEFENDANT ...

ANKLE MONITORS' SECRET REVEALED IN MURDER TRIAL

SENATORS HOPE TO RESTORE ANKLE MONITORS

0 Saved Articles
this article

Email

Print

Bibliography (export)

"It does not take the place of a jail cell," said Richard Nimer, of the DOC's Office of Community Corrections. "It does not provide that kind of confinement. ... I liken it to a security guard sitting on the doorstep during the evening hours."

The Palm Beach County Sheriff's Office sets its alert time at 10 minutes for pre-trial defendants and convicts who qualify. BI and state officials would not say how long they program the ankle bracelets for state prisoners.

They would only say that the bracelet worked.

"It was working as it was intended," said Donald Monroe, a DOC deputy administrator.

On Nov. 9, 1996, Wilt, 14, and her friend, Rosemarie Blanchard, left a friend's home in Jupiter Farms, a rural subdivision west of Jupiter. At 6:15 p.m., a car with its headlights off sped down the road cutting down Wilt and grazing Blanchard.

Charges were filed this week against Hayes for second-degree murder, manslaughter, hit-and-run involving death, hit-and-run involving bodily injury and driving a motor vehicle without a license.

There are 150 offenders electronically monitored in Palm Beach County. A device about the size of a pager is strapped to an ankle.

It sends radio signals to a receiver attached to the offender's phone. Offenders can have conditions that allow them to leave the home for certain reasons, such as work or school.

If offenders leave when they are not supposed to, the device sets off an alert at BI's offices, which faxes the information to the local probation office.

"We don't rely on that 100 percent," Monroe said.

"To make sure [offenders] are complying with the curfew, the [probation] officer goes by the house and goes to work to make sure they are complying with it."

Technology is always changing. State officials are now working with Protech Monitoring Inc. in Hillsborough and Pinellas counties on a tracking system that uses satellites.

The device will track offenders wherever they go. It also alerts officials if the offender enters a prohibited area, such as a victim's neighborhood.

It does more.

It costs more.

The Protech device costs between \$10 to \$20 a day, compared to \$2.49 for the current ankle bracelets.

"It's a tremendous amount more," Nimer said.

"No way we can do it in big numbers.

Caption: CHART

Staff graphic/R.SCOTT HORNER Chart: Sequence of events the night and morning after Kathleen Wilt was ran down with a car in Jupitar Farms. (BOX) Sequence of events 1. Nov. 9, 1996:3:30 p.m. Kathleen Wilt, Rosemarie Blanchard and Courtney Schmitt leave a birthday party (A) and head for Schmitt's home (C). 2. Trio visits Ralph Hayes, who is under house arrest, at the fenceline along his lot (B). They talk about hoe the girls want to get to Jupiter but don't have a ride. 3. Girls leave and go th Schmitt's house (C). 4. 4 p.m. Wilt returns to Hayes' (B) house for a cigarette. 5. Blanchard and Schmitt's sister, Meredith, go to Hayes' house (B) to collect Wilt and return to Schmitt home (C). 6. Hayes calls Wilt at Schmitt's house and they again talk about how the girls need ride to Jupiter. 7. Blanchard and Wilt leave Schmitt's (C) for Wilt's home (D). 8. 6:15 p.m. Southbound car hits and kills Wilt and injures Blanchard (E). 9. 9:37 p.m. Deborah Cooley calls 911 and reports 1995 Mitsubishi Galant stolen from their residence (F). 10. Nov. 10, 1996: 7:30

Quick Links

[Find articles by SARAH LUNDY](#)

[Staff Writer](#)

[Find more articles from page 1B](#)

[Find more from section "LOCAL"](#)

[Find all articles from October 24, 1997](#)

a.m. Palm Beach County Sheriffs Office recovers Cooley's car in front of a home under construction (G). Source: Palm Beach County SHeriffs Offic

Memo: Informational box at end of text

Edition: PALM BEACH

Section: LOCAL

Page: 1B

Index Terms: ELECTRONIC ANKLE DEVICE ; PRISON ; COST IMPROVEMENT ; COST ; HIT-RUN ; DEATH ; JUVENILE INVESTIGATION

Record Number: 9710240117

Copyright 1997 Sun-Sentinel Company.

To bookmark this article, right-click on the link below, and copy the link location:

[ANKLE DEVICE NOT A JAIL CELL, EXPERTS FIND - '96 HIT-AND-RUN CASE REVEALS TIME LAPSES](#)

[Back To Results](#)

Previous **Article 13 of 43** Next

Exhibit 8

Sun-Sentinel, June 6, 1998 article titled Monitor Company Petitions to Keep Its
Secrets Sealed

6/3/13

America's News - Document Display



America's News

English

Other NewsBank Products

[Search History](#) [Saved Articles](#)

Search Results for "BI incorporated" in All Text

United States - Selected Source Types

[Edit Search](#) | [New Search](#)

[Show Help](#)

[Back To Results](#)

Previous **Article 3 of 4** Next

[Save this Article](#)

MONITOR COMPANY PETITIONS TO KEEP ITS SECRETS SEALED

Sun-Sentinel - Saturday, June 6, 1998

Author: NICOLE STERGHOS Staff Writer

Prosecutors and police have long accused a Wellington teen-ager of wiggling out of his house-arrest ankle monitor without detection _ just long enough to run over his former girlfriend in a stolen car, killing her.

Now the Colorado company that supplies and monitors the ankle device wants to keep the public from learning how Ralph Jamie Hayes could have manipulated its product.

In a hearing on Friday, an attorney for BI Inc. asked Circuit Court Judge Harold Cohen to close any portion of Hayes' June 22 trial and seal any court documents that detail how to slip out of the ankle monitor for a six- to seven-minute period and stray from home without alerting the company's computers.

BI is concerned that airing specifics about the company's technology would violate trade secret protections as well as show detainees how to break the law, attorney Bunni Jensen said.

Media attorney L. Martin Reeder, though, argued that if BI's house-arrest system has an inherent flaw that allows criminals to roam free, publicizing that flaw would put public pressure on BI to fix the problem.

Reeder also cast doubt on whether Hayes is the only person who knows how to wiggle out of the ankle monitor.

Though Cohen expressed concern that making the BI monitor technology public could pose safety problems, he said he did not have enough evidence to make a ruling. He assigned a special master to hold a hearing on the issues.

Hayes, then 16, was on house arrest for burglary on Nov. 9, 1996, when police say he slipped out of his monitor just long enough to take a neighbor's car and run down Kathleen "Kady" Wilt as she walked home from a birthday party.

He is facing charges of second-degree murder, leaving the scene of an accident and driving under suspension.

Edition: Palm Beach

Section: LOCAL

Page: 3B

Index Terms: RALPH JAMI HAYES ; MURDER ; JUVENILE ESCAPE ; BI INCORPORATED ; SECURITY PRIVACY

Record Number: 9806060070

Copyright 1998 Sun-Sentinel Company.

Related Articles

[Tell us what you think...](#)

[COMPANY: DONT LET SECRET SLIP OUT- ELECTRONIC MON...](#)

[Boulder-based BI Inc. tracks offenders](#)

[MURDER SUSPECTS ALIBI CIRCLES ANKLE](#)

[ANKLE MONITORS' SECRET REVEALED IN MURDER TRIAL](#)

[Ankle monitors explained](#)

[KEEP ANKLETS' SECRETS. COMPANY ASKS COURT](#)

[Ankle monitor company had widespread equipment pro...](#)

[Boulder-based BI Inc. tracks offenders](#)

[Experts: Ankle monitors are oversold and misused-...](#)

[SOLVE BRACELET MYSTERY](#)

0 Saved Articles
 this article

[Email](#)

[Print](#)

[Bibliography \(export\)](#)

Quick Links

[Find articles by NICOLE STERGHOS Staff Writer](#)

[Find more articles from page 3B](#)

[Find more from section "LOCAL"](#)

[Find all articles from June 6, 1998](#)

Exhibit 9

**Sun-Sentinel, July 10, 1998 article titled House-Arrest Faults Exposed in Killing
Trial-Inmate May Have Fooled Device, Prosecutors Say**



English ▼

Other NewsBank Products

[Search History](#) [Saved Articles](#)

Search Results for "BI inc" in All Text

United States - Selected Source Types

[Edit Search](#) | [New Search](#)
[Show Help](#)
[Back To Results](#)
[Previous Article 17 of 57](#)
[Next](#) [Save this Article](#)

HOUSE-ARREST FAULTS EXPOSED IN KILLING TRIAL - INMATE MAY HAVE FOOLED DEVICE, PROSECUTORS SAY

Sun-Sentinel - Friday, July 10, 1998

Author: NICOLE STERGHOS Staff Writer.

A dinner spoon and a bucket of water. That's all it takes to slip out of a house-arrest monitoring system, prosecutor Ellen Roberts told jurors on Thursday.

And that is only one of the tactics Ralph Jamie Hayes could have used to fool his ankle monitor when he slipped out of his Jupiter Farms house, took a neighbor's car and ran over his former girlfriend, Kathleen "Kady" Wilt, Roberts said.

In an opening statement that further exposed the frailties of a widely used house-arrest program, Roberts painted two scenarios that could have put Hayes at the scene of Wilt's murder on Nov. 9, 1996 _ despite his house-arrest alibi.

One possibility involves the use of common household tools: Stick your foot in a bucket full of water, use a spoon to snap the monitor off the bracelet, and the water prevents a signal from being transmitted to house-arrest supervisors, Roberts explained.

The monitor, which is fooled into "thinking" that it is still attached to the bracelet, stays at home while the offender can stray as far and for as long as he wishes.

Or you could use nothing at all.

Hayes could just have walked out of the house for up to seven minutes _ the time it takes before the device sends an alert to supervisors, Roberts said.

Either way, she said, Hayes almost got away with murder _ until he slipped up by bragging about his exploits to fellow jail inmates.

But Hayes' defense attorney, Paul Herman, refuted the state's case, saying Hayes may be guilty of foolish bravado but not the second-degree murder and other charges that have been lodged against the 17-year-old.

On the evening Wilt, 14, was run over on a darkened roadside as she walked home from a birthday party, Herman said, Hayes was several blocks away, serving house arrest on 1995 burglary charges.

Hayes spent the evening playing cards and noshing on burgers and macaroni salad with his sister and friends. No one lost sight of him for longer than several moments, while Hayes accepted several phone calls, and he never appeared winded, Herman said.

One of those calls came after sirens and helicopters were heard nearby. On the phone was a friend, who told Hayes the news of his former girlfriend's death.

"Jamie broke down and wept," Herman told jurors. "He lost it emotionally."

 0 Saved Articles
 this article

[Email](#)
[Print](#)
[Bibliography \(export\)](#)

Quick Links

[Find articles by NICOLE STERGHOS Staff Writer](#)
[Find more articles from page 1B](#)
[Find more from section "LOCAL"](#)
[Find all articles from July 10, 1998](#)

But Hayes, who was later jailed after violating house arrest on unrelated charges, would implicate himself.

Inmate Anthony Spence will testify that Hayes told him he "killed the bitch" because she was pregnant with his baby and had been cheating on him with another boy, Roberts said.

Roberts said the inmates knew certain facts that only those involved in the murder could have known, such as the lack of fingerprints in the 1994 maroon Mitsubishi that killed Wilt and the fact that Hayes had received the keys from the owner's daughter, Genelle Cooley, Hayes' girlfriend at the time.

Herman asked jurors to question the credibility of inmate informants. But he also admitted Hayes may have made the remarks, though only "to ingratiate himself and gain status in his 16-year-old mind."

Herman also cast suspicion on Cooley, saying she was seen driving the Mitsubishi the day of the murder and that her parents had hired an attorney and refused to cooperate with investigators.

Though the facts of the case are sufficient to capture public attention, they have more importantly shed light on the vulnerability of a house-arrest system widely used as an alternative to expensive prisons.

BI Inc., the Colorado company that supplies and monitors the devices used by the 150 offenders on house arrest in Palm Beach County, successfully argued that the public should be barred from trial testimony detailing how the monitors can be removed and bypassed. But the company could not censor Roberts' comments to the jury.

Company officials did not return calls for comment late on Thursday.

Caption: PHOTO

Photo/RICHARD GRAULICH Ralph Jamie Hayes looks at jurors as they enter the courtroom on Thursday for his second-degree murder trial.

Edition: Palm Beach

Section: LOCAL

Page: 1B

Index Terms: MURDER ; RALPH.JAMIE HAYES TRIAL ; BEGIN

Record Number: 9807100049

Copyright 1998 Sun-Sentinel Company.

To bookmark this article, right-click on the link below, and copy the link location:

[HOUSE-ARREST FAULTS EXPOSED IN KILLING TRIAL - INMATE MAY HAVE FOOLED DEVICE, PROSECUTORS SAY](#)

[Back To Results](#)

Previous **Article 17 of 57** Next

Exhibit 10

Securities and Exchange Commission Form 10-K, Excerpts of BI, Inc.,
June 20, 1995 through June 30, 2000

Source: SEC online database, Edgar Online, URL:

<http://www.sec.gov/Archives/edgar/data/716629/0000927356-95-000252.txt>

<SEC-DOCUMENT>0000927356-95-000252.txt : 19950926
<SEC-HEADER>0000927356-95-000252.hdr.sgml : 19950926
ACCESSION NUMBER: 0000927356-95-000252
CONFORMED SUBMISSION TYPE: 10-K
PUBLIC DOCUMENT COUNT: 3
CONFORMED PERIOD OF REPORT: 19950630
FILED AS OF DATE: 19950922
SROS: NASD

FILER:

COMPANY DATA:

COMPANY CONFORMED NAME: BI INC
CENTRAL INDEX KEY: 0000716629
STANDARD INDUSTRIAL CLASSIFICATION: SERVICES-MISCELLANEOUS
BUSINESS SERVICES [7380]
IRS NUMBER: 840769926
STATE OF INCORPORATION: CO
FISCAL YEAR END: 0630

FILING VALUES:

FORM TYPE: 10-K
SEC ACT: 1934 Act
SEC FILE NUMBER: 000-12410
FILM NUMBER: 95575450

BUSINESS ADDRESS:

STREET 1: 6400 LOOKOUT RD
CITY: BOULDER
STATE: CO
ZIP: 80301
BUSINESS PHONE: 3035302911

MAIL ADDRESS:

STREET 1: 6400 LOOKOUT RD
CITY: BOULDER
STATE: CO
ZIP: 80301

</SEC-HEADER>
<DOCUMENT>
<TYPE>10-K
<SEQUENCE>1
<DESCRIPTION>FORM 10-K
<TEXT>

<PAGE>

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended: JUNE 30, 1995

Commission File Number: 0-12410

BI INCORPORATED

(Exact name of registrant as specified in its charter)

COLORADO

(State or other jurisdiction
of incorporation or organization)

84-0769926

(I.R.S. Employer Identification No.)

6400 LOOKOUT ROAD, BOULDER, COLORADO 80301

(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code: (303) 530-2911

Securities registered pursuant to Section 12(b) of the Act:

NONE

Securities registered pursuant to Section 12(g) of the Act:

COMMON STOCK, NO PAR VALUE

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes No

At September 6, 1995, there were 6,759, 671 shares of Common Stock outstanding and the aggregate market value of Common Stock held by non-affiliates was \$44,492,000.

2

ITEM 3. LEGAL PROCEEDINGS

On April 21, 1995, Clara Willis, special administrator of the Estate of Seke T. Willis, deceased, filed a complaint naming Michael Sheahan, Sheriff of Cook County, Gerald Hodges, County of Cook municipality, Cook County Department of Corrections and BI Incorporated as defendants in the Circuit Court of Cook County, Illinois, alleging malfunction of a home arrest system causing wrongful death. This action is in early stages of discovery. However, the Company believes its equipment worked appropriately and intends to vigorously defend this action.

Source: SEC online database, Edgar Online, URL:

<http://www.sec.gov/Archives/edgar/data/716629/0000927356-96-000846.txt>

Proc-Type: 2001,MIC-CLEAR
Originator-Name: webmaster@www.sec.gov
Originator-Key-Asymmetric:
MFgwCgYEVQgBAQICAF8DSgAwRwJAW2sNKK9AVtBzYZmr6aGjl1WyK3XmZv3dTINen
TWSM7vrzLADbmYQaionwg5sDW3P6oaM5D3tdezXMm7z1T+B+twIDAQAB
MIC-Info: RSA-MD5,RSA,
J/QncY0Z7QZuNKp+rZOMHDr4O9zhBD0s33nr/HCiBF+MqajXCrKipUyx+nqELbQK
wZ0RJawGydpIGYAL1Z3v6Q==

<SEC-DOCUMENT>0000927356-96-000846.txt : 19960919
<SEC-HEADER>0000927356-96-000846.hdr.sgml : 19960919
ACCESSION NUMBER: 0000927356-96-000846
CONFORMED SUBMISSION TYPE: 10-K
PUBLIC DOCUMENT COUNT: 3
CONFORMED PERIOD OF REPORT: 19960630
FILED AS OF DATE: 19960918
SROS: NASD

FILER:

COMPANY DATA:

COMPANY CONFORMED NAME: BI INC
CENTRAL INDEX KEY: 0000716629
STANDARD INDUSTRIAL CLASSIFICATION: SERVICES-MISCELLANEOUS
BUSINESS SERVICES [7380]
IRS NUMBER: 840769926
STATE OF INCORPORATION: CO
FISCAL YEAR END: 0630

FILING VALUES:

FORM TYPE: 10-K
SEC ACT: 1934 Act
SEC FILE NUMBER: 000-12410
FILM NUMBER: 96631944

BUSINESS ADDRESS:

STREET 1: 6400 LOOKOUT RD
CITY: BOULDER
STATE: CO
ZIP: 80301
BUSINESS PHONE: 3035302911

MAIL ADDRESS:

STREET 1: 6400 LOOKOUT RD
CITY: BOULDER
STATE: CO
ZIP: 80301

</SEC-HEADER>
<DOCUMENT>
<TYPE>10-K
<SEQUENCE>1
<DESCRIPTION>FORM 10-K

4

<TEXT>

<PAGE>

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

Annual Report Pursuant To Section 13 Or 15(d) Of
the Securities Exchange Act of 1934

For the fiscal year ended: June 30, 1996

Commission File Number: 0-12410

BI INCORPORATED

(Exact name of registrant as specified in its charter)

Colorado

(State or other jurisdiction
of incorporation or organization)

84-0769926

(I.R.S. Employer Identification No.)

6400 Lookout Road, Boulder, Colorado 80301

(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code: (303) 530-2911

Securities registered pursuant to Section 12(b) of the Act:

None

Securities registered pursuant to Section 12(g) of the Act:

Common Stock, no par value

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes No

At September 5, 1996, there were 7,046,000 shares of Common Stock outstanding and the aggregate market value of Common Stock held by non-affiliates was \$81,056,000.

Item 3. Legal Proceedings.

On October 2, 1995, Joanne Case filed another complaint naming BI Monitoring Corporation and Salvation Army's Harbor Light Complex as defendants in the Court of Common Pleas, Cuyohoga County, Cleveland, Ohio, alleging negligence in monitoring and detention causing physical and emotional distress. The Plaintiff alleged damages in the amount of \$25,000. The prior complaint was dismissed on October 21, 1994, because the Plaintiff was unable to prove wrong-doing by the Company.

On April 10, 1996, Jane Doe filed a complaint naming BI Monitoring Corporation, David M. Harley, and Oriana House, Inc. as defendants in the Court of Common Pleas, Summit County, Ohio, alleging negligence in monitoring and detention causing physical and emotional distress. The Plaintiff alleged damages in the amount of \$3,000,000. The action is in early stages of discovery. The Company believes its equipment worked appropriately and intends to defend this action.

6

Source: SEC online database, Edgar Online, URL:

<http://www.sec.gov/Archives/edgar/data/716629/0000927356-97-001094.txt>

Proc-Type: 2001,MIC-CLEAR
Originator-Name: webmaster@www.sec.gov
Originator-Key-Asymmetric:
MFgwCgYEVQgBAQICAf8DSgAwRwJAW2sNKK9AVtBzYZmr6aGjlWyK3XmZv3dTINen
TWSM7vrzLADbmYQaionwg5sDW3P6oaM5D3tdezXMm7z1T+B+twIDAQAB
MIC-Info: RSA-MD5,RSA,
BJfEyvIs9X9KucuKAE7c2yMZgE2nAP7zFp83Iz+Iw+aq9LAADKzPgdc9JTIoBWwP
p/VM4KspnYPtTg/lZ+5OSA==

<SEC-DOCUMENT>0000927356-97-001094.txt : 19970922
<SEC-HEADER>0000927356-97-001094.hdr.sgml : 19970922
ACCESSION NUMBER: 0000927356-97-001094
CONFORMED SUBMISSION TYPE: 10-K
PUBLIC DOCUMENT COUNT: 3
CONFORMED PERIOD OF REPORT: 19970630
FILED AS OF DATE: 19970919
SROS: NASD

FILER:

COMPANY DATA:

COMPANY CONFORMED NAME: BI INC
CENTRAL INDEX KEY: 0000716629
STANDARD INDUSTRIAL CLASSIFICATION: SERVICES-MISCELLANEOUS
BUSINESS SERVICES [7380]
IRS NUMBER: 840769926
STATE OF INCORPORATION: CO
FISCAL YEAR END: 0630

FILING VALUES:

FORM TYPE: 10-K
SEC ACT:
SEC FILE NUMBER: 000-12410
FILM NUMBER: 97683236

BUSINESS ADDRESS:

STREET 1: 6400 LOOKOUT RD
CITY: BOULDER
STATE: CO
ZIP: 80301
BUSINESS PHONE: 3035302911

MAIL ADDRESS:

STREET 1: 6400 LOOKOUT RD
CITY: BOULDER
STATE: CO
ZIP: 80301

</SEC-HEADER>
<DOCUMENT>
<TYPE>10-K
<SEQUENCE>1
<DESCRIPTION>FORM 10-K
<TEXT>

7

<PAGE>

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF
the Securities Exchange Act of 1934

For the fiscal year ended: JUNE 30, 1997

Commission File Number: 0-12410

BI INCORPORATED

(Exact name of registrant as specified in its charter)

Colorado

(State or other jurisdiction
of incorporation or organization)

84-0769926

(I.R.S. Employer Identification No.)

6400 Lookout Road, Boulder, Colorado 80301

(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code: (303) 530-2911

Securities registered pursuant to Section 12(b) of the Act:

NONE

Securities registered pursuant to Section 12(g) of the Act:

COMMON STOCK, NO PAR VALUE

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes No

At September 15, 1997, there were 7,422,241 shares of Common Stock outstanding and the aggregate market value of Common Stock held by non-affiliates was \$54,749,429.

ITEM 3. LEGAL PROCEEDINGS.

On October 10, 1996, Melitta Beeson filed a complaint naming the State of California, California Youth Authority, Craig Brown, Director California Youth Authority, Greyland Winbush and BI Incorporated as defendants in the Superior Court of California County of Alameda alleging wrongful death resulting from general negligence. The Plaintiff is seeking unspecified damages. This action is in the early stages of discovery. The Company believes it monitored appropriately and intends to defend against this action and any potential liability is covered by the Company's insurance coverage.

On October 29, 1996, Jeremy Cohlhepp filed a complaint naming Allegheny County, Allegheny County Electronic Monitoring Program, Everett F. McElfresh, Michelle Batch, and BI Incorporated as defendants in the United States District Court for the Western District of Pennsylvania. The Plaintiff alleges a malfunction of the equipment which caused him to be held in a detention center for a period of time. The Plaintiff alleges damages in the amount of \$150,000 against BI Incorporated. This action is in discovery. The Company believes its equipment worked appropriately and intends to defend against this action and any potential liability is covered by the Company's insurance coverage.

On May 6, 1997, Melody Trout filed a complaint naming State Farm Mutual Automobile Insurance Co., General Securities Services Corporation, Billy Wyatt, and BI Incorporated as defendants in the Circuit Court of Stoddard County, Missouri, alleging negligence in manufacturing by BI Incorporated, negligence in monitoring by General Securities Services Corporation and reckless and wanton behavior by Billy Wyatt resulting in a wrongful death. The Plaintiff seeks damages in the amount of \$3,000,000. This action is in the early stages of discovery. The Company believes its equipment was manufactured correctly and intends to defend against this action and any potential liability is covered by the Company's insurance coverage.

9

Source: SEC online database, Edgar Online, URL:

<http://www.sec.gov/Archives/edgar/data/716629/0000927356-98-001551.txt>

Proc-Type: 2001, MIC-CLEAR
Originator-Name: webmaster@www.sec.gov
Originator-Key-Asymmetric:
MFgwCgYEVQgBAQICAF8DSgAwRwJAW2sNKK9AVtBzYZmr6aGjl1WyK3XmZv3dTINen
TWSM7vrzLADbmYQaionwg5sDW3P6oaM5D3tdezXMm7z1T+B+twIDAQAB
MIC-Info: RSA-MD5, RSA,
RVb8i7ML/N7+qwzTIZI5cJ0fXFBj7eU8Mch2r+z1FLPMb2FXhtdMKK7lffZ1bzc5
GQ6PFKV9jgaxsLZ9r7OIZA==

<SEC-DOCUMENT>0000927356-98-001551.txt : 19980923
<SEC-HEADER>0000927356-98-001551.hdr.sgml : 19980923
ACCESSION NUMBER: 0000927356-98-001551
CONFORMED SUBMISSION TYPE: 10-K
PUBLIC DOCUMENT COUNT: 6
CONFORMED PERIOD OF REPORT: 19980630
FILED AS OF DATE: 19980922
SROS: NASD

FILED:

COMPANY DATA:

COMPANY CONFORMED NAME:	BI INC
CENTRAL INDEX KEY:	0000716629
STANDARD INDUSTRIAL CLASSIFICATION:	SERVICES-MISCELLANEOUS
BUSINESS SERVICES [7380]	
IRS NUMBER:	840769926
STATE OF INCORPORATION:	CO
FISCAL YEAR END:	0630

FILING VALUES:

FORM TYPE:	10-K
SEC ACT:	
SEC FILE NUMBER:	000-12410
FILM NUMBER:	98712947

BUSINESS ADDRESS:

STREET 1:	6400 LOOKOUT RD
CITY:	BOULDER
STATE:	CO
ZIP:	80301
BUSINESS PHONE:	3035302911

MAIL ADDRESS:

STREET 1:	6400 LOOKOUT RD
CITY:	BOULDER
STATE:	CO
ZIP:	80301

</SEC-HEADER>
<DOCUMENT>
<TYPE>10-K
<SEQUENCE>1
<DESCRIPTION>FORM 10-K
<TEXT>

10

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF
THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended: JUNE 30, 1998

Commission File Number: 0-12410

BI INCORPORATED

(Exact name of registrant as specified in its charter)

Colorado

(State or other jurisdiction
of incorporation or organization)

84-0769926

(I.R.S. Employer Identification No.)

6400 Lookout Road, Boulder, Colorado 80301

(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code: (303) 218-1000

Securities registered pursuant to Section 12(b) of the Act:

NONE

Securities registered pursuant to Section 12(g) of the Act:

COMMON STOCK, NO PAR VALUE

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes X No

At September 15, 1998, there were 7,641,685 shares of Common Stock outstanding and the aggregate market value of Common Stock held by non-affiliates was \$62,105,233.

ITEM 3. LEGAL PROCEEDINGS.

On January 29, 1998, a settlement was reached concerning a complaint filed by Jeremy Cohlhepp on October 29, 1996. The settlement amount was immaterial and within insurance coverage limits.

On February 6, 1998, Bill M. Kirby filed a complaint naming BI Incorporated as the defendant. The suit alleges negligence and misrepresentation resulting in a wrongful death. The plaintiff seeks damages of \$3,977,500.

On March 12, 1998, Arturo Marines filed a complaint naming the State of Texas Board of Pardons and Paroles and BI Incorporated as defendants. The civil suit was filed for product liability, and misrepresentation, breach of warranty, and general negligence. The plaintiff seeks \$250 million in damages.

On April 6, 1998, Joyce Cerda filed a complaint naming BI Incorporated as the defendant in the Court of Cook County. The suit was filed for product liability and negligence. The plaintiff seeks medical and funeral expenses in excess of \$150,000.

On July 20, 1998, Joseph Gill Sr. filed a complaint naming Rudolph McGriff, City of Philadelphia and BI Incorporated as defendants in the Court of Common Pleas in Philadelphia County, Pennsylvania. The suit brings two counts, a survival action and a wrongful death action, and asks for damages in excess of \$100,000.

12

Source: SEC online database, Edgar Online, URL:

<http://www.sec.gov/Archives/edgar/data/716629/000092735699001536/0000927356-99-001536.txt>

Proc-Type: 2001,MIC-CLEAR
Originator-Name: webmaster@www.sec.gov
Originator-Key-Asymmetric:
MFgwCgYEVQgBAQICAf8DSgAwRwJAW2sNKK9AVtBzYZmr6aGjlWyK3XmZv3dTINen
TWSM7vrzLADbmYQaionwg5sDW3P6oaM5D3tdezXMm7z1T+B+twIDAQAB
MIC-Info: RSA-MD5,RSA,
ThMMKfekRWZ0ThcReHuKzd4Pcbieok1X1S4gB/dualkMB1JIfgyp6p815SH3ppMu
rpC/jMKFRpqlwkJudTD2Pg==

<SEC-DOCUMENT>0000927356-99-001536.txt : 19990928
<SEC-HEADER>0000927356-99-001536.hdr.sgml : 19990928
ACCESSION NUMBER: 0000927356-99-001536
CONFORMED SUBMISSION TYPE: 10-K
PUBLIC DOCUMENT COUNT: 5
CONFORMED PERIOD OF REPORT: 19990630
FILED AS OF DATE: 19990927

FILER:

COMPANY DATA:

COMPANY-CONFORMED NAME: BI INC
CENTRAL INDEX KEY: 0000716629
STANDARD INDUSTRIAL CLASSIFICATION: SERVICES-MISCELLANEOUS
BUSINESS SERVICES [7380]
IRS NUMBER: 840769926
STATE OF INCORPORATION: CO
FISCAL YEAR END: 0630

FILING VALUES:

FORM TYPE: 10-K
SEC ACT:
SEC FILE NUMBER: 000-12410
FILM NUMBER: 99717858

BUSINESS ADDRESS:

STREET 1: 6400 LOOKOUT RD
CITY: BOULDER
STATE: CO
ZIP: 80301
BUSINESS PHONE: 3035302911

MAIL ADDRESS:

STREET 1: 6400 LOOKOUT RD
CITY: BOULDER
STATE: CO
ZIP: 80301

</SEC-HEADER>
<DOCUMENT>
<TYPE>10-K
<SEQUENCE>1
<DESCRIPTION>FORM 10-K
<TEXT>

13

<PAGE>

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

Annual Report Pursuant To Section 13 Or 15(d) Of
the Securities Exchange Act of 1934

For the fiscal year ended: June 30, 1999

Commission File Number: 0-12410

BI INCORPORATED

(Exact name of registrant as specified in its charter)

Colorado

(State or other jurisdiction
of incorporation or organization)

84-0769926

(I.R.S. Employer Identification No.)

6400 Lookout Road, Boulder, Colorado 80301

(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code: (303) 218-1000

Securities registered pursuant to Section 12(b) of the Act:

None

Securities registered pursuant to Section 12(g) of the Act:

Common Stock, no par value

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes No

At September 15, 1999, there were 7,911,294 shares of Common Stock outstanding and the aggregate market value of Common Stock held by non-affiliates was \$67,245,999.

Item 3. Legal Proceedings.

On February 6, 1998, Bill M. Kirby filed a complaint naming BI Incorporated as the defendant. The suit alleges negligence and misrepresentation resulting in a wrongful death. The plaintiff seeks damages of \$11,600,000.

Subsequent to June 30, 1999, Sheila Kennerly filed a complaint on August 10, 1999, naming Montgomery, Ohio, Montgomery County Sheriff Department, and BI Incorporated as defendants. The complaint is for wrongful death, survivorship action and civil rights violation. The plaintiff seeks \$10,500,000 in damages.

15

Source: SEC online database, Edgar Online, URL:

<http://www.sec.gov/Archives/edgar/data/716629/000092735600001861/0000927356-00-001861.txt>

Proc-Type: 2001,MIC-CLEAR
Originator-Name: webmaster@www.sec.gov
Originator-Key-Asymmetric:
MFgwCgYEVQgBAQICAf8DSgAwRwJAW2sNKK9AVtBzYZmr6aGjlWyK3XmZv3dTINen
TWSM7vrzLADbmYQaionwg5sDW3P6oaM5D3tdezXMm7z1T+B+twIDAQAB
MIC-Info: RSA-MD5, RSA,
IMbFKD7pTIvwwxKDzOtZtrULRWhxmGoVGVQs5w42eIAQMCwBgTWqMtxbc36NsGUa
BoleC3FWILyVQhXeeB6ehw==

<SEC-DOCUMENT>/in/edgar/work/0000927356-00-001861/0000927356-00-001861.txt :
20000930

<SEC-HEADER>0000927356-00-001861.hdr.sgml : 20000930

ACCESSION NUMBER: 0000927356-00-001861
CONFORMED SUBMISSION TYPE: 10-K
PUBLIC DOCUMENT COUNT: 6
CONFORMED PERIOD OF REPORT: 20000630
FILED AS OF DATE: 20000928

FILER:

COMPANY DATA:

COMPANY CONFORMED NAME: BI INC
CENTRAL INDEX KEY: 0000716629
STANDARD INDUSTRIAL CLASSIFICATION: [7380
] IRS NUMBER: 840769926
STATE OF INCORPORATION: CO
FISCAL YEAR END: 0630
</COMPANY-DATA>

FILING VALUES:

FORM TYPE: 10-K
SEC ACT:
SEC FILE NUMBER: 000-12410
FILM NUMBER: 731176
</FILING-VALUES>

BUSINESS ADDRESS:

STREET 1: 6400 LOOKOUT RD
CITY: BOULDER
STATE: CO
ZIP: 80301
BUSINESS PHONE: 3032181000
</BUSINESS-ADDRESS>

MAIL ADDRESS:

STREET 1: 6400 LOOKOUT RD
CITY: BOULDER
STATE: CO
ZIP: 80301
</MAIL-ADDRESS>

</SEC-HEADER>

</DOCUMENT>

<TYPE>10-K
<FILENAME>0001.txt
<DESCRIPTION>FOR FISCAL YEAR ENDED 06/30/2000

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

Annual Report Pursuant To Section 13 Or 15(d) Of
The Securities Exchange Act of 1934

For the fiscal year ended: June 30, 2000 .

Commission File Number: 0-12410

BI INCORPORATED

(Exact name of registrant as specified in its charter)

Colorado

(State or other jurisdiction
of incorporation or organization)

84-0769926

(I.R.S. Employer Identification No.)

6400 Lookout Road, Boulder, Colorado 80301

(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code: (303) 218-1000

Securities registered pursuant to Section 12(b) of the Act:

None

Securities registered pursuant to Section 12(g) of the Act:

Common Stock, no par value

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes No

At September 26, 2000, there were 7,974,612 shares of Common Stock outstanding and the aggregate market value of Common Stock held by non-affiliates was \$64,544,516.

ITEM 3. LEGAL PROCEEDINGS.

On July 20, 1999, Joe T. Young filed a complaint naming BI Incorporated and Tamara Anderson in the United States District court, Northern District of Georgia, for wrongful detention. Plaintiff seeks compensatory damages in the sum of \$200,000 and punitive damages in the amount of \$200,000.

On August 17, 1999, Jaby & Latonya Crews filed a complaint naming BI Incorporated, Pamela Goodfriend and Eric Longfellow in State Court of Fulton County, Georgia, for wrongful detainment. Plaintiff is seeking \$300,000 in damages.

Exhibit 11

**Pittsburgh Post-Gazette, October 23, 1996 article titled Man Sues Over
Faulty Monitor**

Pittsburgh Post-Gazette - Oct 23, 1996 [Browse this](#)

Services Inc.

"This route would dry us up on the vine," Munhall Mayor Ray Bodnar said.

DRAVOSBURG

Man sues over faulty monitor

A Dravosburg man who claims he was jailed for four weeks at the Shuman Juvenile Detention Center after his electronic monitoring bracelet malfunctioned has sued the Allegheny County Monitoring Program, its supervisor and the company that makes the monitors.

Jeremy Cohlhepp, 18, claimed in a suit filed yesterday in U.S. District Court that he was held at Shuman between Oct. 25 and Nov. 22, 1994. As a result, he said, he missed 24 days of classes during his junior year at McKeesport High School.

His attorney, W.J. Helzlsouer, said Cohlhepp graduated from McKeesport High School in June. He wouldn't say why Cohlhepp was in the juvenile justice system, and the lawsuit also didn't specify why Cohlhepp had to wear the electronic monitor.

Cohlhepp, who had been on monitoring since June 30, 1994, appeared for a detention hearing Oct. 27 after the device indicated he was not at home Oct. 25. Cohlhepp insisted that he was at home and that the device malfunctioned, and tests by the manufacturer later showed it produced false warnings.

Everett F. McElfresh, who supervises the county's monitoring program, declined comment yesterday.

Exhibit 12

De Soto Sun, August 5, 1999 article titled Ankle Monitors Can't Guarantee
Criminals Won't Walk, Ex-Technician Says – Demonbruen Faced Repeat
Offenders During Stint Installing Home-Arrest Bracelets



English

Other NewsBank Products

[Search History](#) [Saved Articles](#)

Search Results for "BI inc" in All Text

United States - Selected Source Types

[Edit Search](#) | [New Search](#)

Show Help

[Back To Results](#)

Previous Article 18 of 33 Next

Save this Article

Ankle monitors can't guarantee criminals won't walk, ex-technician says - Demonbruen faced repeat offenders during stint installing home-arrest bracelets

DeSoto Sun (Arcadia, FL) - Thursday, August 5, 1999

Author: GREG MARTIN ; Staff Writer.; You can e-mail Greg Martin at gmartin@sunletter.com

The fact that the suspect in the March 9 murder of a 19-year-old Punta Gorda woman is a convicted sex offender who was supposed to be under house arrest at the time doesn't surprise Darrell Demonbruen.

Area convicts routinely violate house arrest terms -- despite the fact they are required to wear electronic monitoring devices, he said.

Demonbruen ought to know.

The Charlotte County firefighter moonlighted from November 1998 to February 1999 installing the electronic monitoring devices.

The devices consist of an ankle shackle and a receiver connected to the defendant's home phone line. If the shackle travels beyond a certain range, an alarm signal is sent to a control center, which notifies area probation agencies.

Demonbruen earned \$20 for every ankle shackle and receiver machine he installed. His district included five counties from Manatee to Collier.

He estimated as many as 75 percent of the juvenile defendants and an unknown number of adults he had contact with routinely violated the conditions of their house arrest terms.

"They're a waste of taxpayers' money," he said. "The kids will find ways to get out of them."

Often, parents and employers would provide excuses for the wayward defendants, he said.

"They wouldn't want their son to get in trouble," he said

About a dozen defendants merely cut off the ankle shackles and discarded them.

Others, however, were more sophisticated. They'd use special pliers available in hardware stores to remove the devices without setting off the alarms.

Demonbruen said they learn about those methods while in jail or juvenile detention.

Tampering with a monitoring device can send juvenile offenders back to juvenile hall for up to five days or longer if a judge deems it necessary, officials said.

Adult violators can also be sent back to prison.



Related Articles

Tell us what you think...

[COUNTY TO ADD 100 HOUSE-ARREST MONITORS](#)

[At \\$5 a day, house arrest gains in popularity- EI...](#)

[STATE HOUSE ARREST: NEW STUDY WEIGHS THE COSTS, BE...](#)

[House arrests ease jail crowding](#)

[HOUSE ARREST NOT FAIL-SAFE - MAJOR CRIMES RARE, O...](#)

[THEY STAY AT HOME, BUT AREN'T HOME FREE](#)

[Electronic monitoring bracelets often in short sup...](#)

[HOUSE ARREST UNDER REVIEW- OFFICIALS DEFEND PRISON...](#)

[\\$100,000 bond set in baby's shaking death](#)

[Bail cut for 2 in deadly beating case in Old City](#)

0 Saved Articles
 this article

[Email](#)

[Print](#)

[Bibliography \(export\)](#)

Quick Links

[Find articles by GREG MARTIN; Staff Writer; You can e-mail Greg Martin at \[gmartin@sunletter.com\]\(mailto:gmartin@sunletter.com\)](#)

[Find all articles from August 5, 1999](#)

But sometimes, Demonbrien said, the juveniles found the 70-bed Juvenile Detention Center in Fort Myers a better home than their real homes. They'd violate house arrest in order to get sent back to jail, he said.

"One girl told me she wanted to go to jail because her home had no structure," the firefighter said. "She didn't know when she'd get thrown out, or evicted, or when her parents might be coming home."

Demonbrien said he knows of one armed robbery defendant who told his father he felt secure in jail. So, he used a shotgun during the commission of the crime in order to add five years to the prison term, the firefighter said.

"I feel like it's breeding career criminals," Demonbrien said of the system.

Demonbrien was interviewed a week after the arrest of Wayne Scott Harbison, 30, of Punta Gorda. He's accused of raping and stabbing to death 19-year-old Sonya Santiago of Punta Gorda.

Harbison was convicted in 1993-94 of burglary, forgery and an attempted rape with a deadly weapon. The crimes occurred in Monroe and Sarasota counties.

He was paroled to nine years of community control, which means house arrest, in June 1998. The conditions required him to leave home only for work at Monty's Restaurant, a pizza shop a mile away.

Harbison's probation file indicates that his monitoring device was frequently sending alarms indicating he was out past working hours -- both before and after the murder.

But, Harbison's boss at Monty's Pizza would provide documentation stating Harbison was working late, said a local probation supervisor, Manley Jacquiss.

Documents to indicate whether Harbison's monitoring device showed he was outside his house on the night of the murder were unavailable Wednesday, said Department of Corrections Spokeswoman Jo Ellyn Rackleff.

She said Charlotte County Sheriff's detectives have seized those records as evidence.

At least one of Demonbrien's former house arrest clients also went on to commit a murder.

"That's (Pedro) Pascual Francisco," Demonbrien said. "He was violating his house arrest two to three times per week."

Demonbrien said Francisco lived in a migrant camp in which there'd be 20 people living in a small house. He described the squalid facilities:

"There was a family of eight living in one room. They had a file cabinet for a dresser with a television for recreation.

"There were roaches crawling all over everything. And there was fight going on in another room while I was putting the bracelet on Pascual."

On May 17, however, Francisco, 18, was free to pick up a female and drive out on Country Lake Road in eastern Lee County.

Francisco apparently got his van stuck and went to a house for aid. The resident called police.

Francisco then told sheriff's dispatchers he thought his female passenger was a prostitute. She had asked him for money and began hitting him when he refused to pay.

"He said he did not mean to hurt the female," the report states.

The woman was found face down, strangled about 25 feet from where Francisco's van was stuck in the sand.

Another area firefighter who installs the monitoring devices said he feels the violations are few, however.

John McMahon, a battalion chief with the South Trail Fire Department in Lee County, took over Demonbruen's job when he left in February.

McMahon said of "hundreds" of installations, only a handful have walked away.

And Anita Pedersen, spokeswoman for **BI Inc .**, which supplies 70 percent of the monitoring devices used nationwide, pointed out that the devices are only as good as the state's will to enforce the penalties for violations.

In Charlotte County, only four of 88 registered sex offenders are electronically monitored.

Statewide, only 210 of 8,700 sex offenders are electronically monitored, according to the Florida corrections department.

Nationwide, a half-dozen companies are monitoring an estimated 50,000 convicts.

A 1997 federal study provides the reason for the popularity: the average cost of a federal prison bed was \$64 per day, while the cost of home confinement supervision and monitoring cost only \$18 per day.

The ankle bracelets used in Southwest Florida cost about \$500 each and the monitoring machine as much as \$2,200.

The state typically state rents the machines, from one of several private providers, for between \$3 and \$5 per day.

Record Number: 1082453A4D128A26

Copyright (c) 1999, 2005, Desoto Sun

To bookmark this article, right-click on the link below, and copy the link location:

[Ankle monitors can't guarantee criminals won't walk, ex-technician says - Demonbruen faced repeat offenders during stint installing home-arrest bracelets](#)

[Back To Results](#)

Previous **Article 18 of 33** Next

Exhibit 13

**The Denver Post, October 2, 1994 article titled Device Revolutionizes Penal
Industry Home Arrest Saves Space and Money**



English

Other NewsBank Products

[Search History](#) [Saved Articles](#)

Search Results for "BI inc" in All Text

United States - Selected Source Types

[Edit Search](#) | [New Search](#)

[Show Help](#)

[Back To Results](#)

Previous [Article 13 of 42](#) Next

Save this Article

Device revolutionizes penal industry Home arrest saves space and money

The Denver Post - Sunday, October 2, 1994

Author: Scott Maxwell The Associated Press

BOULDER - As old as civilization, jails originally once were built for punishment and banishment. Then, early this century, reform-minded leaders decided prisoners needed a dose of rehabilitation.

Now, the day has arrived when many convicts may not have to spend time behind bars at all.

A rubber-coated bracelet adapted by BI Inc. of Boulder from technology used to track dairy cows is revolutionizing the prison industry.

The era of "Big Brother" has arrived - electronic home arrest and monitoring. Home-arrest prisoners wear an ankle bracelet with an electronic transmitter that tracks their movements and signals a monitoring center when they go astray.

Starting with its cow-monitoring technology, BI has become the nation's leading provider of both electronic arrest equipment and monitoring services. It provides 65 to 70 percent of the equipment and monitors 45 to 50 percent of the prisoners.

"It frees up prison space for the "three strikes and you're out" type of offenders," said David Hunter, president and chief executive officer of BI Inc. "So you're getting tough on the people who need tough and you're rehabilitating the people who at least still have a shot at getting back into society."

BI last year won an exclusive contract to provide equipment and monitoring services for the U.S. Probation Office, which has about 1,400 offenders under electronic monitoring. The company also has contracts with corrections officials in at least 46 states, said BI spokeswoman Joanna Manley.

The ankle transmitter sends an encoded signal to an electronic receiver installed in the offender's home whenever the offender is within range of the receiver - usually about 150 to 200 feet. The receiver uses a modem to signal a host computer at a monitoring center when the offender travels outside the range of the receiver.

The host computer, programmed with the offender's schedule (for work, counseling session and other court-approved activities) alerts the proper authorities - probation officers, police or the monitoring center staff - when an offender's activities don't match the schedule.

Federal, state and local corrections agencies across the country are using the system in increasing numbers. They say it reduces costs and recidivism rates, frees up prison space needed for more violent or hardened convicts and allows offenders to maintain community

NEW Related Articles

[Tell us what you think...](#)

[ELECTRONIC BRACELET MAKES CELL BLOCKS OBSOLETE BOU...](#)

[Boulder firm modernizes corrections- Bracelet make...](#)

[Firm posting some arresting results](#)

[John Furman was a prisoner in his home for ...](#)

[Electronic 'Big Brother' might relieve overcrowdin...](#)

[High-tech punishments get mixed marks in studyHome...](#)

[Regional players upstarts lead pack](#)

[Why this trial for Edwards?](#)

[LETTERS IN THE EDITOR'S MAILBAG](#)

[Readers' Comments](#)

0 Saved Articles

this article

[Email](#)

[Print](#)

[Bibliography \(export\)](#)

Quick Links

[Find articles by Scott Maxwell The Associated Press](#)

[Find more articles from page C-2](#)

[Find more from section "Denver & The West"](#)

[Find all articles from October 2, 1994](#)

and family ties, corrections officials say.

"Certainly home arrest has revolutionized corrections," Hunter said. "To the degree that we've gone from an abacus to a 486 computer. I'd say that's revolutionary."

More than 67,000 people in all 50 states, Guam and Puerto Rico currently are under electronic monitoring.

One reason electronic arrest is so attractive is its low cost - less than half that of keeping the same offender in a federal prison, said Robert Altman, administrator of the U.S. Probation Office's home confinement program.

The cost per day, per offender of electronic monitoring, including equipment and supervision, is \$19.55, Altman said. In 1992 (the latest year for which figures are available), the cost of keeping an offender in prison was \$56.84 a day, he said.

Electronic home arrest allows prisoners to keep their jobs - which means they can pay restitution, child support and alimony; add to the local tax base, and pay at least part of the cost of their home arrest.

"Of all the money we spend on home confinement, we collect 43 percent from the offenders," Altman said of the federal probation program. "We are able to offset the cost by 43 percent. And (that percentage) is going up."

Hunter said electronic monitoring also reduces recidivism.

He said an Illinois Governor's Task Force report released last year drew a correlation between electronic home arrest and reduced recidivism.

"I'd hold that up as an example that people are taking a hard look at electronic home arrest. These are not free rides," Hunter said.

Hunter said BI's electronic arrest concept grew from technology first developed to identify dairy cows and keep track of their diet and milking schedules. The system uses radio frequency technology that allows a computer to communicate with remote radio chips, reading information from the chip and writing updated information to the chip as necessary.

BI also offers a line of companion products: a device that can detect alcohol on the breath of offenders in their homes; a hand-held device that can detect when electronic monitoring offenders are inside a building, such as a home, school or workplace; a monitoring service, and jail management software.

Caption: PHOTOS: Associated Press/Joe Mahoney KEEPING TAB: BI CEO and President David Hunter, above, holds alcohol level monitor his company supplies for home arrest programs. At left, employees at BI's control room in Boulder study the monitors that track parolees and home arrest prisoners.

Edition: Rockies

Section: Denver & The West

Page: C-2

Index Terms: prisoners ; companies ; products ; computers ; metro

Record Number: DNVR229197

Copyright 1994 The Denver Post Corp.

To bookmark this article, right-click on the link below, and copy the link location:

[Device revolutionizes penal industry Home arrest saves space and money](#)

[Back To Results](#)

Previous **Article 13 of 42** Next

Exhibit 14

Trial Testimony of Fritz Ebenal, *State v. Jones*, June 23, 1998

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,)	
)	
Plaintiff,)	
)	
vs.)	NO: CR-57526
)	
ROBERT JONES,)	
)	
Defendant.)	
_____)	

BEFORE: HON. JOHN S. LEONARDO
Division 10
Pima County Superior Court

APPEARANCES:

FOR THE STATE: DAVID WHITE
Deputy County Attorney

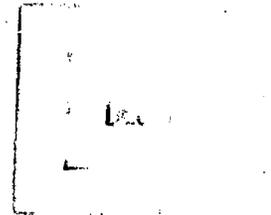
FOR THE DEFENDANT: DAVID P. BRAUN
ERIC A. LARSEN

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

June 23, 1998

REPORTED BY:
TONI HENSON
Official Court Reporter
Division Ten
Pima County Superior Court



DEFENSE

1 parolee.

2 Q. What were Mr. Nordstrom's conditions of
3 parole?

4 A. Mr. Nordstrom had a special release. He
5 was home arrest, which meant that he was going to be
6 electronically monitored in addition to the normal
7 parole conditions.

8 Q. Tell us about the -- may I approach, Your
9 Honor?

10 THE COURT: Yes.

11 Q. Tell us about the electronic monitoring
12 system. Describe that for us.

13 A. Okay. The electronic monitoring system is
14 a two-piece unit. One is about the size of a cigarette
15 pack attached to a bracelet that goes around a person's
16 ankle on a rubber-type band, and it's called the
17 transmitter.

18 And there's a computer with a modem in it
19 that is plugged to the individual's wall in the house,
20 and it picks up the transmitter signals to indicate
21 whether or not the person is home and when he leaves.

22 Q. Okay. We don't have a picture of that and
23 I forgot to ask you to bring one, so I'll see if I can
24 diagram that, all right? You helped me with this
25 before, right?

1 A. Yes.

2 Q. It's not like I am a genuine artist.

3 So first, the thing that the person on
4 parole wears, what do you call that?

5 A. Just a bracelet. We call it just a
6 bracelet.

7 Q. What does it look like?

8 A. It looks just like this. The band is the
9 same color, it's about the same width, only there's a
10 black box on it about the size of a cigarette pack.

11 THE COURT: The record will reflect that
12 the witness is indicating his wristwatch.

13 THE WITNESS: This wristwatch, yes.

14 Q. Okay. So about the size of a cigarette
15 pack and it's got a band around it?

16 A. A rubber band that's just about the width
17 of my watchband.

18 Q. Like that? (Diagram.)

19 A. Yes, sir.

20 Q. And where does that go?

21 A. That goes around the individual's ankle.

22 Q. That's the monitor?

23 A. That's the transmitter. It's battery
24 operated.

25 Q. And what's the other part?

1 A. The other part is a little computer with a
2 modem in it. It has a phone line and a power cord for
3 electricity.

4 Q. What does that look like?

5 A. It's about the size of a good-sized text
6 book.

7 Q. Okay.

8 A. Eight-and-a-half by eleven and about an
9 inch thick.

10 Q. Something like that? (Diagram.)

11 A. Yes, sir.

12 Q. All right. A little thicker than an inch.
13 And what do you call that device?

14 A. I call it the FMD, field monitoring device.

15 Q. Field monitoring device, okay.

16 And this is attached to a telephone?

17 A. It's attached to a phone outlet which is
18 then attached -- the phone is also attached to that
19 too. That goes to the wall and the phone goes to that.

20 Q. Okay. So this goes to the wall?

21 A. Yes, sir.

22 Q. And the phone is attached to this thing?

23 A. The phone is attached to that.

24 Q. All right. I'm going to draw a very bad
25 picture of a phone. And the phone is attached to the

1 FMD?

2 A. Yes.

3 Q. So how does this work?

4 A. Well, what happens is the individual is
5 attached to this device. Each one has a serial number.

6 Q. Attached to what device?

7 A. He has put on the bracelet, okay, and given
8 the FMD and is told to go home. Once he goes home, he
9 plugs it in, and as soon as he does, the transmitter is
10 automatically picked up by the FMD and the phone line
11 calls us and tells us that he's there and it's hooked
12 up and whether or not it's a good connection or not.

13 Q. And this is all hooked to some kind of
14 computer, is that the situation?

15 A. Yes.

16 MR. WHITE: What's the next number, Madam
17 Clerk, 49?

18 THE CLERK: Yes.

19 Q. We'll put a 49 on here so we'll know what
20 number we're talking about.

21 So does this transmit some kind of signal
22 to the FMD?

23 A. It's just like a radio signal.

24 Q. Okay. And it gets picked up by the FMD?

25 A. Yes, sir.

1 Q. So how does that work? When the parolee
2 wears this, you can tell where the parolee is as he
3 moves around town, is that the way it works?

4 A. No, sir.

5 Q. Okay.

6 A. Only when he's in the proximity of that FMD
7 will it indicate that he's there. Or when he's
8 leaving, the same thing, he gets out of range and it
9 tells us that he's gone.

10 Q. Okay.

11 A. Whether it's a legal movement or whether it
12 was an unauthorized movement.

13 Q. So this will tell you when he leaves?

14 A. Yes, sir.

15 Q. And is the computer programmed to alert you
16 if he leaves at a time that he's not supposed to leave?

17 A. It sure does.

18 Q. And what's that called?

19 A. Well, it's hooked up -- the way it works is
20 we get a pager and a pager will notify us. It has a
21 code on it to tell us what the individual just did and
22 then we can look it up and see what the code actually
23 is.

24 Q. Okay.

25 A. Or if it's after hours, we have Central

1 Communications that gets the same signal and then they
2 turn it over to us.

3 Q. Can you get your computer to print out a
4 report of the number of times a parolee left when they
5 weren't supposed to leave?

6 A. Yes, sir.

7 Q. Now, what happens if -- is this placed
8 around the parolee's ankle, did you say?

9 A. Yes, sir.

10 Q. What if they just slip it off? Can't they
11 just slip it off and leave it at home?

12 A. No, sir, you can't slip it off.

13 Q. Why not?

14 A. You just can't. I've tried it and you
15 can't do it.

16 Q. It's not elastic?

17 A. No, it's not. As a matter of fact, it's
18 got some stainless steel wires that go through the
19 center of the band, several of them, so it doesn't have
20 any flexibility. It does not flex.

21 Q. Why can't they just cut it off?

22 A. Well, if they cut it off, we're going to
23 get an alarm for tampering. It's going to notify us
24 that they cut it off.

25 Q. Can't they just unplug the FMD from the

1 power or from the telephone?

2 A. Sure, they could, but we're going to get
3 another alarm, another notification that there's a
4 problem, that he just unhooked it or whatever he did.

5 Q. And is your computer programmed, then, to
6 print out a list of the times you get someone leaving
7 when they're not supposed to or a power loss or a loss
8 of connection with the telephone?

9 A. Yes, sir.

10 Q. Have you seen that kind of printout as it
11 relates to David Nordstrom?

12 A. Yes, sir.

13 Q. Your parolee.

14 Showing you State's 45. Is that a copy of
15 a partial list of the printout related to David
16 Nordstrom?

17 A. Yes, this is an alarm status report.

18 Q. Does that relate to David Nordstrom between
19 the times that you started supervising his parole in
20 January '96?

21 A. Yes.

22 Q. And what's the end date on that?

23 A. August '96.

24 Q. Now, he was supervised beyond that?

25 A. Yes.

1 Q. But at least as from January to August '96,
2 is that an accurate list of the electronic monitoring
3 violations as it relates to David Nordstrom?

4 A. Yes, I believe those are accurate.

5 Q. With the exception of the orange
6 highlighting that we put on there, that's not on your
7 copy, right?

8 A. Right. No.

9 MR. WHITE: Move the admission of 45.

10 MR. LARSEN: No objection.

11 THE COURT: Exhibit 45 is admitted.

12 MR. WHITE: Your Honor, I've made copies of
13 45 so that the jury and the Court and defense counsel
14 can all look at them as we talk about them.

15 May I distribute them?

16 THE COURT: Yes, you may.

17 BY MR. WHITE:

18 Q. Now, Mr. Ebenal, we've highlighted in
19 orange, and just so the record is clear, that's not
20 something that appears on the original Parole Board
21 records, right?

22 A. Right, sir.

23 Q. Just so the record is clear, we've
24 highlighted just the first entry for each month so we
25 can find things easier.

1 Can you tell us when you first started
2 supervision of David Nordstrom.

3 A. January 25, 1996.

4 Q. And that's highlighted there, the very
5 first entry. Do you see that?

6 A. Yes, sir.

7 Q. Walk us through that entry. Tell us what
8 all that stuff means on that January 25th entry.

9 A. That is when we hooked it up. And above
10 the highlight, which looking at it, it says "Hello,"
11 and that's what the computer tells us, saying that he
12 did get an accurate or a complete hookup and it was
13 good. And it tells us the time and the date that it
14 happened.

15 Q. And what time are we talking about, 13:56?

16 A. That was the time it was received. The
17 time that it actually happened was -- yeah, 13:56. We
18 got it at the same time.

19 Q. Now, is that military time?

20 A. Yes, it is. That would be 1:56 in the
21 afternoon.

22 Q. 1:56 p.m., shortly before 2:00 in the
23 afternoon?

24 A. Right, sir.

25 Q. Now, what's the next entry there? See

1 where it says 2-5-96?

2 A. Yes, sir.

3 Q. Tell us what that one is.

4 A. That was a curfew violation on 2-5-96. And
5 let's see what time it happened. Our time was 5:52 and
6 it was received at 5:59.

7 Q. What does that mean, 5:52? He left the
8 house at 5:52 in the morning?

9 A. Yes, an unauthorized leave.

10 Q. Now, was he allowed to leave for work in
11 the morning?

12 A. He was.

13 Q. All right. Was there a certain time that
14 he was allowed to leave?

15 A. There was a certain time.

16 Q. If he left before that time, would you get
17 a report of a violation?

18 A. Yes.

19 Q. And is that what this is?

20 A. That's what that is.

21 Q. He left a few minutes early?

22 A. It looks like: His ride showed up early.

23 Q. And you guys get notified of that?

24 A. Yes, sir.

25 Q. And there's a record of it?

1 A. Yes, sir.

2 Q. Let's go down to the first entry in March,
3 March 1st. Do you see that, the second highlight that
4 goes all the way across the page there?

5 A. Yes, sir.

6 Q. Tell us about that.

7 A. Another curfew violation for a leave at,
8 let's see -- wait a minute, it's got two.

9 Okay. It happened at 7:42 and it was
10 received at 7:49. So he left early again.

11 Q. Okay. So we could keep track of when he
12 left when he shouldn't have left?

13 A. Right.

14 Q. Now, you talked about if somebody unplugs
15 the phone or unplugs the FMD from the electrical
16 outlet, is that going to show up on a report like this?

17 A. Yes, sir. If you look down to, what is
18 that, 4-27-96, there was a power loss and that is what
19 will happen if you unhook it or unplug it from its
20 power source. And then he plugged it back in. It was
21 a short period of time. Minutes, just a minute's worth
22 of time he did it.

23 Q. The 4-27 --

24 A. Maybe he tripped over it or something.

25 Q. Now, when you get something like that, does

1 somebody from your department call to see what's going
2 on?

3 A. Yes, sir, we sure do.

4 Q. Now, in addition to this document, did you
5 keep track of what David Nordstrom's specific curfew
6 was?

7 A. Yes, sir, I did.

8 Q. Was it always the same?

9 A. No, sir, it was not.

10 Q. It changed?

11 A. Yes, sir.

12 Q. Is there a document that you use to keep
13 track of that?

14 A. Well, there's a report that the computer
15 can print if you want a copy of this curfew schedule.

16 Q. Did you try to print out all those copies,
17 all those reports?

18 A. When there was a change, we would print a
19 new one.

20 Q. Okay. Explain what you just said. I'm not
21 sure I understood.

22 A. Well, he has a weekly schedule that goes
23 from, say, Sunday to Saturday, and it would have his
24 whole work schedule, his programming schedule for
25 Alcoholic's Anonymous or whatever he was taking, and

1 maybe some personal time to take care of little things,
2 shopping and whatnot. And we would adjust it every
3 week according to what his needs were.

4 Q. When you adjusted it or changed it, would
5 you then print out a copy of that so you would have it
6 for your records?

7 A. Yes, sir.

8 Q. All right. I'm showing you 46. Is that an
9 example of the kind of thing we're talking about?

10 A. Yes, sir.

11 Q. Showing you 46A. Is that an enlargement or
12 a blowup of State's 46?

13 A. Yes.

14 Q. Is State's 46 an accurate copy of the
15 curfew report that would be in your files regarding
16 David Nordstrom?

17 A. Yes, sir.

18 MR. WHITE: Move the admission of 46.

19 MR. LARSEN: No objection.

20 THE COURT: Exhibit 46 is admitted.

21 MR. WHITE: And is 46A an accurate blowup,
22 a copy of 46?

23 THE WITNESS: It is.

24 MR. WHITE: I move the admission of 46A.

25 MR. LARSEN: No objection.

1 THE COURT: Exhibit 46A is admitted.

2 MR. WHITE: May I publish that to the jury?

3 THE COURT: Yes.

4 BY MR. WHITE:

5 Q. I'll ask you while I'm at it, 49 is
6 obviously a childish drawing of these devices, but does
7 it sort of give us a picture of the way they interact?

8 A. Actually, it's pretty accurate.

9 MR. WHITE: I'd move the admission of 49
10 for illustrative purposes.

11 MR. LARSEN: No objection.

12 THE COURT: Exhibit 49 is admitted.

13 Q. Mr. Ebenal, I'm going to ask you to step up
14 here and explain to the jury what we're looking at.
15 I'll give you a pointer there.

16 A. Okay. This is weekly schedule. Sunday,
17 Monday, Tuesday, Wednesday, Thursday, Friday and
18 Saturday. (Indicating.)

19 Okay. The stars or the asterisks indicate
20 that that's a period that is closed, which means that
21 he's either home or is he home more or less. Unless
22 something's really wrong, he's home.

23 The open areas are when he's out. For
24 example, on Sunday from 10:00 a.m. until 4:00 o'clock.

25 Q. And this number across the top here?

1 A. That's the time.

2 Q. And, again, 14, 15, 16, you're talking
3 military time?

4 A. Based on 24 hours.

5 Q. So 16 would be 16:00 or 4:00 o'clock in the
6 afternoon?

7 A. Yes, sir.

8 Q. Just so we're clear, on 46, which is a
9 copy, see how the margin is cut off here?

10 A. Yes, sir.

11 Q. Sunday, Monday, Tuesday --

12 A. Yes, sir.

13 Q. And that's been written in for clarity's
14 sake, but is it accurate to what is written in there?

15 A. Right, it's accurate. This was printed on
16 June 7, 1996.

17 Q. How do you know that this was printed June
18 7, 1996?

19 A. Because the date is indicated in the
20 right-hand corner here.

21 Q. Okay. Do you know what day of week -- does
22 this indicate what day of week that is, June 7, 1996?

23 A. Normally, it ends on Friday and it does say
24 Friday down here, but I don't know who wrote that
25 there.

1 Q. That's not your handwriting?

2 A. No.

3 Q. All right. So we're looking at a curfew
4 printout dated June 7th. For what week are we looking
5 at here?

6 A. This would be the 8th, 9th, 10th, 11th,
7 12th, 13th and 14th. Or did I do that wrong? It's
8 been a while since I've done this. I do regular parole
9 now.

10 Q. So is June 7th this Friday here?

11 A. This starts on Friday. 6, 7, 8, 9, 10, 11,
12 12.

13 Q. Now, you're going backwards.

14 A. I'm sorry. The other way around. 8, 9,
15 10, 11, 12, 13. Sorry.

16 Q. That's all right.

17 Now, there's two screens shown on here or
18 there's two parts to this. What's the deal with that?

19 A. Well, Mr. Nordstrom, this was for a curfew
20 exception. He wanted to work on Sunday.

21 So what we do is we go in and make -- these
22 are for an exception.

23 Q. These right here? (Indicating.)

24 A. On Sunday. He wanted to work from 7:00 to
25 10:00, all the way to like 4:15 or 4:30. I can't tell

1 exactly.

2 I put it in and it automatically takes it
3 for one day only. And then once Sunday is over, it
4 erases and it goes back to its regular 10:00 to 4:00.

5 Q. So if we're looking at this schedule, and
6 is this Friday, the 7th of June?

7 A. Yes.

8 Q. So that's the Friday, the 7th. Where is
9 the 8th? The Saturday, then?

10 A. Saturday.

11 Q. Where is the 9th?

12 A. Sunday.

13 Q. So it rolls that way. And then Monday is
14 the 10th?

15 A. Yes, sir.

16 Q. Tuesday is the 11th?

17 A. Right.

18 Q. Wednesday is the 12th?

19 A. Right.

20 Q. Thursday is the 13th?

21 A. Right.

22 Q. Can you tell us, what was David Nordstrom's
23 curfew on Thursday, the 13th of June?

24 A. It looks like -- well, exactly, it's 4:45.

25 Q. In the morning?

1 A. In the morning.

2 Q. He could leave at 4:45.

3 A. For work, right. And it ended at 7:15.

4 Q. In the evening?

5 A. Yes.

6 Q. He had to be home at 7:15?

7 A. Yes.

8 Q. What happens if he's not home at 7:15?

9 A. The computer would indicate that he's not
10 there and there would be an alarm.

11 Q. Would that show up on the alarm report that
12 we've admitted as State's 45?

13 A. Yes, sir, it would.

14 Q. Okay. Would you see if you can find a
15 violation, where he violated his curfew on June 13th?

16 A. No, sir. There was not a violation for
17 June 13th.

18 MR. WHITE: What's the next number going to
19 be, Madam Clerk?

20 THE CLERK: I think we have used 49, so it
21 would be 50.

22 Q. Off the top of your head, do you know what
23 Mr. Nordstrom's curfew was on May 30th?

24 A. Not off the top of my head.

25 Q. Showing you what's going to be marked as

1 State's 50. Are we looking at the same kind of
2 document, an updated curfew document just like State's
3 46A there?

4 A. Yes, sir.

5 Q. What is the date on that one?

6 A. This one was printed on May 3rd.

7 Q. If there are no other curfew exceptions in
8 the file as relates to Mr. Nordstrom, up from May the
9 3rd to May 30th, would that tell you what his curfew
10 was on May 30th?

11 A. What happens with curfews is, I don't print
12 the new schedule until there's a change.

13 Q. Right.

14 A. If I need to make a curfew exception, I
15 print a new curfew.

16 Q. Right.

17 A. Even though it's only going to be just an
18 exception and it's going to be gone the next day.
19 Either that, or I'm going to make a permanent schedule
20 change, and I'm going to add a new change to it and
21 print the whole thing.

22 Q. I understand.

23 A. Okay.

24 Q. What is his curfew, at least according to
25 that document, in May?

1 A. In May?

2 MR. LARSEN: Object to relevance.

3 THE COURT: Sustained. Can you not limit
4 it just to the date in question?

5 MR. WHITE: Sure.

6 THE WITNESS: Which date did you want?

7 BY MR. WHITE:

8 Q. The 30th.

9 A. Okay.

10 Q. The 30th is a Thursday.

11 A. Right. And without seeing the whole file,
12 I can't give you that answer. But according to this --

13 MR. LARSEN: Objection to whatever that is
14 because it would be speculation.

15 THE WITNESS: I don't know what the whole
16 file is. This starts on the 3rd and only goes to 3, 4,
17 5, 6, 7, 8, 9. This goes to the 9th.

18 BY MR. WHITE:

19 Q. Okay. So you'd have to look at the whole
20 file.

21 A. Have to see if there was any more --

22 Q. Let's go about it this way.

23 Can you tell us, is there a record that he
24 was in violation of his curfew, according to the alarm
25 report, on May 30th?

1 A. No. No violation on here.

2 Q. Mr. Ebenal, based on what you have looked
3 at in your previous examination of David Nordstrom's
4 file, do you have an opinion as to whether he was
5 outside of his home June 13th past 8 o'clock?

6 MR. LARSEN: Objection. Irrelevant. The
7 exhibits speak for themselves.

8 THE COURT: Sustained.

9 BY MR. WHITE:

10 Q Do the exhibits indicate whether he was
11 out of his home on June 13th after 8 o'clock pm?

12 MR. LARSEN: Objection. Asked and
13 answered.

14 THE COURT: Overruled. You may respond.

15 A The documents that I have indicate that he
16 was home.

17 BY MR. WHITE:

18 Q That he was home?

19 A Yes, sir.

20 Mr. WHITE: Thank you. That's all I have.

21 THE COURT: You may cross-examine.

22

23 CROSS-EXAMINATION

24 BY MR. LARSEN:

25 Q Isn't it true that mistakes can be made?

1 A Yes, sir, they do.

2 MR. LARSEN: Thanks. Nothing further.

3 THE COURT: Redirect?

4 MR. WHITE: Briefly.

5

6

REDIRECT EXAMINATION

7 BY MR. WHITE:

8 Q Is there a possibility of a mistake in
9 regard to whether David Norstrom was in violation of
10 his curfew on June 13, 1996?

11 MR. LARSEN: Objection. Calls for
12 speculation.

13 THE COURT: Sustained.

14 BY MR. WHITE:

15 Q Well, what would have had to happen if
16 it's a mistake to say he was at home?

17 What would have had to happen past June 7
18 and June 17?

19 A Okay. The curfew report indicates no
20 violation. According to that, he was home.

21 Q Did Mr. Nordstrom not go to work for awhile?

22 A Yes, sir?

23 Q Showing you what has been marked as 51.

24 Is that your chronological log relating to
25 Mr. Nordstrom?

1 A Yes, sir.

2 Q Just so the jurors know what we're talking
3 about by chronological log, what do you mean?

4 A Any contact with him or others. We do our
5 best to try to try to maintain this in our log.

6 Q Does your chronological log indicate
7 something happened to him on 6-21?

8 A Yes, sir. We noted the assault, stabbing.

9 Q Where he got stabbed?

10 A Yes, sir.

11 Q Does it have in here when he might have
12 gone back to work after the stabbing?

13 A I have him starting at Valezuela Drywall on
14 the 27th of June.

15 Q June 27, he's starting at Valenzuela
16 Drywall?

17 A Yes, sir.

18 MR. WHITE: Okay. Good enough. Thank you,
19 Judge.

20

21 RE-CROSS-EXAMINATION

22 BY MR. LARSEN:

23 Q You indicated on June 21 Mr. Nordstrom was
24 stabbed, correct?

25 A Yes, sir.

1 Q You got a couple of markedly different
2 versions from Mr. Nordstrom as to his stabbing incident
3 correct?

4 A That's correct.

5 MR. WHITE: That's irrelevant and I object.

6 THE COURT: Sustained.

7 MR. LARSEN: I have no further questions.

8 THE COURT: Any reason this witness can't be
9 excused?

10 MR. WHITE: No.

11 THE COURT: Thank you. You may step down,
12 sir. You are excused.

13 We'll take the evening recess now. ladies
14 and gentlemen. We'll ask you to return tomorrow
15 morning again at 10:30.

16 Our schedule tomorrow is going to be a
17 little bit different than what we have been doing.
18 There is something that I think both counsel and the
19 Court have to attend that's come up in the middle of
20 trial and that is at 2 o'clock.

21 So we will go tomorrow until about one
22 o'clock and then we recess for the day so that we can
23 take care of that as well as some other legal matters.
24 And then if it's necessary, we'll ask you to return
25 then on Thursday morning.

Exhibit 15

Minute Entry, *State v. Jones*, Pima Co. No. CR-57526, September 18, 2002

cc: [handwritten initials]

8

FILED
September 19, 2002
PATRICIA A. NOLAND, Clerk
P. A. Noland
Deputy

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. JOHN S. LEONARDO

CR-57526

COURT REPORTER: NONE

DATE: September 18, 2002

THE STATE OF ARIZONA,
Plaintiff,
vs.

ROBERT GLEN JONES, JR.,
Defendant.

MINUTE ENTRY

Ruling on Petition for Post-Conviction Relief, in Chambers:

The Court has reviewed the Petition for Post-Conviction Relief filed February 15, 2002, the Memorandum in Support of Petition for Post-Conviction Relief filed February 15, 2002, the Response to Petition for Post-Conviction Relief filed June 21, 2002, the Supplement to Response to Petition for Post-Conviction Relief and the Motion to Permit Filing of Supplement to Response to Petition for Post-Conviction Relief both filed July 22, 2002, the Second Supplement to Response to Petition for Post-Conviction Relief filed August 15, 2002, the Reply in Support of Petition for Post-Conviction Relief filed August 27, 2002, and the record.

Following a trial by jury, Petitioner Jones was convicted of six counts of first-degree murder, one count of first-degree attempted murder, three counts of aggravated assault, three counts of armed robbery, and two counts of first degree burglary. The Trial Court awarded consecutive death sentences for the first-degree murder counts. The Arizona Supreme Court reviewed the case on direct, automatic appeal and, in an

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 2

Date: September 18, 2002

CR: 57526

opinion dated June 15, 2000, affirmed all convictions and sentences. The decision was appealed to the United States Supreme Court and certiorari was denied on April 16, 2001. In his Memorandum in Support of Post-Conviction Relief, Petitioner contends: (1) that he is entitled to relief on the grounds that his constitutional rights to a fair trial and due process under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated by misconduct by the Prosecution, (2) that material new facts exist that probably would have changed the verdict or sentence, (3) that he received ineffective assistance of counsel at trial in violation of his rights under the Sixth Amendment, (4) that no reasonable fact-finder would have found him guilty of these offenses beyond a reasonable doubt or that the court should not have imposed the death penalty, (5) that his appellate counsel was ineffective in violation of his rights under the Sixth Amendment, (6) that he was denied his rights under the Sixth and Fourteenth Amendments when he was denied a jury trial on aggravating and mitigating factors, (7) that the decision in *Spears v. Stewart*, 267 F.3d 1026 (2001) is unconstitutional and cannot be applied to this case, (8) that Arizona's Death Penalty Statute violates the Eighth Amendment because it does not sufficiently channel the sentencer's discretion, and (9) that his right to equal protection under the Fourteenth Amendment was violated when he received the death penalty for acts that would not have received so harsh a penalty in other states. Petitioner requests that his convictions be set aside but, at a minimum, that his sentences be reduced. Additionally, he requests an evidentiary hearing on each issue contained in the Petition.

Finding that Petitioner presents no colorable claim and that no purpose would be served by further Rule 32 proceedings, the Court hereby dismisses his Petition pursuant to Rule 32.6(c), 17 A.R.S. Rules of

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 3

Date: September 18, 2002

CR: 57526

Criminal Procedure.

I. Violation of Constitutional Rights to a Fair Trial and Due Process

Petitioner initially contends that the Prosecutor knowingly and intentionally engaged in egregious misconduct in order to obtain a conviction at any cost. Toward that end, he alleges that the Prosecutor presented perjured testimony, made a false avowal to the court, failed to disclose exculpatory evidence, mislead Petitioner's Counsel about the status of the investigations, and deliberately phrased his questions to witnesses so as to mislead the jury with the answers. Petitioner further alleges that the Prosecutor was willing to go to extreme measures in order to prop up the witness, Lana Irwin, whose testimony Petitioner argues was absolutely critical. Petitioner claims he was denied his rights to a fair trial and due process by having the jury impermissibly tainted against him.

Each of the six specific issues included in this section of the Petition is precluded under Rule 32.2(a)(3), Arizona Rules of Criminal Procedure, because they were not raised at trial or on direct appeal. Additionally, The Arizona Supreme Court has repeatedly held that a defendant must voice his objection to arguments that are objectionable, and failure to do so constitutes a waiver of any right to review. *State v. Holmes*, 110 Ariz. 494, 520 P.2d 1118 (1974). Also see *State v. Taylor*, 109 Ariz. 267, 508 P.2d 731 (1973) (listing cases in which the court refused to consider allegations of improper statements by prosecution when defendant failed to make timely objection). Moreover, even if the state did somehow mislead the jury, defendant waives his objection if he failed to make it at trial. *State v. Kemp*, 185 Ariz. 52, 912 P.2d 1281 (1996). Absent fundamental error, failure to object at trial renders a later objection moot.

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 4

Date: September 18, 2002

CR: 57526

State v. Cook, 170 Ariz. 40, 821 P.2d 731 (1991). In order to constitute fundamental error, the prosecutor's comment had to be so egregious as to deprive the defendant of a fair trial, and to render the resulting conviction a denial of due process. *State v. Dumaine*, 162 Ariz. 392, 783 P.2d 1184 (1989) citing *United States ex rel. Shaw v. DeRobertis*, 755 F.2d 1279 (7th Cir. 1985). In the alternative, the Court finds that, if each claim were considered on its merits, relief would also be denied based on substantive grounds.

A. Deliberate Subornation of Perjury Involving a Kicked-In Door

Petitioner initially argues that Prosecutor David White deliberately solicited testimony from Lana Irwin that he knew to be untrue and later in the trial further solicited false testimony from two detectives to corroborate the testimony given by Irwin. The testimony concerned a door to a storage area in the Moon Smoke Shop. Eight months earlier, in the Scott Nordstrom trial, *State v. Scott Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001), Detective Godoy had testified that the subject door was kicked-in by police officers after they arrived at the Moon Smoke Shop. In the Jones trial, Irwin testified that she learned of the kicked-in door when she overheard a conversation between Jones and Coates. In his testimony the day before, Detective Godoy had established that he found a kicked-in door when he arrived at the scene. Later in the trial, Detective Woolridge apparently corroborated Irwin's testimony about the door by testifying that Irwin told her about the kicked-in door during a pre-trial interview. Woolridge also testified that there was no testimony in the Nordstrom trial about a kicked-in door. The Court is aware that both detectives were intimately familiar with the details of the two cases, both attended the separate trials yet, during their testimony in the Jones trial, neither detective mentioned the fact that the subject door was kicked-in by

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 5

Date: September 18, 2002

CR: 57526

police officers. No objection was raised either at trial or on direct appeal.

In his Response to the Petition, Prosecutor White admits to a mistake by connecting Irwin's information about a door being kicked-in with the one forced open by the police but avows that it was wholly unintentional. White claims possible confusion about the door because, in fact, there are two doors located in the same vicinity and he cites some evidence (i.e. "the photo of the bathroom door shows some kind of mark at the right height to be a kick mark") that indicates the second door may have been kicked by one of the intruders. But the Prosecution offers the Court no further substantiation of that claim. Additionally, White admits that although "some of the questions and answers were not technically correct," they were "literally true" and "essentially correct."

Taken in context, the admissions and omissions of the State witnesses may be explained as unintentional but the mistake was exacerbated by White's opening and closing arguments in which he apparently emphasized the testimony about the kicked-in door in order to bolster Irwin's credibility. While Petitioner sees collusion between a prosecutor and his witnesses to secure a high-profile conviction, the Court is unwilling to reach that conclusion. However, the Court is troubled by the inconsistency in the testimony between the two trials. In the Nordstrom trial, there is uncontroverted testimony that the police kicked-in the door. In the later Jones trial, an implication is developed through witness testimony (Irwin, Godoy and Woolridge) and through the opening and closing arguments that one of the intruders kicked-in the door. Petitioner argues this is significant because it is one of the key details from the overheard conversations that serve to bolster Irwin's credibility. On the other hand, the Court is aware that the

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 6

Date: September 18, 2002

CR: 57526

testimony about the kicked-in door was but one of the many correlations between Jones' statements overheard by Irwin and the facts of the crimes. It is highly probable that the great weight of evidence elicited at trial would have resulted in Petitioner's conviction even if Irwin had not testified about the kicked-in door. In the overall context of the evidence presented at trial, the Court is convinced that the testimony concerning the kicked-in door likely did not prejudice the Petitioner nor affect the verdicts. Therefore, the claim must be rejected on the merits.

Petitioner also alleges that the Prosecution failed to disclose two police reports which document that the subject door was kicked-in by the police. Reports prepared by Officer Charvoz and Sergeant Grimshaw, both dated 5/30/96, establish that Sergeant Grimshaw instructed Officer Charvoz to kick in the door to the storage room because the door was locked and they were unable to determine if there was possibly another victim or suspect inside. Petitioner claims that, because his attorneys did not have the reports, they did not have reason to realize that Godoy and Woolridge's statements were false at trial. The Court notes that, although the subject testimony may have been misleading and may have included some omissions, the record contains no substantiation that it was false. In the bar complaint filed on this matter, S. Jonathan Young, Plaintiff's appellate attorney, alleged that Plaintiff's trial attorneys, Eric Larsen and David Braun, were adamant that they did not receive the reports. Additionally, both Larsen and Young stated in Affidavits that they did not recall the two police reports being included with the material that was disclosed by the Pima County Attorney's Office. However, the record contains correspondence from David L Berkman, Deputy County Attorney, which documents subsequent discussions he had with Braun and Larsen in which

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 7

Date: September 18, 2002

CR: 57526

the two attorneys expressed some uncertainty about whether the two police reports were included with the disclosure materials. Also, the County Attorney presented an Affidavit from the assigned Litigation Support Specialist who verified that the two reports were stamped "FIRST DISCLOSURE, July 28, 1997" and disclosed to Eric Larsen on that date. In his Reply, Petitioner comments that the fact that a document is stamped "disclosed" proves nothing about whether or not it was actually sent to opposing counsel. While that may be true, the Court considers that, because the stamping is part of an orderly and seemingly reliable, long-standing institutional process, it creates a rebuttable presumption that the documents were disclosed. Finding that Petitioner's unsupported allegations fail to overcome the presumption, his argument on this point must be rejected.

B. Misconduct Involving "Red Room" and the Position of Arthur Bell's Body

Petitioner next contends that White, with the complicity of the detectives, deliberately mislead the jury into believing that Bell's body was found leaning back when the police arrived. He argues this was necessary to correlate with the testimony given by Irwin. No objection was raised either at trial or on direct appeal.

A review of the record shows that White did not mislead. The record includes sufficient evidence to support a reasonable conclusion that, when the intruders departed the Fire Fighters' Union Hall, Arthur Bell's body was slouched in a chair at the bar with his head leaning back. Of the police officers who first arrived on the scene, two specifically stated in their report that Bell's head was leaning back. Officer Braun wrote "I could see a male in a chair at the bar. His head was leaning back." Officer Butierez was more

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 8

Date: September 18, 2002

CR: 57526

explicit in his report: "A man was in a bar stool up by the front of the bar. He was leaning back in the stool with his head leaning back also." Two other officers, Gallego and Parrish, describe the body position as "slouched over the bar stool" and "slumped over sitting at the bar" but there is no reference to the position of the head. Additionally, Nat Alicata, the first person to arrive at the Moon Smoke Shop after the murders, initially reported that Bell was "sitting at the chair . . . slumped on the chair on the bar sort of sideways." Later, Alicata stated to an investigator that he found Arthur Bell's body in a chair leaning backwards. The statements by Braun, Butierez and Alicata provide persuasive evidence that Arthur Bell was leaning backward when first found. Finding that there is no credible evidence to support Petitioner's theory that Mr. Bell's body was moved or that Lana Irwin was provided information so that her testimony would be consistent with the "changed" body position, the Court rejects Petitioner's argument.

Next, Petitioner contends that the State improperly sought to bolster Lana Irwin's credibility by claiming that the "red room" was another detail that Irwin supposedly overheard from Jones that was not released to the public. It is clear from the record that Irwin did not learn of the room's color from the police. The chance that she may have seen the color photograph of the Fire Hall published by the Arizona Daily Star on December 3, 1997 does not rule out the possibility that Irwin first learned that the murders occurred in a red room when she overheard the conversations between Jones and Coates in the Summer of 1996.

In the allegations concerning the "red room" and the position of Arthur Bell's body, Petitioner has only presented conclusory allegations of prosecutorial misconduct and no credible evidence to substantiate his claims. Moreover, even assuming that Petitioner had proven prosecutorial misconduct, he has not met his

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 9

Date: September 18, 2002

CR: 57526

burden of establishing that the purported misconduct resulted in actual prejudice at trial. Failing to establish the presence of fundamental error on this issue, Petitioner's claim of prosecutorial misconduct must be rejected. *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992).

C. False Suggestion Regarding Sketches

Next, Petitioner alleges that Detective Salgado gave testimony that was intended to deliberately mislead the jury by conveying the false impression that Jones, David, and Scott Nordstrom were the only people who had been identified from the police composite sketches. No objection was raised either at trial or on direct appeal.

The court would reject this argument. The objectionable testimony cited by Petitioner occurred during Prosecutor White's redirect examination of Detective Salgado. Earlier, in Mr. Larsen's cross-examination of the witness, he had established that other people had come forward identifying people other than Jones from the composites. The Court notes that Robert Jones was on trial. Jones was a known associate of the Nordstrom brothers. In an earlier trial, Scott Nordstrom had been convicted of first-degree murder for the same crimes. White's redirect of Salgado appears to the Court as a reasonable line of questioning given Jones' connection with the Nordstroms and the fact that the police identified the brothers as initial suspects in the investigation. Salgado's testimony did not prejudice Jones nor did it violate Jones' right to a fair trial and due process as claimed in the Petition. The Court further notes that, contrary to the State's assertion in its Response that Petitioner's counsel did not object to White's line of questioning, the

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 10

Date: September 18, 2002

CR: 57526

record shows that Mr. Larsen did object but was overruled by the Court.

D. Knowingly False Avowal to Court About Nordstrom's Phone

Next, Petitioner contends that White made a false avowal to the Court when he stated that Terri Nordstrom would testify that the phone used in the test of the monitoring system the State performed was the same phone that was in the Nordstrom home at the time the crimes were committed. No objection was made either trial or on direct appeal.

The Court finds no misconduct on the part of White and certainly not the egregious conduct required by *Dumaine*. While it is true that Terri Nordstrom did testify at the earlier trial that the phones were different, she provided no testimony on that point at the *Jones* trial. Petitioner's assumption that the testimony would have been the same is not supportable. She may well have testified as Mr. White avowed. Petitioner's counsel had the opportunity at trial to resolve that issue by questioning Mrs. Nordstrom about the phones but chose not to do so. The Court is also aware that testimony by Rebecca Matthews, Parole Supervisor, settled any question concerning the relevancy of the computer printout showing he results of the experiment. Her testimony established that the kind of phone used had no impact on the functioning of the monitoring system other than to cause an occasional busy signal. Because no misconduct by the Prosecutor has been established and because the Court is satisfied that the computer printout was properly admitted, the Petitioner's argument must be rejected.

E. Failure to Disclose Clothing Belonging to Jones

Next, Petitioner alleges that the State, during pretrial interviews, deliberately withheld a cowboy

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 11

Date: September 18, 2002

CR: 57526

hat and boots belonging to Robert Jones that had been obtained and tested, and kept this exculpatory evidence from Jones' counsel. No objection was made either at trial or on direct appeal.

The record shows that the State obtained a black cowboy hat and boots on March 18, 1998 and had them tested for blood. The tests were negative. On April 20, 1998, Petitioner's counsel interviewed Detectives Salgado and Woolridge who stated that the State did not have any clothing that they could link to the crime scene or to Jones. On April 23, 1998, the State disclosed the hat, boots and lab results to Petitioner. The State cites *Towery* and argues that judicial estoppel precludes Petitioner from gaining relief because his current position is different from that taken prior to trial. Petitioner argues that judicial estoppel does not prevent Jones from raising this claim because Jones' counsel's original position was taken without the benefit of additional information regarding perjured testimony by State witnesses which did not come to light until long after trial.

The Court agrees that judicial estoppel does not apply but not for the reason cited by Petitioner. One requirement that must exist before the court can apply judicial estoppel is that the party asserting the inconsistent position must have been successful in the prior judicial proceeding. *State v. Towery*, 186 Ariz. 168, 920 P.2d 290 (1996). Prior success is a prerequisite to the application of judicial estoppel because absent judicial acceptance of the prior position, there is no risk of inconsistent results. *Id.* at 183. The record reflects that Petitioner's Motion to Preclude the admission of certain evidence, to include the cowboy hat and boots, was never considered by the court. Rather, the court took up the Motion to Continue the trial and the Motion to Preclude became moot. Because Petitioner was not "successful" in precluding the hat and boots

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 12

Date: September 18, 2002

CR: 57526

from being admitted in the earlier proceeding, judicial estoppel does not establish grounds to bar Petitioner from requesting relief. On the other hand, the requested relief can be granted only if a sufficient basis has been established. The Court is not convinced that Petitioner has met that burden.

Although disclosure of the cowboy hat, boots and lab results was not accomplished in as timely a manner as Petitioner would have preferred, the items were revealed by the Prosecutor almost two months prior to the initiation of trial. That would seem adequate time for Petitioner's counsel to prepare for trial if the items were considered potentially exculpatory evidence. Additionally, Petitioner's allegation that White and the detectives worked in concert to misconstrue the evidence and mislead Jones' counsel is not supported by the record. Although the answers provided to Petitioner's counsel by the detectives were understandably less responsive than desired, White's explanation that the detectives responded in that way because, at that time, the State could not directly link the clothing to Jones appears reasonable. In the motion hearing conducted on May 4, 1998, Mr. Larsen agreed that he had no basis for an allegation of bad faith by the State in this matter and the Court agreed, finding that the need to do further discovery "is not the fault of either side." The Court further notes that the United States Supreme Court has pointed out that the touchstone of due process in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940 (1982). The Court sees no evidence that Jones was denied a fair trial. When viewed in relation to the totality of the evidence presented by the State, the delay in disclosing the cowboy hat, boots and lab test results to Petitioner is insufficient to sustain a claim for relief. Therefore, Petitioner's argument must be rejected.

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 13

Date: September 18, 2002

CR: 57526

F. Pattern of Misconduct

Finally, Petitioner raises a “potpourri” of miscellaneous allegations ostensibly supporting his contention that the misconduct of the State and its representatives deprived Jones of his constitutional rights to due process and a fair trial. He cites a Bar Complaint against David White, an FBI investigation of David White, an FBI investigation of Detective Godoy, a Mohave County Grand Jury indictment of Detective Godoy, a Bar Complaint against Pima County Attorney Ken Peasley, and the Rule 32 Petition in the *Nordstrom* trial.

It appears to the Court that Petitioner and his counsel have lost their focus in this section of the Petition. The grounds for relief in a Rule 32 action are clearly delineated in Rule 32.1, Ariz.R.Crim.P. What Petitioner presents, in shotgun fashion, is a collection of peripheral actions which present none of these specific grounds for relief. Although each of the individual actions may stand on their own merits, Petitioner fails to show how any or all of them could have affected the outcome of the *Jones* trial. Because Petitioner has failed to present a colorable claim, the Court must reject his argument.

H. Material New Facts Warrant a New Trial

The next matter presented relates to claims of newly discovered facts that Petitioner claims meet the criteria established for relief in *State v. Apelt*, 176 Ariz. 349, 369, 861 P.2d 634, 654 (1993).

A. Jones Was Not in the Truck With Scott and David

Petitioner argues that a phone call made from Scott Nordstrom’s cell phone, shortly after the Moon

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 14

Date: September 18, 2002

CR: 57526

Smoke Shop crimes were committed, to a pay phone near Jones' east-side apartment proves that Jones was in his home and not in the truck. The State contends that Jones made the call to his roommate, Chris Lee. Petitioner counters that Lee did not yet live with Jones at the time the call was made. On the basis of the newly discovered evidence, Petitioner asserts that he is entitled to a reversal of his convictions and sentences.

Arizona law governing newly discovered evidence is clear. In order to be entitled to post-conviction relief on the ground of newly discovered evidence, a defendant must show that: (1) the newly discovered evidence is material; (2) the evidence was discovered after trial; (3) due diligence was exercised in discovering the material facts; (4) the evidence is not merely cumulative or impeaching; and (5) that the new evidence, if introduced, would probably change the verdict or sentence in a new trial. Rule 32.1(e), 17 A.R.S. Rules of Criminal Procedure; *State v. Orantez*, 183 Ariz. 218, 902 P.2d 824 (1995). If any of the criteria is not satisfied, the motion must be denied. *Apelt* at 369. The Court finds that the Petitioner fails to meet four of the critical criteria.

First, although Petitioner claims that the information regarding the phone number for the pay phone that Jones used was not discovered until after trial, Petition Exhibits 25 and 26 show that Jones remembered using a phone at the Circle K (#520:298-9516) during May 1996 and that phone is still there and operational. Second, it is apparent that due diligence was not exercised in discovering the material facts. Not only did Jones know the location and number of the relevant phone, but Petitioner's trial counsel, Eric Larsen, examined cell phone records that were introduced in the *Nordstrom* trial. Third, the evidence is both

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 15

Date: September 18, 2002

CR: 57526

cumulative and impeaching. Petitioner's affidavit to the effect that Chris Lee was not living with him on May 30, 1996 does not dispositively establish that as fact especially in light of testimony in the *Nordstrom* trial to the contrary. At most, this evidence perpetuates a defense theory that Jones received a call from Scott Nordstrom's cell phone on May 30 and, therefore, could not have participated in the Moon Smoke Shop crimes. This possibility and its implications for Mr. Jones' credibility were fully explored during Petitioner's trial. Moreover, the jury was fully aware of the theory yet unanimously resolved the issue against Petitioner. Since this evidence would present no new information to the jury and could only be employed to attack the credibility of witnesses who linked Petitioner to the crime scene (David Nordstrom, Lana Irwin), the evidence is clearly both cumulative and impeaching. Finally, the new evidence, if introduced, would probably not change the verdict. The defense theory rests totally on the argument that only Petitioner could have been in the apartment or positioned at the Circle K phone on May 30. That argument is speculative at best and is contradicted by the trial testimony by several witnesses who connect Jones to the crimes. To accept Jones' alibi as credible, the jury would have had to discount the testimony of each of the State's witnesses. It appears to this Court that that would have been a highly unlikely result. Because Petitioner's claim fails to satisfy at least four of the established criteria, it is hereby dismissed.

B. Newly Discovered Letters Written by David Nordstrom

Next, Petitioner contends that letters written by David Nordstrom to Buddy Carson while both were in Pima County Jail, a transcript of an interview of Officer Mace, and a statement by Eddie Santa Cruz should be considered as newly discovered evidence and would greatly undermine the credibility of David

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 16

Date: September 18, 2002

CR: 57526

Nordstrom. This claim is also dismissed because it fails to satisfy at least three of the established criteria.

First, the Carson materials were not discovered after trial. The record shows that the material was disclosed to Petitioner's trial counsel on January 21, 1998, approximately six months prior to the trial. During a recent interview, Eric Larsen apparently acknowledged being aware of the Buddy Carson matter. The Mace interview was conducted by Scott Nordstrom's counsel and the Pima County Prosecutor's Office has no record of it in their files. Second, the evidence is merely cumulative or impeaching. Petitioner's purpose for making this claim was clearly stated in the Petition: it "would have greatly undermined his [David Nordstrom] credibility." During the trial, the defense mounted an aggressive attack on David Nordstrom's credibility including his prior felonies, his drug use, his probation violations, his lack of steady employment, his possession of legal firearms, his curfew violations, his lies to the police, and his prior inconsistent statements. Evidence of scams perpetrated by David Nordstrom in jail would only add to the adverse characterization already painted by the defense and serve to enhance his impeachment. Finally, it is highly improbable that the Carson information would have changed the verdict. David Nordstrom was an important witness for the State and his credibility with the jury was essential to a successful prosecution. In spite of the defense's extensive attempts to impeach David and the multiple attacks on his veracity, the jury chose to convict Jones on every count of murder. It is unlikely that knowledge of the Carson matters would have influenced the jury to reach a different verdict.

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 17

Date: September 18, 2002

CR: 57526

C. Misconduct Claims

Petitioner suggests that the Court can consider all the claims presented in Part I as claims involving material new facts. Each of the subject claims was dismissed above on procedural and substantive grounds. The Court finds that Petitioner presents no colorable basis on which to reconsider them as newly discovered material facts.

III. Jones Received Ineffective Assistance of Counsel at Trial in Violation of His Rights

Arizona courts apply the two-pronged test developed by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 68 (1985), to determine whether a conviction should be reversed on the grounds of ineffective assistance of counsel. First, the defendant must show that his or her counsel's performance fell below an objective standard of reasonableness as defined by prevailing professional norms. Second, the defendant must demonstrate that the deficient performance resulted in actual prejudice to the defendant. That is, defendant must show that, but for the ineffectiveness of counsel, the outcome of the case would have been different. *State v. Ramirez*, 126 Ariz. 464, 616 P.2d 924 (1980). Failure on the part of the defendant to meet either prong is fatal to a claim of ineffective assistance of counsel. *State v. Salazer*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). There is, however, a "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690. See also *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). Defense counsel is presumed to have acted properly. The burden is on the Petitioner to show that "counsel's decision was not a tactical one but,

Louise Beitel/jmc

Division Manager

MINUTE ENTRY

Page: 18

Date: September 18, 2002

CR: 57526

rather revealed ineptitude, inexperience, or lack of preparation.” *State v. Goswick*, 142 Ariz. 582, 691 P.2d 673 (1984). The Petition alleges thirteen instances of ineffectiveness of counsel but the Court rejects each of these claims.

A. Failure to Properly Conduct Investigation Regarding David Nordstrom

Petitioner alleges that Jones’ trial counsel did not properly investigate false reports by David Nordstrom that Scott Nordstrom had threatened his family and himself or his related letters to Buddy Carson to try to set up a scam to sue Pima County. Court is unwilling to find fault when conclusory allegations are not supported by substantive argument. To the contrary, the record reflects evidence that trial counsel gave attention to these matters but determined that other issues should take priority. Moreover, the record reflects at least two instances that establish that the reports that Scott Nordstrom threatened both David and his family were credible. The record also indicates that trial counsel was well aware of both Buddy Carson and Eddie Santa Cruz but decided that presentation of either individual would have been detrimental to his case. Which witnesses to present, or whether to present any witnesses, are strategic decisions left to the professional discretion of the attorney. *State v. Dalgish*, 131 Ariz. 133, 139-40 (1982). It is not likely that there was any prejudice to the defense. Both the trial court and the Arizona Supreme Court concluded in *Nordstrom* that Carson’s testimony could not have effected the outcome of that case and there is no reason to believe that he would have had any greater impact in *Jones*. Also, Santa Cruz’ reputation as a notorious jailhouse snitch likely would have opened him up to a damaging impeachment by the defense.

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 19

Date: September 18, 2002

CR: 57526

B. Failure to Properly Investigate Kicked-in Door

Next, petitioner alleges that Jones' trial counsel failed to fully investigate the conflicted testimony concerning the kicked-in door and to use it to vindicate Jones. This claim is without merit. The kicked-in door was but one of the dozen or so correlations with the facts of the crime that were adduced from the testimony of Lana Irwin about the conversations she overheard between Jones and Coates. The Court is not convinced that, had an issue been made of the kicked-in door, it would have shaken the credibility of Irwin or changed the outcome of the trial.

C. Failure to Challenge David Nordstrom's Alibi

Next, Petitioner alleges that Jones' trial counsel's decision not to properly investigate David Nordstrom's alibi and to call certain witnesses to testify was not a reasonable decision and likely impacted the verdict. It appears to the Court that Petitioner's issue is dissatisfaction with the method used by trial counsel to challenge David Nordstrom's alibi and not that a challenge was not mounted. The record shows that trial counsel did pursue a strategy of attacking the accuracy of the parole records and arguing that the alibi could not be supported. Petitioner argues that trial counsel should have attacked David's alibi by calling other witnesses. The Court is not willing to speculate on what results would have been achieved had trial counsel followed the approach now recommended by Petitioner. The standard articulated by *Strickland* is whether counsel's performance was deficient and that "but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Proof of effectiveness must be a demonstrable reality rather than a matter of speculation. *State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984).

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 20

Date: September 18, 2002

CR: 57526

The Court concludes that Jones' trial counsel's performance on this matter was not deficient and represented a reasonable strategy under the circumstances presented at trial.

D. Failure to Request Immunity for Zachary Jones

Next, Petitioner alleges that trial counsel's failure to make any objection or to seek immunity for Zachary Jones was ineffective assistance. Petitioner contends that, if immunized, Zachary Jones could have testified to statements made by David Nordstrom indicating he was laying blame on Robert Jones. The Court notes that there is some question whether a request for immunity would have been successful. Eric Larsen indicated in an interview that the prosecution clearly had no intention of granting immunity. Also, the record shows that Prosecutor White believed Zachary Jones conspired to falsely impeach David Nordstrom and probably would have withheld immunity. Absent any proof that immunity could have been obtained and, consequently, that the result of the trial would have been different, the Court is unwilling to conclude that trial counsel was ineffective. Also, the Court is not convinced that Zachary Jones would have provided exculpatory evidence. In fact, the record shows that Zachary Jones' attorney indicated his client's testimony "could be of a prejudicial nature and little, if any, probative value." Failing to meet either prong of the *Strickland* test, the claim is rejected.

E. Failure to Investigate Telephone Call

Petitioner contends that trial counsel's failure to fully investigate the call made from Scott Nordstrom's cell phone on the night of the Moon Smoke Shop murders constitutes ineffective assistance of counsel. But Petitioner never articulates with any specificity evidence that the call was not investigated. In

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 21

Date: September 18, 2002

CR: 57526

fact, there are indications in the record that Mr. Larsen did look at Scott Nordstrom's cell phone and pager records. The Court notes that Petitioner's theory that the call could not have been placed by Jones calling his roommate, Chris Lee, is challenged by evidence in the record that Chris Lee admitted living with Jones on May 30 and that Jones admitted to Eric Larsen that he had participated in the Moon Smoke Shop crimes. Therefore, it is not likely that the outcome of the case would have been different had trial counsel pursued Petitioner's current theory concerning the phone call. Because neither prong is satisfied, the claim is rejected.

F. Failure to Properly Research Pretrial Publicity and Use in Cross-Examination

Next, Petitioner contends that, had trial counsel investigated information that two of the details allegedly overheard by Lana Irwin were released in the media, he would have been able to impeach Irwin's story and likely cause a different verdict to result. Petitioner's conclusory assertions do not prove that Larsen was unaware that these details were publicly released; in fact, the record contains evidence that Eric Larsen was acutely aware of the extensive amount of pretrial coverage that appeared in the media (see Motion for Change of Venue dated 4/15/98). The record also presents strong indications that Eric Larsen conducted an aggressive cross-examination of Lana Irwin including impeachment on a number of matters. The Court considers it unlikely that Jones was prejudiced by trial counsel's decision not to ask the additional questions. Impeaching Irwin concerning media publication of the fact that the victims were shot in the head or that the room was red would not necessarily have been effective. At trial, Irwin testified that she lived in Phoenix and had not read anything or heard anything on the news about the Tucson murders. Whether she

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 22

Date: September 18, 2002

CR: 57526

had or not is not dispositive. Release of the article in the Arizona Daily Star on December 3, 1997 does not rule out the possibility that the jury would have believed that Irwin first learned of the details of the crimes during the conversations she overheard. Petitioner's argument fails both prongs and is rejected.

G. Failure to Interview Jones' Parole Officer and Call Him as a Witness

Petitioner alleges that an interview with Jones' parole officer, Ron Kirby, would have established that, in June 1996, Jones still had a full beard and long reddish-blond hair, which would have attacked the credibility of the State's contention that Jones changed his appearance following the crimes. Again, Petitioner provides no evidence that Eric Larsen did not investigate this aspect. Evidence in the record indicates that the sketches of the two suspects were released in the Arizona Daily Star on June 24, 1996 and that Jones cut and colored his hair sometime after that, most likely sometime in July. Because Ron Kirby's last contact with Jones was June 19, it is clear that he could not have known about the appearance change and testimony that Jones still had a full beard on that date would not have been dispositive. Petitioner was not prejudiced by trial counsel's failure to interview Ron Kirby or call him as a witness. The claim of ineffective counsel is therefore rejected. The Court also rejects any claim of newly discovered evidence.

H. Failure to Review *Nordstrom* Trial Transcripts

Petitioner alleges that Jones' trial counsel failed to review the transcripts from the *Nordstrom* Trial but provides no evidence to substantiate his claim. Additionally, Petitioner offers only the issue of the kicked-in door as an example of resulting prejudice. The Court has concluded above that the testimony about the kicked-in door did not prejudice Petitioner nor affect the verdicts. Contrary to Petitioner's assertion, the

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 23

Date: September 18, 2002

CR: 57526

record contains numerous entries that document that Jones' trial attorneys accessed the *Nordstrom* materials. In addition to obtaining selected transcripts, it is clear that either Larsen or Braun: (1) reviewed some of the *Nordstrom* trial transcripts (2) attended some of the *Nordstrom* trial sessions, (3) reviewed telephone records, (4) reviewed transcripts of *Nordstrom* witnesses, (5) entered into a "common defense" agreement and exchanged information with *Nordstrom*'s counsel, (6) assigned an investigator to conduct a "tremendous" amount of investigation concerning the *Nordstrom* trial, and (7) used *Nordstrom* trial transcripts to cross-examine some of the *Jones* witnesses.

The court has seen no evidence that Jones' trial counsel acted incompetently or failed to utilize opportunities afforded by the prior trial to develop a defense. If, in fact, counsel did not review all *Nordstrom* trial transcripts or that Petitioner's counsel "now disagrees with the strategy or claims errors in the trial tactics is not enough to support a finding that the trial lawyer's conduct was incompetent." *State v. Oppenheimer*, 138 Ariz. 120, 123 (App. 1983). The Court is satisfied that Jones' trial counsel performed to a reasonable standard. Because Petitioner's claim fails the first prong of *Strickland*, it is hereby dismissed.

I. Representation of Jones Despite Conflict of Interest

Petitioner alleges that Eric Larsen's friendship with the sister of one of the murdered victims created a conflict of interest that prejudiced Jones' defense. Alternately, Petitioner alleges that, even if Jones was not prejudiced by the relationship, Larsen should have disclosed the relationship to Jones. The Court has reviewed available case law on this subject and finds no authority that suggests that friendship with the

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 24

Date: September 18, 2002

CR: 57526

relative of a victim, absent proof of an actual conflict, disqualifies an attorney from representing the defendant. Our system of justice relies on conscientious attorneys and judges to address potential conflicts of interest and take appropriate action. Although in his opening argument Eric Larsen mentioned the relationship, he did so for tactical reasons and not because he considered there to be a conflict. Under the circumstances, the trial judge had no reason to initiate an inquiry. *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980). Because there was no objection raised at trial, Petitioner has the burden of demonstrating that an actual conflict of interest adversely affected his lawyer's performance. 446 U.S. at 348. Given the absence of proof of actual conflict or prejudice, the claim is dismissed.

J. Failure to Properly Handle Preliminary Hearing Information

Next, Petitioner alleges that, at the preliminary hearing, Jones' counsel failed to object to False testimony about Jones' clothing and also failed to adequately cross-examine the State's witnesses. The court notes that both the State's Response and Petitioner's Reply have annotated the heading to correctly identify the proceeding as a grand jury rather than a preliminary hearing. As such, Petitioner's counsel would not have been present and could not have objected or cross-examined witnesses. Petitioner's claim focuses on allegedly false statements by Detective Salgado indicating that several witnesses had said that Jones gave up wearing western garb after the composite sketches were published in the newspaper. The record reflects that Detective Salgado had received information from at least two witnesses (David Nordstrom and Chris Lee) that Jones stopped wearing western garb. Salgado's reference to "several" people may be characterized as an exaggeration but not a falsehood as Petitioner claims nor does it provide a reasonable basis for a

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 25

Date: September 18, 2002

CR: 57526

motion to remand. Additionally, as the State points out, the failure to seek a remand was mooted by Petitioner's conviction of the charges beyond a reasonable doubt. *State v. Charo*, 156 Ariz. 561, 566, 754 P.2d 288, 293 (1988). Since Petitioner presents no credible evidence of ineffective assistance, the claim is dismissed.

K. Failure to Properly Make a Record

Petitioner again makes reference to the issue of immunity for Zachary Jones but repackages it in a different context. The Court has already addressed the Zachary Jones claim and found it to be without merit. Vague references to "other instances in which Jones' counsel failed to properly record objections at trial" do not present a colorable claim and furnish no basis for relief. *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985). Therefore, the claim is rejected.

L. Failure to Thoroughly Cross-examine and Impeach Witnesses

Next, Petitioner alleges that Jones' trial counsel failed to utilize prior inconsistent statements made by State witnesses to properly cross-examine them. The Court rejects this claim. Petitioner never articulates with any specificity how counsel's performance was less than objectively reasonable or how his defense was prejudiced by this performance. Additionally, because "matters of trial strategy and tactics are committed to defense counsel's judgment, and claims of ineffective assistance cannot be predicated thereon," *State v. Beaty*, 58 Ariz. 232, 20, 762 P.2d 519, 537 (1988), trial counsel's performance does not constitute ineffective assistance of counsel.

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 26

Date: September 18, 2002

CR: 57526

M. Failure to Take Pictures of Getaway Truck

Petitioner alleges ineffective assistance of counsel because Jones' trial counsel did not present photographs to show how unlikely it would have been for a witness to observe only two individuals in the truck when three were present. The State had presented the results of an experiment that demonstrated it was possible. *State v. Beaty*, supra, held that matters of trial strategy are not grounds for ineffectiveness claims. Eric Larsen chose to challenge the State's argument by devoting two pages of his closing argument to attacking the experiment and the witness's credibility. Petitioner's speculation as to the possibility of an alternate experiment is noted but there is no evidence that it would have achieved any greater degree of success. Therefore, because the claim involved trial tactics and no prejudice has been demonstrated, the claim is rejected.

IV. No Reasonable Fact-Finder Would Have Found Jones Guilty of These Offenses Beyond a Reasonable Doubt, or the Court Would Not have Imposed the Death Penalty

Petitioner contends that the issues discussed above in Parts I, II, and III qualify Jones for relief equally under Rule 32.1(h). According to that portion of the rule, a defendant is entitled to post-conviction relief if he "demonstrates by clear and convincing evidence that the facts underlying the claims would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty."

Having disposed of all of the claims Petitioner presented in Parts I, II and III on procedural and/or substantive grounds, the Court finds that no basis exists for relief under Rule 32.1(h). Therefore, the claim is

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 27

Date: September 18, 2002

CR: 57526

dismissed.

V. Jones' Appellate Counsel Was Ineffective in Violation of Jones' Rights Under the Sixth Amendment

A. Any Issues Found Precluded Because Not Raised on Direct Appeal

Petitioner contends that Jones' appellate counsel provided ineffective assistance if any issue raised in the Petition is found precluded for failure to raise it on direct appeal.

Because each of the claims in Parts I, II and III of the Petition that were denied relief based on preclusion under Rule 32.2 were also dismissed based on substantive grounds, Petitioner cannot establish that he suffered prejudice because of the ineffective performance of his appellate counsel. Therefore, the claim is dismissed.

B. Failure to Raise Mitigation Issues on Appeal

Next, Petitioner alleges that the failure of Jones' appellate counsel to investigate and present mitigation issues on direct appeal constitutes ineffective assistance of counsel because, had additional mitigation evidence been presented, Jones might have received a life sentence rather than the death penalty.

A trial court has jurisdiction under Rule 32 to determine a claim of ineffective assistance of appellate counsel. *State v. Herrera*, 183 Ariz. 642, 644, 905 P.2d 1377, 1379 (App. 1995). To prove ineffective assistance of counsel, a petitioner must show both deficient performance and prejudice. 466 U.S. at 687. Failure on the part of a defendant to meet either test is fatal to a claim of ineffective assistance of counsel. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). Whether Jones' appellate counsel

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 28

Date: September 18, 2002

CR: 57526

offered additional mitigation evidence on direct appeal is not at issue. In its decision in *Jones*, the Arizona Supreme Court stated "Jones did not raise any issues regarding mitigating factors on appeal." *State v. Jones*, 197 Ariz. 290, 311, 4 P.3d 345, 366 (1998). However, that fact alone is not dispositive of ineffective assistance. The second prong of *Strickland* requires prejudice. In *Anderson*, an Arizona Appeals Court found that a defendant was not prejudiced by his counsel's failure to request a mitigation hearing where the court had considered defense counsel's sentencing memorandum addressing mitigating circumstances, and defendant did not establish that anything more would have been accomplished by a formal mitigation hearing. *State v. Anderson*, 177 Ariz. 381, 386, 868 P.2d 964, 969 (App. 1993). Also, the U.S. Supreme Court has suggested that there is no constitutional violation when a defendant chooses to put on no mitigation evidence. *Blystone v. Pennsylvania*, 494 U.S. 299, 306 (1990). Here, Petitioner claims that his appellate counsel offered no mitigation; however, he fails to suggest what mitigation, if any, could have and should have been offered. Neither does Petitioner submit any evidence from which the Court could reasonably conclude that, had other mitigation issues been raised, the appeal would have been resolved differently. To achieve a hearing on an ineffectiveness claim, a petitioner must satisfy an evidentiary burden by a preponderance of the evidence. *State v. Prince*, 142 Ariz. 256, 260, 689 P.2d 515, 519 (1984). Here, Petitioner's conclusory assertion does not meet that burden. Thus, Petitioner's allegation that his appellate counsel provided ineffective assistance does not present a colorable claim.

The Arizona Supreme Court has a duty to independently review the existence of aggravating or mitigating factors to determine if imposition of the death penalty is proper. *State v. Richmond*, 114 Ariz.

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 29

Date: September 18, 2002

CR: 57526

186, 560 P.2d 41 (1976). On appeal, the Arizona Supreme Court had before it the Petitioner's Pre-Sentence Mitigation Memorandum, which included a number of mitigation factors pursuant to A.R.S. § 13-703. After an independent review of all statutory and non-statutory mitigation factors, the Court affirmed Jones' convictions and his sentences.

Having determined that the required showing of prejudice has not been met, the Court rejects Petitioner's claim that his appellate counsel provided ineffective assistance.

VI. Jones Was Denied His Rights Under the Sixth and Fourteenth Amendments When He Was Denied a Jury Trial on Aggravating and Mitigating Factors

Petitioner contends that the U.S. Supreme Court's recent decision in *Ring v. Arizona* has rendered Arizona's death penalty sentencing scheme unconstitutional because it requires a judge, rather than a jury, to determine the aggravating factors that make a defendant death-eligible. *Ring v. Arizona*, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Petitioner requests that this Court stay a decision on the *Ring* issue until such time as the Arizona Supreme Court issues a ruling on the applicability of *Ring* to post-conviction cases. Petitioner also requests permission to file a separate Memo within thirty days of the filing of his Reply to address *Ring*.

The Court is not inclined to stay a decision on this matter pending a decision by the Arizona Supreme Court on the *Ring* issue. In *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991), Arizona adopted and applied the retroactivity analysis that had been announced by the U.S. Supreme Court two years earlier. See *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). *Teague* held that a new rule can be retroactive to cases on collateral review only if it falls within one of the two narrow exceptions to the general rule of non-

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 30

Date: September 18, 2002

CR: 57526

retroactivity. *Id.* at 311. The present case satisfies the criteria for non-retroactivity. First, Petitioner's direct appeal is complete and he is now engaged in a collateral post-conviction process. Second, neither of the specified exceptions are applicable to the facts of *Jones*. Therefore, this Court has no basis to apply *Ring* retroactively to this case.

This Court's position is supported by a recent decision in the Tenth Circuit Court of Appeals. In *Cannon*, the Circuit Court ruled that *Ring* was not made retroactive to cases on collateral review. *Cannon v. Miller*, 297 F.3d 989 (10th Cir. 2002). The Court reasoned that the Supreme Court decision in *Ring* did not announce a new rule of substantive criminal law under the Eighth Amendment thus barring retroactive application of the rule for purpose of collateral review without the Supreme Court's express holding that the rule applied retroactively.

Because *Ring* provides no basis for relief, the claim is rejected and Petitioner's request to file a separate Memo to address *Ring* is moot.

VII. The *Spears* Decision is Unconstitutional and Cannot be Applied

Next, Petitioner contends that the recent Ninth Circuit opinion in *Spears v. Stewart*, 267 F.3d 1026 (2001), unconstitutionally infringes on Jones' rights to due process by severely limiting the time frames in which his federal habeas corpus petition, and therefore this Petition, can be prepared and filed.

Petitioner's conclusory assertion does not provide a basis to challenge the constitutionality of the Ninth Circuit decision. Therefore, the claim is dismissed.

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 31

Date: September 18, 2002

CR: 57526

VIII. Arizona's Death Penalty statute Violates the Eighth Amendment to the U.S. Constitution Because it Does Not Sufficiently Channel the Sentencer's Discretion

Petitioner contends that the Arizona Death Penalty Statute is unconstitutional because it provides little or no direction on how to weigh and compare the mitigating versus aggravating factors.

This claim was not raised at trial or on direct appeal and, therefore, is precluded under Rule 32.2(a)(3), Ariz. R. Crim. P. Moreover, the Arizona Supreme Court has previously ruled on this issue and rejected the argument now raised by Petitioner. *State v. White*, 194 Ariz. 344, 355, 982 P.2d 819, 830 (1999).

Therefore, the claim is dismissed.

IX. Jones' Rights to Equal Protection Under the Fourteenth Amendment to the U.S. Constitution Were Violated When He Received the Death Penalty for Acts That Would Not Have Received So Harsh a Penalty in Other States

Finally, Petitioner contends that it is a violation of the Equal Protection Clause of the Fourteenth Amendment for him to be subject to the death penalty in Arizona when other states do not authorize it for the same crimes.

Because it was not raised on trial or on direct appeal, the claim is waived pursuant to Rule 32.2(a)(3), Ariz. R. Crim. P.

Petitioner presents no basis for an Equal Protection challenge other than Arizona's approach is different than other states. But the U.S. Supreme Court has ruled that the States enjoy latitude to prescribe the method by which murderers shall be punished. *Blaystone* at 309. And as long as the death penalty is not

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 32

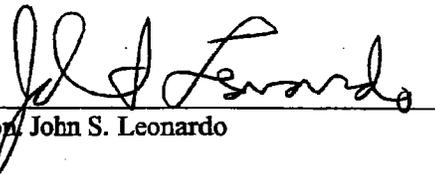
Date: September 18, 2002

CR: 57526

imposed in an arbitrary and capricious manner, it is not unconstitutional by federal or state standards. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976). The Arizona Supreme Court has held that the death sentence is not cruel and unusual. *State v. Blazak*, 131 Ariz. 598, 601, 643 P.2d 694, 698 (1982).

An Equal Protection argument rests on the premise that a given statute provides different treatment for similarly situated individuals. Arizona's death penalty statute applies equally to everyone within its jurisdiction. *State v. White*, 168 Ariz. 500, 513, 815 P.2d 869, 882 (1991). That Petitioner would not be subject to the same punishment in other states is irrelevant. "[I]ndividual persons convicted of the same crime can constitutionally be given different sentences." *Id.* at 514.

Petitioner's equal protection claim is without merit and is hereby dismissed.


Hon. John S. Leonardo

cc:
Hon. John S. Leonardo
Criminal Calendaring
Clerk of Court – Criminal Desk
Clerk of Court – Appeals
Capital Litigation Attorney – Jonathan Bass
Attorney General – Bruce M. Ferg
Attorneys for Petitioner – Daniel D. Maynard
Jennifer A. Sparks
Maynard Murray Cronin
Erickson & Curran, P.L.C.
3200 N. Central Avenue, Suite 1800
Phoenix, Arizona 85012

Louise Beitel/jmc
Division Manager

MINUTE ENTRY

Page: 32

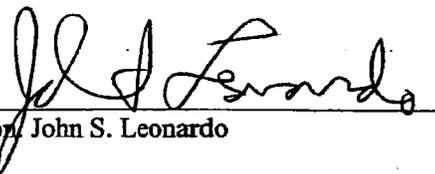
Date: September 18, 2002

CR: 57526

imposed in an arbitrary and capricious manner, it is not unconstitutional by federal or state standards. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976). The Arizona Supreme Court has held that the death sentence is not cruel and unusual. *State v. Blazak*, 131 Ariz. 598, 601, 643 P.2d 694, 698 (1982).

An Equal Protection argument rests on the premise that a given statute provides different treatment for similarly situated individuals. Arizona's death penalty statute applies equally to everyone within its jurisdiction. *State v. White*, 168 Ariz. 500, 513, 815 P.2d 869, 882 (1991). That Petitioner would not be subject to the same punishment in other states is irrelevant. "[I]ndividual persons convicted of the same crime can constitutionally be given different sentences." *Id.* at 514.

Petitioner's equal protection claim is without merit and is hereby dismissed.


Hon. John S. Leonardo

cc:

Hon. John S. Leonardo
Criminal Calendaring
Clerk of Court – Criminal Desk
Clerk of Court – Appeals
Capital Litigation Attorney – Jonathan Bass
Attorney General – Bruce M. Ferg
Attorneys for Petitioner – Daniel D. Maynard
Jennifer A. Sparks
Maynard Murray Cronin
Erickson & Curran, P.L.C.
3200 N. Central Avenue, Suite 1800
Phoenix, Arizona 85012

Louise Beitel/jmc
Division Manager

Exhibit 16

Pretrial Interview of Fritz Ebenal, June 24, 1997

Requested Documents
for Rule 32 - June 14, 2000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF ARIZONA VS. SCOTT NORDSTROM

RECORDED INTERVIEW OF

FRITZ EBENAL

06/24/97

MR. KURLANDER: Today's date is June the 24th, 1997. Tape-recorded interview with Parole Officer Fritz Ebenal. Fritz, do you want to spell your last name, please?

MR. EBENAL: It's, uh, E-B-E-N-A-L.

MR. KURLANDER: And this interview is taking place in the Attorney General's Office, Transamerica Building, Law Office --
(Break in conversation).

MS. STUART: Yeah.

MR. KURLANDER: Okay.

MS. STUART: And Fritz Ebenal.

MR. KURLANDER: And -- and Fritz Ebenal.

EXAMINATION

BY MR. KURLANDER:

Q: Mr. Ebenal, as I understand it, for the most part, you were David Nordstrom's parole officer once he was released early in 1996; is that correct, sir?

A: While he was on home arrest, yes.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: While he was on the home arrest. And, so you
2 were his initial parole officer for that
3 release; correct?
4 A: Yes, sir.
5 Q: And for how long a period of time did that
6 last?
7 A: Uh. Let's take a look here. Looks like my
8 last entry in my -- my log book was 7 29,
9 '96.
10 Q: And do you have when your first entry in your
11 log would have been?
12 A: January 25th, 1996.
13 Q: So approximately just a couple of days over
14 six months is when you were responsible as
15 being his parole officer?
16 A: That's approximately right.
17 Q: And you prepared what's called a chronologi-
18 cal log which would refer to your involvement
19 contact with him, as well as other people
20 associate with him while he was o-- under
21 your supervision?
22 A: As required by the Department of Corrections.
23 Q: Right. And this activity log would have been
24 done contemporaneous with the events that

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 were taking place that you were recording in
2 there?
3 A: Yes, sir.
4 Q: And this is in your handwriting; is that
5 correct?
6 A: Right. Most of it is, yes. There's -- there
7 might be a couple entries (inaudible) I
8 didn't look to see. Anybody's allowed to
9 make an entry if they're doin' a contact with
10 that person, or if they know something about
11 that person.
12 Q: So as of July the 29th, is it? Some other
13 parole officer would have taken over on his
14 case log?
15 A: That's right. He was, uh, I was -- I was
16 moved to a new parole position and, uh, my
17 case load was left behind for some -- another
18 parole officer.
19 Q: And do you have any idea who that was that
20 would have been responsible for his supervi-
21 sion at that point?
22 A: And that would have parole officer Earl
23 Phillips.
24 Q: Earl Phillips?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Right.

2 Q: And was he his parole officer, to your
3 knowledge then up unto the time of his arrest
4 on January the 16th of '97?

5 A: No, I believe there was another parole
6 officer involved. Looks like September 10th
7 another parole officer took over and I don't
8 recognize the -- the handwriting. I believe
9 that's, uh, Debbie Hegedus, or Ron Kirby or
10 somebody.

11 MS. STUART: Fred Gust.

12 A: Fred Gust? Okay. May have been Fred Gust.
13 I don't -- I don't know who it went to after.

14 Q: All right. So what you've -- the -- is there
15 any others up to his arrest of January 16th?

16 A: Let me see. (Inaudible) like the same
17 person's handwriting all the way up until
18 January 21st.

19 Q: Okay. So from your knowledge of the chron
20 and the handwriting of the parole officers,
21 it appears as if three parole officers were
22 responsible for his supervision from the time
23 he was released on January the 25th basically
24 for about a year, up to January 21st --

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: (Inaudible, speaking simultaneously) --
2 Q: -- of '97; correct?
3 A: Yes, sir.
4 Q: All right. Now, was he initially released on
5 parole or was he released on some other form
6 of supervision?
7 A: Now, this is a board released to home arrest.
8 Q: Okay.
9 A: The board granted this release.
10 Q: This is technically not parole; is it?
11 A: No, he's still considered an inmate.
12 Q: He's still considered an inmate. So, and
13 this would be, uh, so he can be yanked back
14 for any reason that you have at any time
15 without a hearing; is that your understand-
16 ing?
17 A: No, sir, that's not true.
18 Q: Okay. How does it work/
19 A: Well, depending on his violations, his
20 technical violations, then the board is the
21 -- is the one who granted him that release
22 and the board is the only one who can take it
23 away. I supply the information and the
24 reasons and he goes to a hearing and they

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 decide what he gets, if they're gonna take it
2 away from him or if he continues to (inaudi-
3 ble). A lotta times they'll go there and
4 then, say, well, yeah, he did it and they --
5 and they -- and they revoke him. However,
6 they continue his supervision and they send
7 him back out. It depends.

8 Q: I see. Well, is, uh, are there stricter
9 requirements with regard to home arrest as
10 opposed to bein' on parole in the way of
11 supervision, in a general sense, not as to
12 this specific person?

13 A: Well, it's -- it's more strict i-- in a sense
14 that he's only authorized to leave his house
15 at certain times and has to be home by
16 certain times, pretty much, and his contact
17 frequency is -- is more. It's once a week as
18 opposed to, whatever, if two, thr-- two --
19 twice a month, once a month, once every three
20 months, you know, I mean, it -- it drops
21 quite a bit after you leave that.

22 Q: And when to your knowledge from reviewing the
23 records was he placed actually on parole, and
24 taken off home arrest?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Let's see.
2 (Pause).
3 Yeah, he was going to general parole and I --
4 I, uh, program, and (inaudible) --
5 (Pause).
6 Looks like he ended home arrest on 9 3 and
7 began, uh, he sees his first contact with a
8 regular parole officer on September 10th.
9 That must have been -- they give 'em seven
10 days to process everything and that was just
11 right.
12 Q: I think I have s-- a -- what's called a
13 certificate of parole that I saw in his
14 packet.
15 A: Right.
16 Q: Would that then --
17 A: That'd be the one.
18 Q: -- note the official date that he was
19 granted --
20 A: Right.
21 Q: -- parole?
22 A: Right.
23 Q: All right. So -- some fancy lookin' sheep-
24 skin here.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 (Pause).
2 Uhm.
3 A: It's a proclamation (inaudible).
4 Q: Okay.
5 A: Proclamation for community parole.
6 Q: And when was that, uh --
7 A: I received it back on June 24th.
8 Q: June 24th.
9 A: Is when I received it.
10 Q: Is that the one I'm talkin' about. The
11 Arizona Board of Executive Clemency?
12 A: That's the one.
13 Q: Okay. So this is (inaudible) -- that's when
14 he was officially re-- released on parole?
15 A: (Inaudible).
16 Q: June 24th, 1996.
17 A: No. That's when I received it, and that's
18 when I have 'em sign it.
19 MS. STUART: Yeah, 'cause he remains on home arrest.
20 A: Oh, he remains arrest un-- un-- until -- does
21 it say in here what date? Let's see if they
22 give a date in here somewhere I guess
23 (inaudible) --
24 (Pause).

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Okay. It's -- my -- my records indicate that
2 his parole eligibility date wasn't until 11
3 22, '96, which means that he got a temporary
4 release, a -- a 90 day early release, okay?
5 So, 11, 10, 9, 8, so he may have got out in
6 August, on that parole.

7 Q: Okay, well --

8 A: That would have been his earliest release.

9 Q: -- I've been doing this for some 25 years and
10 I've still yet to understand your system in
11 terms of these releases. Could ya' simplify
12 it for me and tell me what the history was
13 with regard to his release, through January,
14 if you're able to, of 1997?

15 A: I'll go up until the time I stopped supervis-
16 ing him.

17 Q: Okay.

18 A: Okay? And then I can -- I can try to explain
19 to you what he was eligible for but that's --
20 that's all I'd know.

21 Q: All right.

22 A: Okay. So, he was remanded to home arrest,
23 okay? And what they do is, they figure out
24 when he's eligible for parole. Okay? He's

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 eligible for two things at this point. He's
2 eligible for parole and he's eligible for
3 provisional release. Okay? Now, his
4 provisional release, actual release was in
5 May of '97, which we just passed. So, for
6 him to get off of home arrest he had to
7 select his -- his, uh, board release which
8 would have been parole, okay? And that's why
9 he went onto parole instead of choosing his
10 provisional, 'cause it's much, much earlier.
11 Q: Well, what's the difference between provi-
12 sional?
13 A: Well, provisional release is an administra-
14 tive release granted by the Department of
15 Corrections, and has no, uh, board on th--
16 ub, no Department of Clemency conditions, no
17 parole board clemency conditions, okay? The
18 -- the administrative release only has a
19 parole officer (inaudible). Those are the
20 two basic -- and the-- and then, of course,
21 he doesn't pay any fees on provisional
22 administrative release either, okay? So this
23 is to his advantage if he can is wait for the
24 provisional administrative release. But,

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 because it was so far away, I mean several
2 months away, he opted to take (inaudible)
3 parole.
4 Q: Is he still on parole right now?
5 A: Yes.
6 Q: Through when?
7 A: He's -- he -- he is done in, uh, March 24th
8 of '99.
9 Q: Are you aware of --
10 A: Based on this.
11 Q: Based upon this. Are you aware of anybody
12 from your department seeking to take action
13 on his parole at this time?
14 A: Well, what they do is they'll wait for the
15 results of, uh, of this to occur and then
16 they'll probably revoke his parole (inaudi-
17 ble).
18 Q: So, to your knowledge, do they accept
19 recommendations or plea offers, or bargains
20 from any law enforcement or county attorney's
21 office with regard to revocation of parole --
22 A: No, sir.
23 Q: -- or conditions involving parole?
24 A: No, sir. It doesn't happen.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: So, what you're telling me is, you can assure
2 me from your training and experience, that if
3 David Nordstrom's case is over before May of
4 '99; is that what you said?

5 A: March.

6 Q: March of '99, by way of entry of some sort of
7 plea which would cause him to be incarcerat-
8 ed, he still faces a parole violation?

9 A: That's right.

10 Q: Do you know from your experience as to -- is
11 that separate and apart? In other words, is
12 -- is it consecutive with regard to the time
13 facing additional or what we call street
14 time?

15 A: His parole violation, you know, has a
16 (great?) bearing on what happens to him, you
17 know, 'cause the parole board, like I was
18 saying before, the board of executive
19 clemency is the only one who can take that
20 away from. And when they do that they have
21 all kinds of options. I mean they can take
22 away the street time, they can take away
23 (inaudible) time, continue him on parole,
24 uh --

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: so the-- they have the discretion as to what
2 to do in any sort of parole hearing with
3 regard to this matter, even if he would enter
4 a plea an-- and do some additional time.
5 A: Right.
6 Q: Okay. All right. I want to get to his
7 conditions of release that you'd understood.
8 I've got this document here, which is dated
9 August -- no. There's -- at the initial
10 intake, you review the conditions of his
11 parole, do you not, sir?
12 A: Right.
13 Q: And, what is the form that's utilized in
14 doing that?
15 A: To review his conditions?
16 Q: Yes. To assess his conditions, let me put it
17 that way.
18 A: What we do is we look at the computer to
19 determine what the board has granted him for
20 conditions. If you're talkin' about special
21 conditions. General conditions all apply.
22 Q: Okay. And --
23 A: That would be number 12 and on. See number
24 12 there? And -- and A, B, C, D, whatever.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Right. Well this one is dated from September
2 of '96, so these become modified from time to
3 time?
4 A: Each time that a person is granted another
5 release, different conditions may or may not
6 apply.
7 Q: Do you have his initial conditions of
8 supervision and release in the packet that
9 you have in front of you?
10 A: I didn't see them in there. They're not in
11 here.
12 Q: Rick --
13 MR. BOCK: (Inaudible).
14 Q: -- can you help me out on this (inaudible).
15 ??: (Inaudible).
16 Q: Okay. Before that's done are -- is some pre-
17 release information generally filled out as
18 well.
19 A: Right. Pre-home investigation was done on
20 David Nordstrom. Based on the investigation
21 results of the program, that's what we call
22 it, pre-release investigation sheet, it was
23 sent back to Phoenix for approval.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Would this page that I'm showing you right
2 here be the pre-release information form that
3 appears to have been --
4 A: That -- that's the one that comes from the
5 institution.
6 Q: That would have been generated by David
7 Nordstrom in this instance?
8 A: No, no. His -- his -- his -- what they
9 called it at that time is correctional
10 program officer generated that, and provided
11 the information to him so that this could be
12 given to me so that I could investigate his
13 -- his placement.
14 Q: I see. And so then once you get this, you
15 investigate the placement, in this instance
16 at Richard Nordstrom's 5725 South Helena
17 Stravena [sic] in Tucson; is that correct?
18 A: That's correct.
19 Q: And so sometime after November of '95 you
20 would have gone out to Mr. Nordstrom's house
21 to investigate whether it would be appropri-
22 ate for him to stay there; correct?
23 A: Right. It should be somewhere in that packet
24 (inaudible) that stuff.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Well . . .

2 A: There should be another form, similar looking

3 to this with, uh, information about -- at

4 least it'll say when I finished it. It'll

5 have a date on when I finished that assign-

6 ment. And I don't know what else, you don't

7 have the --

8 Q: Maybe you can help us out here with this in

9 terms of the packet I have. It does not

10 appear to be in any sort of order whatever.

11 A: Let me see a sec, okay?

12 Q: Sure.

13 A: This is it right here.

14 Q: Good. All right. So this is investigation

15 as being completed?

16 A: Right. This is it and I finished it on, uh,

17 6 19 '96.

18 Q: Where's the paper I just had, Rick?

19 A: Oh, wait a minute, hold on a minute, let's

20 check this out. (Inaudible) this is the one

21 that goes in for his at -- you know what this

22 is, this is for his proclamation. You got

23 one more before this one. You have to do one

24 (inaudible). It's just like a -- a pre-home

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 release? A pre-- pre-- regular -- for a
2 reg-- a regular investigation.
3 Q: 'Kay.
4 A: Okay? So he can continue on with the next
5 release, which would have been his pa--
6 parole. I had to do one just like this for
7 home arrest, looks just like this.
8 Q: Okay.
9 A: It's just a different date.
10 Q: And the date would -- would --
11 A: Is it on there -- yeah. That -- that -- that
12 -- well, wait a minute (inaudible). Yeah,
13 that's mine, okay. That's it. That's it.
14 That's the one. So that was 1 4 '96?
15 MS. STUART: Uh-huh (Affirmative answer).
16 Q: 1 4, '96, is when you did that. Let me see
17 that, yours real quickly, Cathy.
18 A: That sounds about right. That sounds about
19 right.
20 Q: I'm sure I have it but . . .
21 A: I remember it was right around the holidays,
22 and they were surprised to see me.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Okay. And, you verified that would be an
2 appropriate place for him to be released to;
3 is that correct?
4 A: That's correct.
5 Q: Any -- what e-- what else do you do in this
6 kind of field investigation?
7 A: Uhm. Whole lotta things, but, uhm, first we,
8 uh, (inaudible) go there. I sit down with
9 whoever's, uh, like i-- for him, it was his
10 -- Mr. Nordstrom and his -- his wife (inaudi-
11 ble) there, so -- and that was important that
12 they were both there so that I could ask them
13 questions also. But, uhm, I find out who's
14 all living there at the time, find out there
15 ages. I find out if any of (inaudible)
16 felons, uhm, I look at the overall living
17 situation as far as, you know, uh, if there
18 are a-- if there were any felons, what were
19 they. If they weren't, you know, what type
20 of life these people have lived and I, you
21 know, I -- I realized at the time, I asked,
22 you know, if -- and they had indicated to me
23 that their son, other son, had been in
24 prison, okay? And we looked at that and I'm

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 pretty sure that back when we did it I told
2 somebody about that, that there was a
3 possibility of their son comin' out and there
4 wasn't a problem with it because, uhm, it's
5 his brother, and their son. There's not a
6 whole lot we can do about it, you know what I
7 mean, as far as that goes (inaudible). It's
8 pretty tough to -- to stop somebody --

9 Q: Did -- did you remember whether there was a
10 -- a girl in the home about 20, 22 years old
11 that was the, uh, the niece of Theresa
12 Nordstrom?

13 A: Theresa Nordstrom only had a -- a, I think it
14 was a granddaughter there when I was there.

15 Q: A granddaughter?

16 A: Yeah.

17 Q: Do you remember her name?

18 A: She was young, like, uh, 10, 8, somewhere in
19 there.

20 Q: That was the extent of it?

21 A: That's it.

22 Q: You don't -- you don't remember somebody
23 older, 22, 20?

24 A: Oh, no.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: A female.
2 A: Huh-uh (Negative answer). I would have -- I
3 would have noted that somewhere.
4 Q: 'Kay.
5 A: I mean I don't recall from now. I mean those
6 records -- I mean I'd have to go back --
7 Q: Sure.
8 A: -- and look at my original notes.
9 Q: Okay. Now, you --
10 MS. STUART: (Inaudible).
11 A: Yeah, that's part of it. That's my (inaudi-
12 ble) -- what is that? Let's see the date,
13 1 2. Yeah, that's when I went there,
14 exactly.
15 Q: Okay. He's, uh, he's released and now
16 there's specific conditions which you set
17 forth as you noted, A, B, C, D, E, F, et
18 cetera.
19 A: Right.
20 Q: Specific to him; correct?
21 A: Right.
22 Q: And, do we have that one on his release,
23 itself?
24 MS. STUART: (Inaudible).

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: I don't -- you have it.
2 MS. STUART: (Inaudible). Looks like this. (Inaudible).
3 Q: What's the date of that?
4 MS. STUART: 1 25 (inaudible).
5 (Pause).
6 Q: Well, could I see yours for a second, Cathy?
7 MS. STUART: It's right before, if you see this, it's
8 immediately before (inaudible).
9 Q: Yeah. (Inaudible) been shuffled around about
10 14 times. Thanks. Okay. So, you set forth
11 the conditions in a form known as a Home
12 Arrest Authorization and Conditions of
13 Supervision; is that correct?
14 A: Right.
15 Q: Okay. And just to review the other -- the --
16 the conditions other than the standard ones,
17 he was not to have any alcohol; is that
18 correct, sir?
19 A: Right.
20 Q: He was to have random tests for drugs and
21 alcohol; is that correct?
22 A: Right.
23 Q: And he was -- all mandatory DOC conditions;
24 correct?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Right.

2 Q: Which included in this instance not having

3 any contact with any convicted felons?

4 A: Without his -- prior approval from his parole

5 officer.

6 Q: Okay.

7 A: And he did in-- ind-- indicate to me that his

8 brother was getting out and I did -- did --

9 did talk to somebody about that. Like I said

10 before, not a whole lot you can do as far as

11 keeping them apart.

12 Q: Did he ever indicate to you that he was, uh,

13 at any time during the course of his parole

14 that he was having contact with a person by

15 the name of Robert Jones?

16 A: Never heard of him 'til this occurred.

17 Q: And you know today that he was a convicted

18 felon on -- on release?

19 A: Jones?

20 Q: Yes.

21 A: Right.

22 Q: So that would have been a violation of the

23 conditions of his release.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Right. If I'd have found that out, at least
2 a (inaudible) with the supervisor.
3 Q: And he was -- you've already said he's not
4 have any alcohol, random tests for drugs, and
5 in this instance he was to be placed on home
6 arrest; correct?
7 A: Right.
8 Q: Now, were you actually the one responsible or
9 do you have a -- a -- a field supervisor or
10 something that supervises the -- the actual
11 home arrest situation?
12 A: We have a supervisor that supervises home
13 arrests specifically.
14 Q: Ju-- okay, just that portion of his release
15 then in this instance.
16 MS. STUART: (Inaudible) --
17 A: (Inaudible).
18 MS. STUART: -- each other here.
19 A: Yeah. (Inaudible, speaking simultaneously).
20 Q: Well, he'd be doing the supervision as to the
21 home arrest portion, you'd be doing the
22 supervision as to the --
23 A: No, you mean -- you -- there wasn't -- there
24 wasn't a dual team or anything. I was the

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 only supervising on home arrest. And there
2 was a supervisor over home arrest.

3 MS. STUART: Over the whole --

4 A: Over the whole thing.

5 MS. STUART: -- program.

6 A: Over the whole program.

7 Q: And who would that have been?

8 A: Rebecca Matthews.

9 Q: Now, would there have been some sort of
10 person, for instance, if there's a problem
11 with a monitor involving a -- a home arrest
12 unit, electronic monitoring unit, other than
13 yourself, that would go out and check to see
14 where somebody, for instance, like David
15 Nordstrom, was.

16 A: More specific would be a mon-- a -- a -- an
17 expert in the monitoring and go out and
18 check. No, all of us did that, but other
19 officers were used. If they were in the
20 area, hey, so-and-so, could you stop by and
21 can you check this out for me, you know. We
22 all have that -- be our own, uh, police.

23 Q: Okay. A-- as long as we're into this
24 subject, uh, do you recall the date when you

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 actually -- when this was placed on David
2 Nordstrom (inaudible, speaking simultaneous-
3 ly) --
4 A: Same -- same day.
5 Q: The same day.
6 A: Oh, yes.
7 Q: So tha-- that day would have been --
8 A: The 25th.
9 Q: -- the 25th of January, 1996; correct?
10 A: That's right.
11 Q: Would he have be-- was that the day of his
12 release or his release had been the day
13 before?
14 A: Same.
15 Q: Okay. He gets released and he comes directly
16 to your office.
17 A: That's the way we do it.
18 Q: And you're certain it occurred that way in
19 this instance?
20 A: Oh, yes.
21 Q: And, uhm, are you the one actually responsi-
22 ble for placing the unit on him?
23 A: That's correct.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Do you have any idea where the particular
2 unit has been before you -- you get it to
3 place it on him?
4 A: It was on somebody else, probably.
5 Q: But you're not sure in this instance?
6 A: No.
7 Q: There's no records of that?
8 A: No, I don't have any records, no. But, I'm
9 saying they're -- they're reused and reused
10 and reused.
11 Q: I understand. Do you have any idea as to how
12 many were in operation through your office as
13 of January the 25th of last year, 1996?
14 A: Each officer in home arrest was mandated by
15 law not to have more than 25. So each
16 officer has a maximum of 25 pieces of
17 equipment and, let's see, we had one, two,
18 three, four officers. So we had a hundred
19 pieces of equipment in our office, approxi-
20 mately.
21 Q: Do you keep -- if -- if you don't have 25
22 parolees on electronic monitoring, where are
23 the devices -- strike that. Are you respon-
24 sible for certain devices?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Are they assigned? It's -- you know what?
2 It's up to the supervisor. They changed it
3 so many times that there was times while I
4 was home arrest that there was a pool of them
5 to select from and then there was that --
6 there was a time on home arrest when they
7 assigned you 25 or 20 or whatever they --
8 Q: I see.
9 A: -- (inaudible).
10 Q: And you're not sure when --
11 A: I'm sure --
12 Q: What your --
13 A: -- I -- I -- I think at the time, because,
14 see we were doin' a transitional. I was
15 coming in, another parole office-- this is
16 almost th-- the -- around the time when some
17 other officers left and we were comin' in.
18 That was me. So, I -- I -- I inherited
19 somebody else's equipment, and case load, and
20 desk and chair and the whole nine yards. So,
21 uhm, I -- I believe I was assigned whatever
22 was in there.
23 Q: Are there any records of that to your
24 knowledge?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: No, I don't think there are actually. I
2 think they got rid of all that stuff. After
3 a certain period of time, because it changed,
4 they just, you know, after the parole
5 officers left they got (inaudible).
6 Q: You said you were new coming in. Were you
7 new as a parole officer coming in?
8 A: Right.
9 Q: Okay. How long had you been a parole officer
10 before January the 25th of '96?
11 A: Approximately two months.
12 Q: Okay. And where had you been a parole
13 officer?
14 A: Just there.
15 Q: Had you had other clients, other people that
16 are -- were under your supervision who were
17 using electronic monitoring devices during
18 that two period of time?
19 A: Other clients?
20 Q: Yeah.
21 A: Sure.
22 Q: Okay. And, again, you're not sure in this
23 instance 'cause there's no records as to
24 whether David Nordstrom's monitoring device

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 was taken off another person who had complet-
2 ed the program or whether this was simply one
3 that had been left over, available for use,
4 assigned to you that you -- that you put on
5 him at that time.
6 A: I'm almost certain it was -- was used --
7 used. There was no new equipment there.
8 Q: No, I understand, but I -- I -- (inaudible,
9 speaking simultaneously) --
10 A: And it was on somebody else before that. But
11 let me explain that. When a -- when a piece
12 of equipment comes off of a person when he's
13 released to another release or if he's done
14 with his sentence, it's -- it's serviced,
15 okay? We clean it, we reset it and we put it
16 back in the box and it's -- and it's in
17 storage until the next person gets it. And
18 then when that person gets it, it -- it goes
19 back into the computer system and they have
20 to reinitiate all the, uhm, data fields.
21 Q: And as I understand it, you don't have any
22 records --
23 A: No.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: -- to track who this particular one came off
2 of, when it came off that person? We know
3 when it was put on David Nordstrom --
4 A: Right.
5 Q: -- but we -- you don't have any records prior
6 to that?
7 A: No, I don't.
8 Q: Okay.
9 A: Department of corrections might somewhere,
10 but I don't.
11 Q: And you're not aware of any -- do you
12 maintain any maintenance records as you
13 described when i-- when it's cleaned and, uh,
14 and checked? Somehow verify?
15 A: The only -- the -- that occurs when they're
16 taken off. It's a practice to take it off,
17 and service it, put it away.
18 Q: Who's the one responsible?
19 A: It's accountability. It's accountability.
20 (Inaudible).
21 Q: Who's the one responsible for servicing?
22 A: We are.
23 Q: By we, ya' mean . . .
24 A: That parole officer.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Okay. Do you maintain any records with
2 regard to its maintenance?
3 A: No. Unless it has to be sent to the shop for
4 a major repair. And I'm saying other than
5 service, but cleaning, normal maintenance
6 type of thing. But if it-- it's damaged, or
7 it's not functioning properly, it goes in to
8 be repaired to the company, but we (inaudi-
9 ble).
10 Q: Does that occur from time to time?
11 A: Sure. People get violent with their equip-
12 ment and they (inaudible) they throw it up
13 against the wall or whatever and -- they
14 don't want to be on home arrest any more and
15 we gotta fix 'em.
16 Q: Okay.
17 A: (Laughs).
18 Q: Now -- now what is your maintenance and your
19 ge-- general cleaning consist of? Just
20 cleaning it?
21 A: Well, what it is is, you take it u-- you --
22 you clean it, okay?
23 MR. BOCK: Is this the ankle bracelet itself?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: They're bo-- there's th-- two -- two pieces
2 (inaudible).
3 MR. BOCK: And the -- the box that goes by the phone.
4 A: Right.
5 MR. BOCK: Okay. So we're talking about two separate
6 pieces.
7 A: Two pieces of equipment.
8 MR. BOCK: And do they -- and does the ankle bracelet
9 stay with the same box, also?
10 A: Right. The -- the actual -- the bracelet
11 part's thrown away. The -- the box that goes
12 on the bracelet is retained.
13 MR. BOCK: That little square thing.
14 A: The little square part.
15 MR. BOCK: And the box by the phone is --
16 A: Is retained.
17 MR. BOCK: Okay. And the box --
18 A: That's (inaudible, speaking simultaneous-
19 ly) --
20 MR. BOCK: -- on the ankle bracelet and the box and the
21 -- the phone box, those two are a --
22 A: They're main-- they're maintained together.
23 MR. BOCK: And so when someone else gets both of -- gets
24 a new piece of equipment or a used piece of

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 equipment, the box and the square thing on
2 the ankle bracelet go together again.
3 A: Generally that's true, because -- the only
4 way that wouldn't happen is if one or the
5 other was damaged. Let's just say for the
6 example the bracelet, the box, the transmit-
7 ter, is damaged? They may replace it with it
8 a new one and then it picks it up in the
9 computer as that one.
10 MR. BOCK: And you clean the box, too, that goes by the
11 phone?
12 A: Ya' clean both.
13 MR. BOCK: Uh, w--
14 A: Dust and stuff like that. And the other one
15 has to co-- the bracelet has to come all
16 apart. There's a battery in there that comes
17 out of there because we can't leave the
18 battery in it. Take the battery out, ya'
19 clean it. You take the bracelet part off,
20 you throw that away and you clean the rails,
21 those little rails that go on the end of the
22 bracelet to keep it together all one piece.
23 That's what holds it together. And, uh,
24 those are cleaned and put away.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Are you trained as to how to clean this and
2 -- and --
3 A: Not until you get there, sir. And your fir--
4 on your first day and --
5 Q: So, sort of on-the-job training.
6 A: On-the-job training, and, uh, you know,
7 actually what happens is another parole
8 officer, when we did it, did it for us and
9 showed us how to do it, and then after that
10 they walked us through it and then after that
11 we were on our own.
12 Q: Do you have any idea how many times you
13 woulda done it before you were involved with
14 David Nordstrom?
15 A: Mm. I -- I couldn't tell you without
16 actually lookin'.
17 Q: Well, given -- given your normal case load,
18 give the fact that you were there for two
19 months, do you have a guess estimate? A
20 range.
21 A: Uh, less than a dozen, more than five,
22 somewhere in there.
23 Q: And is there a key that allows you to release
24 the bracelet itself?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: No.

2 Q: How does it get released?

3 A: I cut it off.

4 Q: You just simple cut it off.

5 A: I cut it off. It's not re-- it's not
6 reusable anyway.

7 Q: Okay.

8 A: And then you unscrew the rails, like I was
9 saying before, that hold the bracelet to the
10 box. There's screws on the back of it.
11 Okay? And the only way you can access those
12 screws are from behind so it's impossible to
13 unscrew the box.

14 Q: So you have to go the location of the box?

15 A: (Inaudible).

16 Q: Okay. You unscrew --

17 A: You unscrew the bracelet.

18 MR. BOCK: The bracelet has a little square thing that's
19 the transmitter.

20 Q: Right.

21 MR. BOCK: And he's saying to unscrew the back of the
22 transmitter, you go behind it to unscrew --

23 A: It's true.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 MR. BOCK: -- to get to the batteries and stuff in the
2 little box that's -- that's held by these
3 straps; right?
4 A: Right. Yes, sir.
5 Q: Okay. And then, what, do you put new straps
6 on there, or . . .
7 A: Brand new. It's a -- it's a hygiene thing.
8 Besides that, you know we -- i-- if a guys
9 been on it for any length of time at all it's
10 stretched out and you know (inaudible).
11 Q: They can -- they can stretch.
12 A: They're expendable. The rubber stretches but
13 there's metal -- not metal, a cable through
14 the middle, does not stretch.
15 Q: Okay.
16 A: That's to give 'em a little bit of, you know
17 comfort.
18 Q: Do you ever put it on any place other than an
19 ankle?
20 A: No.
21 Q: And, do you remember specifically placing it
22 on David Nordstrom?
23 A: Oh, yes.
24 Q: Do you remember what leg you pla-- put it on?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: No, I can't recall (inaudible). We give them
2 the option. Some people (inaudible) one leg
3 or the other. Some people have swelling and
4 (inaudible).
5 Q: And, I take it it's obvious you don't
6 remember that particular day that he did
7 this?
8 A: No, but chances are he was wearing what he
9 got released from prison in and that would be
10 jeans.
11 (Laughter).
12 Q: Okay.
13 A: Jeans and boots.
14 Q: He would have been wearing boots?
15 A: Probably. (Inaudible) he was, but ya' know
16 he's out (inaudible). I don't know. I
17 (inaudible; speaking simultaneously) --
18 Q: Is that prison-issue boots?
19 A: Yes, those low boots, they're low cut boots.
20 Q: Uh-huh. And, how is this system monitored?
21 Can you give me an overall view on it?
22 A: All right. We're a remote site, in Tucson,
23 and this is done through the phone lines.
24 And the main computer is in Phoenix, okay?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 So everything -- everything depends on that
2 phone line being (inaudible), okay? And
3 that --
4 Q: The phone line where he's gonna be located.
5 A: -- re-- between -- well, between us and their
6 home and between us and Phoenix, 'cause
7 Phoenix is the one actually doing the
8 computer, a-- they have a computer that
9 actually checks the system, then you just go
10 on. So, the guy puts on a bracelet which is
11 a transmitter and the box which goes in their
12 house is a receiver, okay? It's just like a
13 modem with a little bit more s-- has a little
14 more capabilities than a modem does. The
15 modem is automatically cued, or I sh--
16 automatically, randomly cued through Phoenix
17 to check if the system is still working and
18 if the client's still there. The -- the
19 transmitter transmits a signal as soon as the
20 person gets within range of what -- of the
21 receiver and it indicates whether he is home
22 or not. And the same as when he leaves.
23 Soon as he gets out of range, it indicates
24 that he left. Pretty simple.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: So, and where is that -- that's monitored
2 from Phoenix?
3 A: That -- the computer -- w-- any transaction
4 that occurs with that client goes to Phoenix
5 and then comes to us.
6 Q: Okay. So, do you then first -- let-- let's
7 say hypothetically, uh, he's supposed to be
8 in at 7:15 and it's now 8:00 o'clock, what
9 happens?
10 A: It'll -- we'll get an alarm from him. And
11 what happens at 7:15 (inaudible) in the
12 morning, we don't get the alarm at 7:15 at
13 night, Central Communication gets the alarm,
14 because it's a s-- it's a -- it's a two-shift
15 thing. We go from 8:00 to 5:00 and they go
16 from 5:00 to 8:00, and they pick up all the
17 alarms in Phoenix. And then we get a -- we
18 get a report in the morning saying what
19 happened, if there's a warrant issued or it
20 was a curfew violation. If they -- if th--
21 if they're unable (inaudible) to contact that
22 client, if they're unable to, whatever.
23 Q: So, let's say that it's 7:15 at night. Let's
24 say it's 8:00 o'clock at night, okay? And

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 they're supposed to be in and it-- and it's
2 cued to them being there at 7:15. You with
3 me so far?
4 A: Right.
5 Q: Now, what happens to -- does a-- an alar--
6 what happens in the home, in that type
7 situation?
8 A: Nothing.
9 Q: Okay. There's no phone that rings in the
10 home?
11 A: It -- it's just like a -- what'll happen is,
12 the thing'll go -- he'll walk out the door.
13 Soon as he walks out the door, the computer
14 is gonna indicate -- it's gonna -- it's gonna
15 start working. The modem's gonna call
16 Phoenix and tell him that he's gone.
17 Q: Oh.
18 A: And then, when -- when -- when they do that
19 they'll send an -- a-- an alarm to either us
20 or they're gonna send one to Central Communi-
21 cations in Phoenix. And then we act on
22 whatever that alarm is.
23 Q: Well let's say, he's gotta be home at 7:15
24 (inaudible, speaking simultaneously) --

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: And he doesn't get home until late.
2 Q: He doesn't get home until late.
3 A: So then we're gonna get an alarm.
4 Q: You're gonna get an alarm.
5 A: Uh-huh (Affirmative answer).
6 Q: But nothing is gonna occur at his house.
7 Nothing --
8 MS. STUART: (Inaudible).
9 A: Nothing -- you me nothing that we're gonna go
10 to his house or something, is that what you
11 mean?
12 Q: Nothing that's -- nothing that's gonna occur
13 at his house --
14 MR. WHITE: No sirens, no lights.
15 A: No, nothing like that.
16 Q: Nothing at all?
17 A: No.
18 Q: No telephone call to automatically call him?
19 A: Automatically call Phoenix. But -- and then
20 what'll happen, as soon as that alarm is
21 registered at Phoenix they're gonna call and
22 see where he's at if -- if it was him. If --
23 if it's their shift. If it's not it's gonna

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 be -- if it'll -- if it's during the shift,
2 that we're on --
3 Q: I --
4 A: -- then we call.
5 Q: I understand, sir.
6 A: Okay. Okay.
7 Q: Let's say it -- it's not during your shift.
8 Let's say it's 8:00 o'clock at night, 9:00
9 o'clock at night. You're off at 5:00 or so?
10 A: Right.
11 Q: All right. So now, some sort of alarm goes
12 off. It gets monitored into Phoenix. And
13 now Phoenix then would call the receiver?
14 A: Right.
15 Q: Is that correct?
16 A: Right. Call th-- that client's home.
17 Q: Call that client's home to determine whether
18 that person is there.
19 A: Right.
20 Q: Is there a voice verification?
21 A: No.
22 Q: Okay. You don't have that type of system?
23 A: No.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: You're -- you're aware of systems out there
2 that do exist like that?
3 A: I've heard of them.
4 Q: Okay. What is the -- the name and the style
5 and the model, if you know, of this particu-
6 lar system?
7 A: This here -- this -- the system that we use
8 is VI. I don't know what it stands for, but
9 the one we have the 9000, the model 9000.
10 Q: Is that -- that's the same system that was in
11 use in January of '96 is presently still in
12 use or is there a different type of model
13 that's in use presently?
14 A: No, that's the same system we're using now.
15 Q: Okay. So there's no voice verification.
16 A: No, sir.
17 Q: What other ways would they -- so, let-- let's
18 say from your experience and your understand-
19 ing, they now call. Somebody answers the
20 phone and says, oh, I'm here. So-- you know,
21 I don't know what happened, whatever. Would
22 that cause a field person then to go out and
23 see if that person is, in fact, there.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: They may call my house, okay? And tell me
2 they, look, we got an alarm on him, he's --
3 and he's not at home -- we -- and -- and --
4 and that point we may make a decision to go
5 (out to the house?), know what I mean? And
6 the other thing ya' gotta remember, as soon
7 as that alarm occurs, there's a data sheet,
8 or a data screen --
9 Q: Uh-huh.
10 A: -- in the computer that gives them questions
11 to ask, you know (inaudible).
12 Q: Do you know what questions there -- those
13 are?
14 A: Date of birth, his social security number,
15 his addresses' phone number, what his crime
16 was, what his DOC number is. I mean, not
17 everybody's gonna know all that stuff.
18 Q: Okay, s--
19 A: So, if they use their head and they -- and
20 they ask those questions, they can (inaudi-
21 ble).
22 Q: Are you awa-- w-- --ware of any situations
23 that have occurred where, in fact, somebody
24 who was required to be called at a certain

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 time pursuant to their conditions and as set
2 up through their monitoring system, and they
3 were not found to be at home through some
4 sort of independent means, they got arrested
5 for something, something occurred, and yet
6 the alarm did not go off to Phoenix?

7 A: No.

8 Q: 'Kay.

9 A: There is no way around that. There's no way
10 around that. The guy can s-- if a-- the
11 alarm is gonna go off. Whether he's there or
12 not i-- i-- you know, somebody could be lying
13 for him or whatever. What -- what they
14 should do is ask for the sponsor, too, to
15 ask, you know, like if it's his parents,
16 chances are his parents are not gonna lie for
17 him.

18 ???: Maybe.

19 A: Okay. Chances are they're not.

20 Q: If a person is cap-- just accept these as
21 facts for purposes of the hypothetical. If a
22 person is capable of taking the electronic
23 monitoring device off, without cutting it, if
24 they left it at home, they could walk out the

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 door and there would no -- there would be no
2 alarm that would ever go on.
3 A: If he could take it off? My understanding is
4 that this system has built into it that it
5 has to be next to skin.
6 Q: Who told ya' that?
7 A: Uh.
8 Q: 'Cause I heard something different than
9 this --
10 A: The VI people told us that, and, uh, and
11 that's the way I (inaudible). It has to be
12 next to skin.
13 Q: Who's that person (inaudible)? So you're
14 saying it's heat based?
15 A: No, I don't know what it is. I'm just saying
16 that fro-- from what I was told it has to
17 have skin contact, whether it's chemical or
18 it's heat.
19 Q: There's --
20 A: Whether it's just a measurement of pressure,
21 I don't know.
22 Q: This was something you were told --
23 A: During training.
24 Q: -- during training.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Right.

2 Q: Was it ever tested, uh, in your training

3 classes to determine or corroborate that that

4 is indeed the way it works?

5 A: I don't know that -- th-- that's a -- that's

6 a fact.

7 MR. BOCK: Have you read any materials from the VI

8 system? Have you read their manuals? Have

9 you looked at their manuals at all as --

10 A: I didn't get a manual, but, uh, I have looked

11 over some of their things that have come down

12 from time to time. They'll send out like a

13 little notice, you know, an updated thing,

14 or --

15 MR. BOCK: Did they send out any cautionary publications

16 as to how people can beat the monitor?

17 A: Nope.

18 MR. BOCK: Excuse me?

19 A: No, they haven't.

20 Q: (Inaudible).

21 MR. BOCK: Who's the -- who's the supervisor over there?

22 A: Mr. Hinkey (ph).

23 MR. BOCK: Hinkey.

24 Q: Yeah.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 MR. BOCK: That's who you're talking --
2 Q: Have you ever spoken to Mr. Hinkey as to
3 whether in fact this is skin based?
4 A: No.
5 Q: Would he be more of an expert in this
6 particular area of electronic monitoring
7 device than you would be?
8 A: Than I would be? I don't know what his
9 experience is, uh, home arrest. Okay? While
10 I was there he was never on home -- never
11 supervised home arrest.
12 Q: Do you know what he's doing presently?
13 A: Right now he's got, I think (inaudible).
14 MR. BOCK: What about Becca Matthews do you think she
15 would ha-- know --
16 A: Yeah, she's pretty good about that.
17 MR. BOCK: So she -- she -- we can ask her similar
18 questions.
19 A: She -- she would know, uh, you know, and --
20 call VI and ask them. You know, they're the
21 e-- they're the ones who designed this thing.
22 Q: Did any law enforcement officer ever come to
23 you within the last year at any time and ask

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 you is there a way to, quote, beat, the
2 electronic monitoring device?

3 A: Think somebody did ask me that. (Inaudible).

4 Q: Did you record that information at all in
5 your -- in your chronological or any other
6 place to verify or document the conversation?

7 A: I don't recall the conversation so I don't
8 know if I documented it.

9 Q: You have some sort of vague memory of
10 somebody --

11 A: Yeah, somebody asked me, you know -- I mean,
12 there are so many people to talk, okay? And
13 fo-- officers who are interested also just to
14 see how the equipment works, I mean people to
15 you about the equipment constantly, so --

16 Q: Yeah, but I --

17 A: -- I mean, I -- I know what you're sayin', an
18 official thing. I think, uh, somebody came
19 and talked to us about the -- the equipment
20 on David Nordstrom in particular a while
21 back. (Inaudible, speaking simultaneous-
22 ly) --

23 Q: Do you think that was before his arrest or
24 after his arrest?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: It was after they arrested him.
2 Q: It was after his arrest?
3 A: Right.
4 Q: And, if you heard a name, do you think that
5 might cause you to remember the person?
6 A: Try me.
7 (Laughter).
8 Q: Either Ed Salgado or Brenda Woolridge?
9 A: Yeah, okay. Yeah, I remember (inaudible).
10 Q: Ed Salgado?
11 A: Yeah, they talked about the equipment.
12 Q: Okay. And when do you believe that was?
13 A: (Inaudible). This winter. January, Febru-
14 ary, somethin' like that.
15 Q: But it's your impression this was sometime
16 after he had been a-- David Nordstrom had
17 been arrested?
18 A: (Inaudible).
19 Q: And again, you didn't document that anywhere.
20 A: No, I wouldn't. I didn't have this case at
21 that time. You know, if I was monitoring
22 him, specifically, I would have indicated
23 somethin' in his case, uh, log that I talked
24 to someone (inaudible).

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Do you recall whether he had been formally
2 charged or not?
3 A: No, I don't.
4 Q: Do you recall what ya' told them? What you
5 told Ed Salgado?
6 A: No. I don't recall. It's been too long. I
7 know we talked about the equipment. We
8 talked about David Nordstrom. I think we
9 went over (inaudible) schedule (inaudible)
10 that's it.
11 Q: Do you think, given your understanding of the
12 system, and given what you've told us here
13 today about the system, you would have ever
14 communicated to them that there is a certain
15 way in which the system, the machine could
16 have been beaten?
17 A: Oh, I have heard is ways, and I may have
18 relayed that. But I don't -- I don't know of
19 any ways. I can't think of any ways (inaudi-
20 ble).
21 Q: What ways have you heard that there are?
22 A: Well, i-- and even if it happened --
23 Q: Well, just -- just --

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: I know, I'm just sayin' that even if the
2 system was beat, it's still gonna give an
3 alarm that one -- one time, okay? 'Cause the
4 could take it -- his FMD, which is battery
5 operated?
6 MR. WHITE: What's the FMD?
7 A: That's the computer (inaudible) that's
8 plugged into the phone and stick it in a
9 backpack and take off. But what's gonna
10 happen is they're gonna get a phone discon-
11 nect and you're gonna get a power -- power
12 failure. And, ya' know, because of the
13 lightning storms that we get, that could
14 occur and then the guy has, ya' know, puts
15 two and two together, and just takes it off
16 and throws it away, we're thinkin' that it
17 occurred during a storm. Without checkin'
18 all, you figure, okay, we've got a hundred
19 people on supervision, are you gonna call
20 everyone of 'em? We have. I'm not sayin' we
21 don't, but we do do that, but generally we
22 don't, for every -- every one of them.
23 Q: I'm not sure (inaudible, speaking simulta-
24 neously) understand --

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: The guy could've -- the guy could've walked
2 out the door with this in his backpack, do
3 anything he wants, 'cause he's with the piece
4 of equipment that monitors whether or not he
5 came in and out of that --
6 (END OF TAPE ONE, SIDE ONE).
7 Q: I didn't quite understand your last answer,
8 so let me back up a bit and ask you this. In
9 what you've just heard, in terms of that
10 example you just gave us, from personal
11 experience, are you aware of electric--
12 electrical storms that have knocked out the
13 system?
14 A: Right.
15 Q: And from your experience, because so many
16 people are on the, uhm, that it would be
17 impractical, and in fact you know that not
18 each and every one of them would have been
19 called in that scenario?
20 A: No, I'm not saying that. I'm saying that it
21 could happen that somebody could have not
22 been called, but we -- we -- we attempt to
23 contact everybody. Let's just say that it
24 happens toward quitting time, you know, where

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 people normally are getting finished with
2 work. You may or may not be able to get a
3 hold of that indi-- individual right then and
4 there. You know. And you may be able to get
5 hold of 90 percent of them, 50 percent of
6 them, (inaudible), you know, so, there's
7 roo-- there's room for error.

8 Q: What other ways have you heard --

9 A: That's it.

10 Q: That's the extent of it?

11 A: Yeah, I believe so.

12 Q: You never heard of a situation where a person
13 could cut the bracelet and then take it with
14 them?

15 A: No. As soon as you cut that wire inside,
16 which is maintaining the electrical connec-
17 tion that's when you're gonna get a tamper
18 and the alarm's gonna go off.

19 Q: So you don't think you would have ever told
20 somebody like Ed Salgado that there's a way
21 to beat the system by cutting it?

22 A: No.

23 Q: Taking it with you?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: You can take it with you, but you're still
2 gonna get that one initial alarm, the power
3 and the phone line.
4 Q: Listen to the question, carefully.
5 A: Yes, sir.
6 Q: Okay. Do you think you might have told Mr.
7 Salgado at any time, yeah, there's a possi-
8 bility you could beat the system, but an
9 alarm still would go off in the scenario
10 where you cut the bracelet and took it with
11 you.
12 A: No.
13 Q: You feel certain of that?
14 A: (Inaudible).
15 Q: Were you ever present when Ed Salgado might
16 have spoken to Rebecca Matthews?
17 A: No.
18 Q: Now, these papers that I have, and I'll
19 briefly just go over them.
20 MR. BOCK: Let me -- let me just ask one other follow up
21 question. There was an article, Mr. Era (ph)
22 of the Department of Corrections, said he was
23 -- it was in the newspaper that he was going
24 to investigate the electronic monitoring. Do

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 you know anything about that or have you ever
2 talked to him about that? Mike (inaudible)
3 Era?
4 A: Mr. Era was gonna investigate? I don't know
5 if he -- what he investigated. If -- if he
6 did he never talked to me.
7 Q: Are you aware of any reports or summaries
8 done by any supervisors within Department of
9 Corrections who conducted an independent
10 investigation to determine whether in fact
11 David Nordstrom had been on electronic
12 monitoring device on May the 30th and on June
13 the 13th?
14 A: Within the -- a-- an investigation to see if
15 he was? No, I -- I don't know (inaudible,
16 speaking simultaneously) --
17 Q: You're not aware of any independent investi-
18 gation?
19 A: There is a -- well, there was a -- there was.
20 Q: Just --
21 A: There was (inaudible) an investigation,
22 internal affairs did some kind of investiga-
23 tion. Then they canceled it and they started
24 it again, and I don't know what they all did

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 with that. It was really confusing what they
2 did, so. I mean, I got a notice in the mail
3 that said it was canceled as I recall. Then
4 I -- then I ended up going back down to
5 Phoenix to answer some more questions and I
6 -- and I had asked him and he said, no, it
7 was never canceled. And I showed him my copy
8 of my letter that it was canceled and he
9 said, well, they restarted it. So, I don't
10 know.

11 Q: Well, who did you speak to o-- over there?

12 A: Salgado guy. I don't -- who's that -- is
13 that his name? Salgado? I think it was I
14 believe. No wait, wait, wait. (Inaudible).
15 I can't remember his name. (Inaudible). It
16 was --

17 Q: Well, was it law enforcement or was it
18 internal a--

19 A: It was internal --

20 Q: -- affairs in -- within the department of
21 corrections?

22 A: It was in the department, right.

23 Q: Okay. Do you remember who ya' spoke to
24 there?

requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: No, that's the same guy.
2 Q: What's the same guy?
3 A: It was the same name. I can't remember his
4 name.
5 Q: Does the name Michael Era sound familiar to
6 you?
7 A: No, it was not him. It was internal affairs.
8 Michael Era's -- has to do with public
9 affairs.
10 Q: Okay. So, to your knowledge at this time,
11 there is no continuing independent investiga-
12 tion in the department as to the verification
13 as to whether David Nordstrom was on elec-
14 tronic monitoring on those two days I just
15 mentioned?
16 A: I think there is.
17 Q: There is one going on presently?
18 A: Right.
19 Q: Do you have any idea who I might contact to
20 verify or seek that information from?
21 A: Internal affairs, Department of Corrections.
22 I don't know the person's name. And I don't
23 know -- see, the person that was doing it,
24 found some kinda other job and left.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: I see.

2 A: And they had assigned somebody else, and I

3 don't know who that was. See? And they did

4 this a while back, too, so I don't remember

5 the guys name. It was like --

6 MR. BOCK: Does the attorney --

7 A: -- it sounded like Salgado though, it was d--

8 Desalgado or D something. Depoli, something

9 like that I don't know (inaudible).

10 Q: Somebody obviously different than the law

11 enforcement officer d-- who spoke to you

12 about David Nordstrom?

13 A: The police, right, no.

14 Q: Right.

15 MR. BOCK: Does the attorney general's office represent

16 internal affairs at the Department of

17 Corrections?

18 MS. STUART: We've got the whole department.

19 Q: Yeah, it's the whole department. Okay. Now,

20 I want to show you a two-page document.

21 Let's see (inaudible). They both say page

22 two on them. Gonna ask you if you recognize

23 what that is?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: This is, a query report. Somebody queried
2 this report. This is not a -- an alarm
3 generation report, 'cause they're different
4 types. Somebody actually went in and said I
5 want this specific report.
6 Q: Could somebody like law enforcement go in and
7 ask for that specific information, that re--
8 that kind of report that's in front of you,
9 that -- those two pa-- two pages?
10 A: Right. I don't know if they did. They'd
11 have to go through a supervisor for that.
12 Q: Okay. Let-- let's just assume that they got
13 it, okay? This is not actually then a
14 logging of what it purports to be from your
15 department. Do you understand the question?
16 A: No.
17 Q: Okay. This is not actually some sort of
18 record that's kept by your department?
19 A: It's not a record, no, we don't (inaudible).
20 Q: It's not a record.
21 A: We don't -- we don't keep this record.
22 Q: Okay. Do you know where it would be generat-
23 ed from?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Well, we can generate that from our terminal
2 or this can be generated in Phoenix.
3 Q: Okay, and, where would it be based from?
4 A: (Inaudible, speaking simultaneously) --
5 Q: The information that caused this in-- in
6 formation to be taken out of. Where would it
7 -- where -- where would it be gen--
8 A: The computer -- the mainframe is in Phoenix.
9 Q: Okay. And can you tell us what it is?
10 A: You know sayin' (inaudible). Somebody wanted
11 to see what the last 99, or I haven't looked,
12 y-- you can pick how many messages that you
13 want to view, wanted to see what they were.
14 Okay, so in this case, I don't know how many
15 are here or even if these belong together.
16 Q: A-- as to what? As to the alarm going off or
17 what?
18 A: As to his transactions in the last so many
19 messages, okay? Over a period of time. He
20 -- you have to pick a date and you have to
21 pick a time and then you pick how many
22 messages you want to view, okay? And then
23 it'll run these messages for you, of course
24 you pick the client, too. And then you see

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 what -- what he's done in that given period
2 of time for that many messages. It can only
3 report up to 99 messages, so however many you
4 see there plus, minus that from 99, that's
5 all that was left in there.
6 Q: Well, it purports to reflect alarm -- a
7 message with regard to alarms, and I assume
8 with -- concerning electronic monitoring.
9 A: Right.
10 Q: Is that -- is that what it is?
11 A: No. I mean, it ca-- it can be. It'll show
12 an alarm if there was an alarm. It's showing
13 all the transactions that occurred. If the
14 computer called randomly to check to see
15 comi-- the equipment was there, if there was
16 a curfew violation, if there was a tamper,
17 whatever.
18 Q: But it's all related to the electronic
19 monitoring --
20 A: Oh yeah.
21 Q: -- device concerning David Nordstrom; is that
22 correct?
23 A: If this is his, right. I don't know (inaudi-
24 ble, speaking simultaneously).

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Well, let's assume it is.
2 A: Okay.
3 Q: That would be correct?
4 A: Yeah. If this -- if this is the right guy.
5 Q: So, i-- it's all instances where there's some
6 sort of occurrence where Phoenix woulda
7 generated something on their computer 'cause
8 they had to do something concerning his
9 electronic monitoring device?
10 A: Right.
11 MR. WHITE: L-- is that a f-- can I ask him? Is this all
12 of 'em or just -- this just the last --
13 A: This is --
14 MR. WHITE: -- 20 or the last however many.
15 Q: Well.
16 A: This is the date that it -- that -- this --
17 this happened -- let me just see if I can
18 figure out if they got any dates on here
19 (inaudible).
20 Q: Y--
21 A: See this was faxed to us from -- from Phoenix
22 'cause I can see the fax numbers on here.
23 Okay, so we didn't generate this, Phoenix
24 did. So they must have occur-- this must

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 have occurred during their duty shift, okay?
2 Something musta happened. All right. And
3 then they want to find out what happened,
4 so --
5 Q: Well, as--
6 A: -- they didn't make any notes on here and
7 they usually do.
8 Q: Well, I assume, you know, just for --
9 hypothet-- I assume somebody's investigating
10 whether in fact David Nordstrom was actually
11 in violation of his conditions involving his
12 monitor so they'd want to generate some sort
13 of record, law enforcement?
14 A: No. That's not why it generated.
15 Q: Well.
16 MS. STUART: You -- you don't know why these --
17 A: Right.
18 MS. STUART: -- specific ones were (inaudible).
19 A: I don't know, but I'm sayin' that's not why
20 we generate 'em though.
21 Q: I didn't ask why --
22 A: Okay.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: -- you would have generated them. But let's
2 just assume that that's how it comes in the
3 form in which it comes, okay?
4 A: Okay.
5 Q: This then would -- what you're saying is that
6 c-- every time they had something occur, some
7 situation involving a monitoring device that
8 would be on the hard drive; is that correct?
9 U-- up in Phoenix?
10 A: You mean the hard -- you mean his computer
11 system that he has, his mon-- his modem?
12 Q: Yeah.
13 A: All right. They -- they can print this
14 report or they can print different reports.
15 This is a formula, so you know.
16 Q: Thi-- this --
17 A: This one here, they print it at this point to
18 see what he was doing.
19 Q: All right. Does that appear to be every time
20 that for instance the alarm would have gone
21 off and perhaps the reason why?
22 A: Well, in this particular case an alarm --
23 looks an alarm went off, okay? And they
24 generated this particular report to -- report

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 to see what -- what it was. And they --
2 there's other ones that could have chosen
3 (inaudible).
4 Q: What other ones could they have chosen?
5 A: There are different reports.
6 Q: Well, can you explain to me the different
7 reports?
8 A: They're similar, but they -- they can narrow
9 it down a little more. As far as they s--
10 pick the fields that they want to -- on
11 there.
12 Q: Can it be -- is it more expansive than -- I
13 guess what I want to know is, from your
14 familiarity with the system, okay? And what
15 this two-page (inaudible) appears to report
16 -- to reflect, would there be some other way
17 in which I could bring up through the system
18 information that may reflect more violations,
19 mo-- more times when the alarms when the
20 alarms went than this, during the dates of
21 which they'll purport to allege reflective.
22 A: On the date that -- on the date --
23 Q: I have no idea what I just said.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 (Several people speaking simultaneously,
2 unable to determine what was said).
3 (Laughter).
4 MR. WHITE: Jesus.
5 A: The date this happened they selected this
6 report. After that there is no more since
7 we're not near that date we can't select any
8 more reports. And if there was something
9 that you wanted specifically to try to cue in
10 on, we can try to focus your report on that,
11 but this is what they picked. So there's
12 nothing more detailed than this.
13 Q: With reference to what this has in it.
14 A: Right. Right.
15 Q: Nothing more detailed than this.
16 A: No.
17 Q: Do you understand the -- thi--
18 A: I have to loo-- I'd have to --
19 Q: Well, hang on a second.
20 A: -- go through this again to figure this out.
21 Q: You haven't heard the full question.
22 A: I know.

requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Do you understand what it would mean where
2 there's a message that says call back and a
3 message leave.
4 A: Right.
5 Q: And a message enter. Do you understand what
6 this terminology means --
7 A: Sure.
8 Q: -- within the system?
9 A: Sure.
10 Q: Can you explain it to us.
11 A: All right. This person here left and it was
12 an unauthorized, well I-- yeah, left and it
13 was unauthorized leave. And the same for the
14 next three. And then the computer called to
15 see what was goin' on. And this call back
16 thing? Somebody was on the phone and it
17 wouldn't allow them to put on the next
18 message. Each time it calls back, when you
19 see a call back and you see, I don't even
20 show one on here, when you see -- it didn't
21 complete (inaudible). It'll show location
22 verified after a call back if it made its
23 connection. (Inaudible). It calls until it
24 gets through to the modem and the modem

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 answers. Then it goes location verification
2 saying that it did connect.
3 Q: All right.
4 A: Okay? So it never connected, here, here and
5 it went all the way down. 'Cause see there
6 was a problem somewhere with this power gain
7 and power loss.
8 Q: Let's take the one -- okay. That's a rather
9 long one. This one all involves a history as
10 to something occurring -- well, these are
11 different dates, aren't they?
12 A: Uuhhh.
13 Q: Let-- let's just take one scenario. Le--
14 let's just take a hypothetical for instance
15 for --
16 A: Well, I'm just tryin' to figure what these --
17 see 'cause I gotta -- I gotta refresh my
18 memory on how all these work 'cause I -- I
19 re-- there -- there are differences in these
20 times, and dates --
21 Q: Okay.
22 A: -- and what they mean.
23 Q: All right. Let-- let's just go to the top,
24 just briefly. This purports to be from May

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 the 4th, 19, I think, 96, okay? Now the
2 alarm time appears to be at 8:57 Mountain
3 Standard Time; correct?
4 A: Hold on a minute. Let me -- let me just
5 review this a minute because I haven't seen
6 one in a long time. And I'm telling you,
7 these different columns are not (inaudible,
8 speaking simultaneously) --
9 Q: All I'm tryin' to do is get educated.
10 (Laughs).
11 A: I know.
12 (Inaudible background conversation).
13 (TAPE TURNED OFF).
14 Q: Let's -- let -- let's go through the first
15 column here. We got May the 4th of '96, it
16 looks like on mine. It's got 8:57 Mountain
17 Standard Time.
18 A: Uh-huh (Affirmative answer).
19 Q: Now that's the time that the alarm would go
20 off in Phoenix; correct?
21 A: The alarm time is different from the actual
22 time that the message got there. See, they
23 didn't get this alarm until it was received
24 at this -- the same time, I mean down here.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 I'm pretty sure that's how it works. That's
2 what I was tryin' to tell ya' before. If the
3 alarm went off at 8:57, okay? And the
4 message comes in, see that's why -- that's
5 why I need to go back and figure this out.
6 Time received was 8:57 and then message time
7 was 8:50. See that's why I (inaudible)
8 figure out.

9 MR. WHITE: They got the message seven minutes before the
10 alarm went off.

11 A: Right. That's what I'm tryin' to say. I
12 don't remember why --

13 MR. WHITE: That's a good system.
14 (Laughter).

15 A: The -- the na-- the title's across the top --

16 Q: (Inaudible, speaking simultaneously).

17 A: -- are not consistent with what -- what's on
18 here, you know what I'm saying. So I need --
19 I need to see, ask, maybe some questions of
20 somebody else too to find out exactly how
21 that thing worked (inaudible). I knew you
22 had to jump around a little bit to make it
23 understandable.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: So thi-- this is even confusing to you as to
2 what --
3 A: Right now, yeah, but --
4 Q: -- this means? A-- a-- as to --
5 A: I mean you can get the gist of it. The guy
6 had an alarm somewhere around 8:57, 8:50,
7 somewhere in there. The time got to -- it --
8 it -- it was sent to Phoenix on that same day
9 that it occurred around the same time,
10 whether it was seven minutes before or it was
11 10 minutes 'til, or I don't know. (Inaudi-
12 ble).
13 Q: Okay. Let -- let's just say the alarm goes
14 off. Now, Mountain Standard Time; correct?
15 A: Right.
16 Q: Which is, uh, our time.
17 A: Right.
18 Q: All right. Now, and this is being -- the
19 alarm then would go off in Phoenix, from what
20 I understand you're saying; right? Is that
21 right? Yes.
22 A: Right. The alarm'll go off.
23 Q: Okay. Now, you're obviously, uh, this is in
24 the morning, this is all -- 9:00 o'clock in

requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 the morning? Somewhere around 9:00 o'clock
2 in the morning.
3 A: This is on -- but what day? Is it a weekend,
4 'cause we're not there on the weekend. So it
5 makes a difference.
6 Q: Okay.
7 A: 'Cause see they did get this message because
8 they did send it to us.
9 Q: Well, it simply says curfew violation and
10 then it says, leave.
11 A: Right.
12 Q: Now what -- what would this tell you about
13 this situation, where the alarm went off on
14 May the 4th, somewhere around 9:00 in the
15 morning?
16 A: That he went outside his range. Either he
17 left his home or he went outside to get the
18 mail or he went into his back yard where he's
19 not supposed to be.
20 Q: Okay. The next entry he's got five, and it's
21 again pretty poor quality, 5:26 or somethin'.
22 What happens -- I mean, don-- isn't there
23 some sort of verification that everything is

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Let's go . . . is --
2 MS. STUART: Let me just tell you what --
3 Q: This looks like --
4 MS. STUART: -- I understand this represents. At any
5 given time any -- a-- a number of different
6 kinds of reports can be printed off the
7 computer related to data from the electronic
8 monitoring. This is the sum total of printed
9 reports concerning David Nordstrom that were
10 retained. Different of-- and this was
11 (inaudible). Different officers have
12 different practices as to when they actually
13 print something and how they retain it. So
14 these are what have been retained concerning
15 David Nordstrom from the beginning to the
16 end. I-- i-- it wouldn't be continuous --
17 Q: So --
18 MS. STUART: -- because there wouldn't be a reason to
19 print something every day and to print
20 different things depending on what's happen-
21 ing.
22 Q: So are you printi-- are you re-- then
23 responsible i-- if you're supervising him

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 then in May, you're responsible for printing
2 this in May.
3 A: (Inaudible).
4 Q: So that the computer has this information
5 and --
6 A: I'm not the only one that's able to print
7 this stuff. (Inaudible) the -- the people in
8 Phoenix are also printing this and this is
9 where this one came from 'cause it was faxed
10 to us. I didn't -- this is not one that I
11 printed, okay?
12 Q: Well, when you print one you print it in the
13 computer and it -- and you can find it in the
14 Phoenix terminal as well; correct?
15 A: It's all the same.
16 Q: Correct.
17 A: Right.
18 Q: So --
19 MS. STUART: It doesn't print into the computer he runs a
20 print of whatever is on the screen, which
21 could be done in either location.
22 Q: Right.
23 MS. STUART: And there are different fields.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: (Inaudible) select print out what you want
2 (inaudible).
3 MS. STUART: I -- I -- I think the way to clarify this is
4 that sometime around November, which is when
5 the officers were questioning folks, somebody
6 went in and said, give me this kind of a
7 printout running from 5 4, '96, to --
8 actually, it looks like he did twice. First
9 time you do it from 5 -- 5 '96 to 7 '96.
10 This is the same thing, it just has a later
11 date.
12 Q: But did I understand you to say that if an
13 officer chooses not to enter it into the
14 system --
15 MS. STUART: No, it has nothing --
16 A: (Inaudible, speaking simultaneously) --
17 Q: -- (inaudible, speaking simultaneously)
18 violation.
19 MS. STUART: It has nothing to do with entry. This is all
20 being entered because you've got an ongoing
21 entering thing.
22 A: It's automatic.
23 MS. STUART: At any given time they're getting messages
24 about what's going on, they can go in and

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 print that screen to show what the computer
2 is receiving --
3 Q: Okay.
4 MS. STUART: -- or has received.
5 Q: Refresh me then as to what ya' said, I didn't
6 quite understand, about an officer's ch--
7 choice as to --
8 MS. STUART: What he prints and what he retains in his
9 file.
10 A: This is what (inaudible, speaking simulta-
11 neously) --
12 MS. STUART: You know, you can go into your computer --
13 Q: Oh.
14 MS. STUART: -- and there's any --
15 Q: You -- you mean in the DOC file.
16 MS. STUART: Right. Right.
17 Q: Okay.
18 MS. STUART: So this is all that has ever -- was ever
19 printed and retained with respect to David
20 Nordstrom. Which doesn't mean that you cover
21 everything that ever --
22 A: Right.
23 MS. STUART: -- that was in the computer.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Right. It's only what we wanted at the time.
2 There was something that cued us to print --
3 or, I never printed this -- printed --
4 MR. WHITE: Print it and save it.
5 A: Right.
6 MS. STUART: Right.
7 A: (Inaudible).
8 Q: Okay.
9 MR. WHITE: Can I ask a question?
10 Q: Yeah.
11 MR. WHITE: So how long does the computer save the
12 information?
13 A: Ninety-nine messages. If they don't find 'em
14 in --
15 MR. WHITE: So at the hundredth message, then the first
16 message of that 99 --
17 A: Drops off.
18 MR. WHITE: -- gets deleted.
19 A: (Inaudible, speaking simultaneously) --
20 MR. WHITE: Second one becomes the first one, the
21 hundredth becomes the 99th.
22 A: That's right.
23 MR. WHITE: And so on.
24 A: (Inaudible).

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Okay.

2 MR. WHITE: Cathy, did you send me a copy of that as
3 well, or . . .

4 MS. STUART: I don't -- I don't know that for sure.

5 MR. WHITE: Do you mind if I have one?

6 MS. STUART: No.

7 Q: So, if we don't have an entry then. If -- if
8 this purports to generate, give me everything
9 for a two month period of time. Well, let--
10 let's say you call in November for -- for
11 something, okay? And he's been off electron-
12 ic monitoring for a period of time, and so,
13 this purports to run out from --

14 A: The last time he was on.

15 Q: -- the last time he was on, July the 8th of
16 '96. And it only runs out up to May the 4th
17 of '96, 'cause that's the 99 entries?

18 A: (Inaudible).

19 Q: It doesn't seem like 99 entries to me but
20 it --

21 A: No. Remember I said you can select how many
22 entries he wants to look at, and that could
23 have been it. Or, it could have been that

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 computer doesn't verify that the equipment is
2 working or this guy is there.
3 Q: What is this curfew violation?
4 A: Those are indicating that he had either come
5 in late or early, or other curfew violations.
6 Q: You can come home early can't ya'?
7 A: Yes. Well, let's see, you leave early. You
8 can leave early also. (Inaudible).
9 Q: Okay. I think I understand what that is.
10 Rick, do you have -- I've got -- I wanted to
11 show you what we also got.
12 (Pause).
13 Do you have the week of -- for the week of --
14 well, let me ask you this.
15 MR. BOCK: Here, I've got it.
16 Q: Are -- are you aware of his conditions as to
17 his curfew in May and in June of 1996?
18 A: No, not without lookin' at 'em. They change
19 so much. They change daily sometimes.
20 Q: (Inaudible).
21 MR. WHITE: Generally, or David's changed daily?
22 A: Everybody's changed, you know (inaudible) I
23 mean. The guys maybe ready to go out for a
24 job interview and the employer calls back and

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 says, hey, look, I'm gonna change it to
2 another day, you're back in there changing
3 (inaudible). Stuff changes all the time.
4 Q: We have what's known as an update curfew,
5 slash, exception information. Looks like
6 almost like a calendar, real poor quality.
7 A: That would have been a weekly schedule.
8 Q: That's a weekly schedule?
9 A: Uh-huh (Affirmative answer).
10 Q: Okay.
11 MR. BOCK: Do you have the weekly schedule for June the
12 13th? Is that the right one?
13 A: I-- do I have it?
14 MR. BOCK: Yes, is that -- is -- is --
15 A: Is this it?
16 MR. BOCK: I'm -- I'm -- I want to make -- I don't know.
17 A: Holy Moses, you can't hardly read it, can
18 you? (Inaudible). (Makes noises). No, wait
19 a minute.
20 (Pause).
21 Well, it was printed on 6 7, okay?
22 MR. BOCK: Okay. This is the document that w--
23 A: (Inaudible) appears down on the bottom.
24 MR. BOCK: This is the document that was next to it.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: No, those are different though. That's a
2 different type of printing.
3 MR. BOCK: But can you -- do you remember --
4 Q: What kinda print out is --
5 A: This is where we add or -- or change his
6 (inaudible) schedule or schedule.
7 Q: All right. Well --
8 MR. BOCK: Do you know if this one is for the week of
9 Thursday, June the 13th?
10 A: It says, uh, s-- let's see, 6 9 to 6 9. So
11 we started it, and somebody made an entry on
12 6 9 and (inaudible). And they printed it on
13 6 7.
14 MS. STUART: (Inaudible).
15 Q: Sure.
16 ????: (Inaudible).
17 MS. STUART: Does the number show (inaudible) starting
18 here on the 7th, 8th, 9th --
19 A: Well --
20 MS. STUART: -- (inaudible).
21 A: -- if that's a factor right then. I mean, I
22 don't know what dates these are. This could
23 have been printed on 6 7 and w-- it would
24 have started up here somewhere. Then that

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 date would have been whatever day that was.
2 If 6 7 woulda been Monday then that (inaudi-
3 ble). See what I'm sayin' it woulda been
4 (inaudible, speaking simultaneously).
5 Q: (Inaudible, speaking simultaneously).
6 MR. BOCK: I don't have that (inaudible, speaking
7 simultaneously).
8 MR. WHITE: Can I ask a question?
9 Q: Yeah.
10 MR. WHITE: So, is there anywhere where you have a
11 record, you being Department of Corrections,
12 Parole, of what David Nordstrom's curfew was
13 the week of June the thir-- June the 10th
14 through June the 15th or 16th? Is there any
15 place we can go back and say, yeah, he -- he
16 shoulda been heme at this time and gone out
17 at this time.
18 MS. STUART: You could only -- you could only verify that
19 if it was printed on a particular day.
20 A: Uh-huh (Affirmative answer).
21 MS. STUART: That's my understanding of this. Isn't it
22 yours? (Inaudible).
23 A: No.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 MS. STUART: 'Cause someone went in to try to verify that,
2 I guess, and they (inaudible).
3 MR. WHITE: Okay, I guess I'm not --
4 MS. STUART: I don't know. I --
5 MR. WHITE: -- so -- but -- but obviously at some point,
6 Mr. e-- Mr. Ebenal, you -- you said, so David
7 Nordstrom, you have to be home by X p.m.;
8 right?
9 A: (Inaudible).
10 MR. WHITE: I assume you -- you made a note of that
11 somewhere, you wrote that down somewhere, so
12 if you died or got hit by a bus (inaudible,
13 speaking simultaneously) --
14 A: Well, see what happens is, that's why it's in
15 the computer.
16 MR. WHITE: So, it's on a computer screen.
17 A: Right. It's on a computer screen. If
18 somebody wanted at any given time just to
19 walk and punch it up and see what he was
20 doin' or --
21 MR. WHITE: Okay.
22 A: -- what he was available to do.
23 MR. WHITE: Okay.
24 A: They could do that.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 MR. WHITE: Bu-- but -- but --
2 A: And I didn't write it down --
3 MR. WHITE: Right.
4 A: -- because you could be changing -- you'd be
5 writing (inaudible) --
6 MR. WHITE: I understand.
7 A: -- paperwork.
8 MR. WHITE: So if you changed it, does the computer keep
9 a record of what it previously was or does
10 the computer --
11 A: No.
12 MR. WHITE: -- just record what it is now, since you've
13 changed?
14 A: That's right.
15 MS. STUART: That's my understanding.
16 MR. WHITE: Okay.
17 MS. STUART: It's gonna stay the way it is --
18 MR. WHITE: Until you change it.
19 MS. STUART: -- until you change it. Then once you make
20 that change, that's incorporated and then if
21 you change it back --
22 MR. WHITE: Okay.
23 MS. STUART: -- you depending what day of the week it is.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 MR. WHITE: Okay. So we cannot go back into the computer
2 and say, tell me David Nordstrom's curfew on
3 February 7th, or March the 3rd, or -- right?
4 A: Not unless it was printed.
5 MR. WHITE: Okay. (Inaudible).
6 Q: Well, do you know, was it ever printed?
7 MR. BOCK: (Inaudible).
8 Q: Or is that what we have?
9 MR. BOCK: (Inaudible).
10 MR. WHITE: I've never seen these documents, Harley.
11 Q: Thi-- thi-- this one came from you.
12 A: See, this one -- this one -- this particular
13 one here was --
14 Q: (Inaudible, speaking simultaneously) differ-
15 ent -- it -- it didn't -- it came like
16 this --
17 MR. BOCK: Had writing on it though.
18 Q: But it had writing on it. I could go to my
19 office and get it.
20 MR. WHITE: (Inaudible) go look at it. I've not -- that
21 one I have not seen.
22 Q: Well, let's break until I can run up and get
23 it 'cause it's important enough that we need
24 to discuss it.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 MR. WHITE: Well, if you've got a better quality (inaudi-
2 ble) --
3 Q: It's actually not. It's cut off at the edges
4 on the -- on the disclosure on it.
5 MR. BOCK: Why don't we take a five minute break and
6 just --
7 MS. STUART: That's a good idea.
8 (TAPE TURNED OFF).
9 Q: -- was there.
10 MR. BOCK: Okay. We're back on tape.
11 Q: Okay. I want to show you what I'm gonna mark
12 as just a disclosure received by the County
13 Attorney's Office in part, a copy on the top
14 and ask you if you can summarize for us what
15 this is?
16 A: This is a curfer-- curfew exception to David
17 Nordstrom's schedule. He wanted to -- or his
18 boss called me, I don't know at, you know,
19 this point, asking that we allow him out
20 earlier on Sunday and back just a little bit
21 later on Sunday, so we made it a-- we made an
22 exception for originally it was, looks like
23 10:00 o'clock until 4:00 and we changed it to
24 7:00 until 4:00.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: And this would have been on June the 9th,
2 1996; correct?
3 A: That's correct.
4 Q: And you would have entered that in the
5 computer?
6 A: On the 7th.
7 Q: On the 7th you would have entered that in the
8 computer for his extension.
9 A: For his exception.
10 Q: All right. And then, the rest of his
11 calendar, unless there was an exception,
12 would have remained the same.
13 A: Right.
14 Q: And, these two, uh, s-- these are actually
15 two screens on -- on (inaudible); is that
16 correct, sir?
17 A: Right. This is two different screens.
18 Q: Okay. And the second screen is your -- your
19 entry of it making an exception for June 9th.
20 A: Right.
21 Q: To allow him to continue to remain out --
22 well, uh --

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: He was originally let out te-- til -- at
2 10:00 o'clock in the morning, but we opened
3 him so that he could leave at 7:00.
4 Q: Right.
5 A: Then, he needs to be back at 4:00 in that
6 situation (inaudible).
7 Q: And that would have been on the summary, June
8 the 9th.
9 A: Right. Right.
10 Q: And, you have no knowledge as to whether this
11 -- this is basically then just simply a -- a
12 -- a curfew planning calendar for the week
13 coming up?
14 A: No.
15 Q: What is it?
16 A: This is a curfew exception for that day.
17 Q: Well, it's for the whole week, though, isn't
18 it, sir?
19 A: No, no. What you're seeing is, I printed out
20 the normal weekly schedule, okay, on the 7th,
21 and he wanted a curfew adjustment for the
22 9th, okay? Now past the 7th, or past -- past
23 that weekend that occurred, on Monday, who
24 knows what happened after that. Okay?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Anything could have changed. Monday coulda
2 changed, Tuesday coulda changed, Wednesday
3 coulda changed, anything could have changed.
4 ???: (Simultaneous conversation).
5 A: Without having another the -- the -- the day
6 following this, I won't know.
7 Q: Okay. So, and you don't know if you can
8 retrieve from the system for instance, June
9 the 13th, 1996's exceptions, if they existed
10 at all?
11 A: If they're not printed, then I don't know if
12 you can get (inaudible) system or not.
13 MR. BOCK: So he coulda been out as late as 9:30 on the
14 June the 13th? Or 10:00 o'clock? Is that a
15 possibility?
16 A: He could have been, but it's not likely.
17 MS. STUART: (Inaudible, speaking simultaneously) --
18 Q: Well, why is --
19 MS. STUART: (Inaudible, speaking simultaneously).
20 A: I'm just looking at his schedule. This is
21 his normal schedule.
22 Q: Well --
23 A: Without seeing any other adjustments, I would
24 say that this is a normal schedule.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 MR. WHITE: Normal meaning he gets -- he gets to leave --
2 A: (Inaudible, speaking simultaneously) --
3 MR. WHITE: -- at 4:45 --
4 A: Right.
5 MR. WHITE: -- and comes home at 8:00 o'clock.
6 A: Without seeing any other data on his curfews,
7 I can't tell you that he was -- this is his
8 normal stuff right here.
9 Q: All right.
10 MR. WHITE: (Inaudible, speaking simultaneously) --
11 Q: As I understood it, one of the conditions of
12 his release was that he attend some drug
13 rehab screen? He had to be screened to
14 determine whether he was gonna go to AA
15 meetings or --
16 A: Oh, okay, yes.
17 Q: Is that correct?
18 A: Right.
19 Q: And weren't those on Tuesdays and Thursdays?
20 A: I don't recall the dates they turned out to
21 be.
22 MR. WHITE: The screening or the AA meetings?
23 A: Yeah.
24 Q: The AA meetings.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: The AA meetings? They were -- I think they
2 were twice a week. I don't recall what days.
3 Q: Did you ever receive in your packet, and
4 maybe I'm wrong, but I didn't see anything in
5 either the packet provided by DOC or the
6 packet provided by Laura Udall through the
7 attorney general, of any record which would
8 verify his going to AA meetings and the dates
9 and times when he went to those AA meetings.
10 A: I don't have the -- the times. But if you
11 look at my chronological that I wrote. I
12 logged every AA (he?) went to that I had
13 seen.
14 Q: Was he r--
15 A: You know, he showed me --
16 Q: Was he required to go twice a week...
17 A: Right, twice a week.
18 Q: Okay. And from what I understand it was on
19 Tuesdays and Thursdays, does that sound
20 familiar to you?
21 A: It coulda been Tuesdays and Thursdays. They
22 have 'em -- AA's run every day of the day of
23 the week they run from midnight to whenever,
24 you know, they most-- they go all -- 6:00

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 o'clock in the morning to midnight at night.
2 (Inaudible).
3 Q: So a person could get an exception to go to
4 an AA meeting, 9:30, 10:00 o'clock at night?
5 A: Sure. But I wouldn't let 'em do it. It's
6 just me, I would never let them be out that
7 late.
8 MR. WHITE: So if David Nordstrom said I want to go to an
9 AA meeting at 9:00 o'clock at night?
10 A: Tough luck.
11 Q: But, you don't have any records to -- to
12 verify that one way or the other.
13 A: No, but if you look in there you'll see that
14 he never went -- well, I think you'll find in
15 his curfew (inaudible) he never went to an AA
16 meeting that late.
17 Q: Well, sir, if I --
18 A: 'Cause I never -- I never let him go out that
19 late.
20 Q: -- if I tell ya' his conditions were that he
21 attend twice a week --
22 A: Right.
23 Q: -- do you have verification that he actually
24 attended AA meetings twice a week?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: It's anonymous. I can't -- I can't go there.
2 That's what it's all about. I -- I -- I'd be
3 followin' all these guys around to every AA
4 meeting they went to and I just can't do it.
5 Q: So -- well --
6 MR. BOCK: Do they have to give you a signature sheet?
7 Q: Yeah.
8 A: No. No, I wrote down what he provided to me
9 as proof that we require to see in my -- my
10 chronological.
11 Q: And what kind of proof would he provide you?
12 A: A sign-in sheet.
13 Q: A sign-in sheet from AA that he would --
14 A: Have attended.
15 Q: -- have attended.
16 A: Right.
17 Q: This is a sheet you get from AA. It's self-
18 generating. Ya' sign it yourself, nobody
19 else verifies or co-signs?
20 A: No, we provide the sheet from the Department
21 of Corrections.
22 Q: Okay.
23 A: Okay? They take it with them. They go to
24 the AA, they get it signed there, they bring

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 it back and show me, and then I log it down
2 there. (Inaudible).
3 Q: Don't you have somewhere in here --
4 A: And, also in there, just so you know, those
5 AA's that he attended, he missed some and I
6 made him make them up. So he knew -- he was
7 honest with me, saying that, yeah, I didn't
8 make -- he coulda just signed anything he
9 wanted to in there as far as the AA sheet
10 goes.
11 Q: Well, let's just talk about, for instance,
12 uh, here's an entry on March the 6th, '96.
13 Proof of AA, 2 21, '96, dash, 2 22, '96, dash
14 2 29, '96, dash, 2 29, '96.
15 A: Right. I made him make those up. He missed
16 some.
17 Q: Tell me what this entry means as of March the
18 6th?
19 A: (Inaudible).
20 Q: Well, why don't you just --
21 A: (Inaudible) --
22 Q: -- just interpret that for us. As to the AA
23 meetings.
24 A: On this one here?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Yeah.

2 A: Okay, so while this doesn't make any dif--

3 this was -- this is for -- for the parole

4 officer. I had a face-to-face contact, with

5 him. Okay?

6 Q: Yes.

7 A: At an, uh, at an un-- at a different location

8 (inaudible).

9 Q: And what does your note indicate with regard

10 to what took place concerning the AA informa-

11 tion at that time?

12 A: He showed me his AA sheet that said he

13 completed AA on the 21st, 22nd, 29th, or is

14 it the 29th? Yeah. And two on the 29th.

15 Q: So, it's the sheet that you apparently

16 provided him initially and he then shows it

17 back to you with his signatures on it; is

18 that right?

19 A: Right.

20 MR. WHITE: Does he have somebody else sign it?

21 A: Right, the -- the, uh, facilitator of the

22 meeting signs.

23 MR. WHITE: How do you know that that's a -- really a

24 facilitator and not his uncle or . . .

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Oh, that' true. But (listen, though?) on
2 those, we see so many of them, I see the same
3 name so many times and (inaudible) look and
4 see, you know, that it was --
5 MR. WHITE: Uh-huh (Affirmative answer).
6 A: -- you can tell if it's legitimate or not,
7 more times than not.
8 Q: Can you -- can you tell if it's legitimate
9 with regard to verification of work employ-
10 ment, as well, from your experience?
11 A: Well, he shows me just the paycheck stubs. I
12 mean, they're not -- pay-- paycheck stubs. I
13 don't know -- take his word that he did 40
14 hours a certain week.
15 Q: Did you, uh, put all of his paycheck stubs
16 that you had into his file? Did you make
17 copies of them?
18 A: No.
19 Q: What about if a person didn't use paycheck
20 stubs and paid cash under the table?
21 A: No, can't do it.
22 Q: So in your understanding, that never occurred
23 in a situation involving David Nordstrom.
24 A: Far as I know.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 MR. WHITE: How would you know if it occurred? (Inaudi-
2 ble, speaking simultaneously) --
3 A: Well, he didn't tell me. I mean, I want to
4 see -- I -- I -- we ma-- in -- in home
5 arrest, in particularly, we mandate that they
6 have a job that deducts all the deductions
7 and pays 'em a paycheck so that we can verify
8 it.
9 Q: You have something here from Star that I saw,
10 Star Masonry. Did you ever speak to a man,
11 to your knowledge by the name of John
12 Mikiska?
13 A: Sounds familiar (inaudible).
14 Q: John Mikiska didn't tell you that he paid him
15 cash for the times that he worked?
16 A: I don't recall what he did. I-- if he was
17 payin' him cash and he told me, I told him
18 that he needed to have -- have the -- pay--
19 payroll deductions taken out.
20 Q: We have some copies of payroll receipts from,
21 for instance, Liberty Dry Wall that's, uh,
22 occurred November. You wouldn't make copies
23 for verification for the file of other work
24 employment information?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: No.

2 Q: Okay. Getting back to this then, the entry

3 as to -- and this is the one closest, can you

4 show me the one closest to June the 13th for

5 verification o-- of AA? Which would be after

6 June the 13th?

7 A: (Inaudible). The next entry was June 21st.

8 Q: Is there any verification of AA meetings

9 attended?

10 A: Well, I didn't write any-- anything down.

11 There was a period of time in there also

12 where he injured and I didn't (inaudible).

13 Q: Well, if I tell you that he was injured on

14 June the 21st, do you think you would have

15 stopped asking for the verification that

16 might have occurred the week or two before?

17 A: No, and if he did miss some the week or two

18 before, he was to make them up. That's how

19 we worked it. It was con-- especially with

20 the construction guys. They have different

21 hours. They -- they work longer sometimes

22 and I know you can't make it, so I tell 'em,

23 you need to make 'em up. That doesn't give

24 you an excuse not to go.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: And --
2 A: He didn't make up several.
3 Q: -- do you have any proof of any documenta-
4 tion, reflective of any notes, that he
5 attended an AA meeting on June the 13th?
6 A: (Inaudible).
7 MR. WHITE: What does VO mean, by the way?
8 A: Violent Offender group (inaudible).
9 ????: (Inaudible).
10 MR. WHITE: (Laughs). Sorta like a how to course
11 (inaudible).
12 A: Well, you know what? I -- and -- and
13 (inaudible) this happened -- this happened,
14 I'm not 100 percent sure, but if he missed
15 some AA's prior to the s-- 21st and then he
16 got injured, I'm not gonna go all the way
17 back. (Inaudible, speaking simultaneously).
18 Q: That's what I asked you before. Well, do you
19 have any documentation that he attended an AA
20 meeting on June the 13th?
21 A: Oh, di-- I don't -- I don't know. Well, it
22 looks like his last AA (inaudible) his last
23 AA before, uh, before the 21st was a -- was 5
24 23.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Now let me ask (inaudible).
2 A: (Inaudible).
3 Q: Well, let me ask you this question. Are w--
4 from the information you have, or that you're
5 aware of, are you able to document in your
6 reports or file, anything you have, that he
7 would not have been allowed out up 'til 10:00
8 o'clock at night on June the 13th?
9 A: No, I don't have anything documented.
10 Q: And he was allowed o-- out until that time,
11 then obviously an alarm would not ring.
12 A: If (inaudible).
13 Q: If he was authorized to be allowed out --
14 A: Oh, right.
15 Q: -- on the 13th, an alarm would not ring.
16 A: Right.
17 MR. WHITE: But you wouldn't let him go to -- to an AA
18 that late.
19 A: No, I wouldn't. Generally, you know, I mean,
20 99 percent of 'em never go late.
21 MS. STUART: It's your interview but, I just wondered, was
22 it your practice when you did go (inaudible)
23 save.
24 A: Right.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 MS. STUART: So, you know, there are several of these
2 spread throughout here.
3 A: And -- and not all of them were saved because
4 (inaudible). You don't realize how much --
5 how tedious this is to go in and out of that
6 computer, print them all, too.
7 MR. WHITE: I'm a -- I've got to go --
8 Q: I just want to ask him some mo--
9 (TAPE TURNED OFF).
10 Q: -- your chronology. Do you believe your
11 chronology to be accurate?
12 A: Yes.
13 Q: You make an entry in your chronology that on
14 June the 15th, 1996, he's ordered to drop UA.
15 A: Uh-huh (Affirmative answer).
16 Q: In fact, didn't he drop a UA on June the
17 13th?
18 A: I don't know.
19 Q: J-- I mean, actually on June 15th. Why would
20 you make that entry on the 15th?
21 A: If he dropped it on the same day?
22 Q: Yeah.
23 A: 'Cause he does.
24 Q: What time did you make that entry for?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: I don't have a time.
2 Q: Do you have then any tracking or history in
3 your chronology as to what then occurred?
4 A: Do you have that one because the ti-- times
5 should be on here of when he did his (inaudi-
6 ble, speaking simultaneously).
7 Q: Yeah. I -- I have that. Don't you have a
8 notation here --
9 (Pause).
10 -- of 6 24, 1996, UA results negative 6 15,
11 '96?
12 A: Yes.
13 Q: Do you believe that to be accurate?
14 A: I understand that there was one UA that was
15 mislogged.
16 Q: Well --
17 A: I don't know if this is the one or not.
18 Q: -- didn't you get a copy of these TMCHE
19 Laboratory results?
20 A: Correct.
21 Q: Okay. When you say mislogged, you would have
22 written down incorrectly; is that what you're
23 saying?
24 A: (Inaudible, speaking simultaneously).

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: And if I show you this from June the 15th
2 which was received by the lab on June the
3 17th, what does that tell you with regard to
4 the testing?
5 A: That he was positive for amphetamines.
6 Q: Does it also make another note there on the
7 bottom of it?
8 A: Right. (Inaudible) that the specific
9 gravity, (reaction?) level of the urine are
10 both below acceptable limits, possibly
11 indicating an altered or diluted urine
12 specimen. (Inaudible).
13 Q: Well, would it be fair to say then on the
14 June 21st you certainly would have had in
15 your possession this particular piece of
16 paper?
17 A: I got it on the 24th, that's when I wrote it
18 down. That's how I know.
19 Q: Did you take any action then?
20 A: I didn't know.
21 Q: When you got -- well --
22 A: I wrote it down negative, that's why I didn't
23 take any action.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Do you have any memory as to where you got
2 the information that caused you to write down
3 negative on the twenty fir-- uh, on the
4 twenty --
5 (END OF TAPE ONE, SIDE TWO)
6 Q: We've got an entry you made on June the 24th
7 (inaudible) a UA was avo-- results of June
8 the 15th. Now you also got the sheet of
9 paper which reflected the results on the 24th
10 as well; isn't that correct, sir?
11 A: Right.
12 Q: Would you have had this piece of paper in
13 your possession at the time you made this
14 entry?
15 A: I made it on the 24th after I got it.
16 Q: Right. So, you simply logged it in incor-
17 rectly?
18 A: (Inaudible). I didn't even -- I wasn't even
19 aware of it being -- somebody had come and
20 said, hey, (inaudible) a dirty UA. No. So.
21 Q: So what you're saying is, even though you had
22 this sheet of paper from TMCHE in your
23 possession when you entered negative, you
24 simply read this sheet of paper wrong.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Right. I get stacks of those. That's
2 probably what happened.
3 Q: Did you ever go to any of his employers to
4 verify the times and dates that he had
5 presented to you to support when he was
6 working?
7 A: I talk to them on the phone all the time.
8 Q: Did you verify with them the dates that he
9 had given you as to when he was working?
10 A: Well, this is they way it worked. They
11 wanted a -- if they want a curfew change for
12 their employer, their employer has to call me
13 and tell me. (Inaudible).
14 Q: Well, I understand. But, what I'm saying is,
15 as I understand the system, he presented to
16 you information to document hi--- his work
17 schedule; correct?
18 A: Uh-huh (Affirmative answer).
19 Q: Is that right?
20 A: Right.
21 Q: Okay. And, did you ever go to the employer
22 and have the employer support it for you?
23 A: No, I would call 'em. I don't go there.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: This didn't -- when was this brought to your
2 attention as to the dirty UA?
3 A: When he got arrested. After the investiga-
4 tion.
5 Q: So far to say that it didn't generate any
6 violation or re-- requirement for him to do
7 additional (inaudible, speaking simultaneous-
8 ly).
9 A: (Inaudible) violated (inaudible).
10 Q: Well, I didn't ask you that.
11 A: I know.
12 Q: You -- you -- you -- you didn't no--
13 A: We didn't do anything -- we didn't do
14 anything 'cause we didn't -- we weren't aware
15 of it, right.
16 Q: Were there any other dirty UA's during the
17 course of when he was on --
18 A: Nope.
19 Q: -- probation?
20 MS. STUART: While he was supervising?
21 Q: Yeah.
22 A: No.
23 Q: Do you have any idea how long amphetamines
24 stay in the system, from your experience?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Seventy-two hours, or less.
2 Q: So if you got a dirty a UA on June seven--
3 15th results, it very well could have
4 supported the fact that he could have had in
5 his system amphetamines on June the 13th,
6 from your understanding and experience?
7 A: (Inaudible) sure.
8 Q: So he had been, by your memory also in
9 violation of his conditions as to not
10 attending AA meetings as regularly required?
11 A: He was attending AA meetings as regular-- a--
12 regularly otherwise he would have been
13 violated. I mean --
14 Q: Well, fair to say, you only have document--
15 how many U of A, uh, UA, excuse me, AA
16 meetings do you have documented in your
17 chron-- chronology?
18 A: I don't know. He attended 'em regular in my
19 estimation. They may have not been everyday,
20 they may not have been twice a week. But he
21 attended regular. Depends how you define
22 regular.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Well, when do you have him -- when do you
2 have documented that he started in your
3 chronology? Go ahead and take a look.
4 A: When he started?
5 (Pause).
6 A-- his first U-- his first AA was on 2 7.
7 Q: Do you have any other documentation as to any
8 other dates? I know ya' do, so can ya' tell
9 me those dates?
10 A: All of 'em? (Inaudible).
11 Q: Yeah.
12 A: All the -- okay.
13 Q: Yeah.
14 A: 2 7, 2 8, 2 8, 2 14, 2 21, 2 22, and 2 29.
15 MR. BOCK: A mini-- just a minute, sir.
16 Q: Two -- 2 21, ya' say?
17 A: 2 21, 2 22.
18 Q: Yeah.
19 A: 2 29, twice.
20 Q: Yes.
21 A: 3 6, 3 7.
22 (Pause).
23 3 13, 3 14.
24 (Pause).

111

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 3 27, 3 27, 3 30, 4 3, 4 4.
2 Q: Just a minute. Could we back up?
3 A: To where?
4 Q: If you will, to the 3 30. Oh, I'm sorry. Go
5 ahead. 3 30, 4 4.
6 MS. STUART: 4 3.
7 A: 4 3, 4 4.
8 Q: Yes.
9 A: And then, let's see here. Uhm, 4 1.
10 Q: 4 1?
11 A: Yeah, I musta one in the -- in the (inaudi-
12 ble).
13 (Pause).
14 5 15, 5 16, 5 22, 5 23.
15 (Pause).
16 And-I had him stop, and I I show here on
17 7 17 that I have him start AA again. Musta
18 gave him a verbal to stop somewhere up there.
19 I think it was right, you know, at his
20 accident or his accident, for his injury.
21 MR. BOCK: Were there any -- any meetings in --
22 Q: His injury was June the 21st, 6 21. Do you
23 have anything between 5 23 and 6 21?
24 A: No. I don't see any.

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: No? Would he be in violation of his require-
2 ments of attending U-- AA meetings by not
3 providing you verification for over a month
4 period of time?
5 A: Would he be? Well, that's a-- that's a PO
6 discretion thing, if I wanted to. And then
7 I'm -- and I think I told him (inaudible)
8 somewhere, he lost his AA sheet. He told me
9 that he'd been going and he'd lost the thing,
10 and, uh, okay. (Inaudible).
11 Q: And we're talkin' about for an entire --
12 we're talkin' about for five weeks?
13 A: Well, he -- he coulda lost it (inaudible).
14 Q: But you don't have that documentation?
15 A: That he lost it?
16 Q: No, that he lost five weeks worth of documen-
17 tation.
18 A: No, I don't have it.
19 Q: And again there's no -- you don't separately
20 confirm that a person has attended?
21 A: No.
22 Q: How many home visits did you pay -- did --
23 did you make to Mr. Nordstrom's home?
24 A: Well, I don't know exactly how many.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 (Pause).
2 Q: Up through June the 21st let's put it.
3 A: Oh, just one.
4 Q: One?
5 A: (Inaudible). Two.
6 Q: Two?
7 A: Yeah.
8 Q: So from January 24th through June 21st you
9 made two home visits?
10 A: (Inaudible). I've got another one here. No,
11 I don't -- that two.
12 Q: From that time period I just mentioned.
13 A: Right.
14 Q: Isn't that unusual?
15 A: No.
16 Q: Is it your information that sometime shortly
17 after he was released, within a week or two,
18 until he was stabbed June the 21st he was
19 working on a continuous -- continuous basis?
20 A: Pretty much.
21 Q: Thir-- 30 to 40 hours a week?
22 A: Pretty much.
23 Q: Do you have the places he worked during that
24 time frame that he gave you?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Let's see. Now, keep in mind, these were the
2 primary. He mighta started somethin' and
3 didn't work out or something like, so minor
4 stuff (inaudible) checkin' into, he worked a
5 day or so, but these are the -- the two
6 locations that I have is Star Masonry and
7 Valenzuela Dry Wall. I know he tried a
8 couple (inaudible, speaking simultaneously).
9 Q: When do you have him working at Star Masonry?
10 A: Started 2 5, '96.
11 Q: And when do you have him ending at Star
12 Masonry?
13 A: I believe it was seven twenty s-- well,
14 actually it was before that because he got
15 injured and then he started up at the
16 Valenzuela.
17 Q: So when do ya' -- when do ya' verify his --
18 from February?
19 A: About when he got injured, so he w-- I'd say
20 the 21st he stopped.
21 Q: Okay. So you have him on your notes working
22 on a pretty continual basis 30, 40 hours a
23 week, full time, from February the 5th
24 through June the 21st?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Right.
2 Q: At Star Masonry.
3 A: Right.
4 Q: And what do you have as to your notes as to
5 when he worked at Valenzuela?
6 A: He started there the 22nd of July.
7 Q: Okay. So, the only verification you had as
8 to any work on a continual basis from his
9 release up to his stabbing would have been at
10 Star Masonry.
11 A: Right.
12 Q: Did you ever, uh, speak to -- did you -- did
13 you know how he go-- was one of his condi-
14 tions that he not drive a vehicle?
15 A: His conditions? I don't think so.
16 Q: Do you have any knowledge if he had a valid
17 driver's license?
18 A: (Inaudible). I have a license that was
19 suspended on here.
20 Q: When was that from?
21 A: I don't know.
22 Q: Did you assist him in writing a letter to a
23 judge so that he could get off fines?
24 A: His aunt did. His aunt wrote the letter.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: That's Connie Altieri?
2 A: I think so.
3 Q: Is this the letter? March the 4th of '96?
4 A: I think so. (Inaudible).
5 Q: Is that right?
6 A: Yes, that's it.
7 Q: Were you aware that when he was released --
8 strike that. Did you become aware after he
9 was released of the fact that there was a
10 warrant for him out of the state of Texas?
11 A: Right.
12 Q: When did you be--
13 A: He told me that.
14 Q: So to your knowledge -- the Department of
15 Corrections would have never released a
16 person on home arrest had they known that
17 there was an outstanding warrant for somebody
18 in another state for a felony, would they?
19 A: If they'd known of this, they wouldn't have
20 (inaudible).
21 Q: So in this instance, he was the one that
22 advised you of that?
23 A: Right.
24 Q: And when did he advise you of that?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: I don't know.
2 MS. STUART: 3 21.
3 A: 3 21. Okay, 3 21.
4 Q: Do you recall what was done about that?
5 A: I sent a -- a request through -- through the
6 central communications in Phoenix for ACJIS
7 (inaudible) check on, came back negative.
8 Q: Came back that there were no wants or
9 warrants for him out of Texas?
10 A: Right.
11 Q: Nothing else in a -- of an affirmative nature
12 was done to -- to check into that?
13 A: That's all I can do.
14 Q: Well, were there war-- wants or warrants for
15 misdemeanors which would have generated this
16 letter by his -- his aunt for failure to pay
17 some fines?
18 A: Right.
19 Q: Did the Department of Corrections had know
20 about that at the time of the home arrest
21 situation?
22 A: (Inaudible).
23 Q: And they would have still released a person
24 without having paid these fines?

requested documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: For misdemeanors, you know. They won't ho--
2 you know, they need to let somebody have some
3 leeway to fix them, so in order for him to do
4 that they release him.
5 Q: Did Judge Hoffman, to your knowledge, take
6 any action in setting aside this matter?
7 A: Never heard (inaudible).
8 Q: So you have no idea if the w-- the want or
9 the warrant from City Court was ever removed
10 during the period of time that you were
11 supervising him?
12 A: No, I didn't.
13 Q: That wouldn't concern you as his parole
14 officer?
15 A: I -- I check up on him from time to time.
16 Those are his responsibilities there, to make
17 sure that he is clear. And he -- he would
18 not be allowed to, you know, or whatever 'til
19 he fixes 'em.
20 Q: Well, I'm -- you understand that he had the
21 potential for bein' arrested if somebody
22 stopped him out there, did you not, sir?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: He could have been if he hadn't gone down
2 there. Now, I don't know if he did or not.
3 Okay?
4 Q: You just don't have any idea one way or the
5 other.
6 A: I directed him -- I directed him to go there.
7 Whether he did, you know, I'm not gonna take
8 him by the hand and take him down there.
9 Q: And you're not gonna verify in your report
10 that that had been taken care of one way or
11 the other.
12 A: If I -- if I directed him to go down there
13 and then he came back and said, yes, I did,
14 and this is what I have, I would have
15 recorded it. He didn't do that, so I didn't
16 record anything (inaudible).
17 Q: Isn't part of t-- part of his conditions o--
18 of special conditions of his release that he
19 pay all of his fines?
20 A: It's not a special condition, it's just a
21 regular condition.
22 Q: So this is something you would normally
23 monitor, wouldn't it?
24 A: Maybe.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: Did you go -- you -- fair to say you never
2 went out to any job site connected with Star
3 masonry?
4 A: No.
5 Q: To your knowledge and memory his -- his
6 weight never appeared to change during the
7 period of time, uh, i-- within -- within
8 minor discrepancies, it never appeared to
9 change. In other words he never appeared to
10 have some unusual gain of weight or some loss
11 of weight during that time frame when you
12 were, uhm, supervising him?
13 A: No.
14 Q: Do you recall whether he had a beard or
15 mustache during that period of time?
16 A: He di-- he had a mustache.
17 Q: Would he have a tendency as some people do
18 sometimes to have a day or two's worth of
19 growth of unshaven beard?
20 A: Yeah, once in a while. (Inaudible) unshaven.
21 Shaven.
22 Q: And --
23 (Pause).
24 Do you recall what color his hair was?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Red.

2 Q: Always seem to be the same tone of red color

3 to you?

4 A: Pretty much.

5 Q: Well, what's that mean?

6 A: I mean, I didn't notice a difference.

7 (Pause).

8 Q: Was there a -- I think I'm just about done

9 here. Did he ever miss any appointments with

10 you?

11 A: No. I think, uh, if they were missed we ma--

12 we met -- we met somewhere. It was a -- it

13 was a thing we agreed on. He knew that he

14 had to make every appointment unless it was

15 prearranged, so, if there was a reason that

16 he missed we agreed that it was -- it was --

17 we -- we adjusted it for another day. So he

18 didn't miss any appointments.

19 MR. BOCK: Did ya' ever have any feedback on this

20 Violent Offenders program that he went to

21 (inaudible) from his counselors?

22 A: It -- it continued into the next guy's

23 supervision, so I didn't get a chance to --

24 we were too close to that period so I -- they

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 usually don't -- they're -- that's one thing
2 they're real bad at is -- is getting the
3 report back to us. We usually don't get one
4 for a month after they start, or more even.
5 MR. BOCK: So Earl Phillips would have had more knowl-
6 edge on how it --
7 A: It shoulda been somewhere in the (immediate)
8 he got one.
9 MR. BOCK: So there -- it shoulda been in this package
10 if there was anything --
11 A: Yeah.
12 MR. BOCK: -- from the Violent Offenders Program.
13 A: Or he should have -- or he would have made
14 mention to it, ya' know (inaudible).
15 Q: When he would come in would you check his
16 monitoring equipment?
17 A: Would I check ti?
18 Q: Yeah.
19 A: Not unless I knew -- knew that there was a
20 problem.
21 MR. BOCK: You can -- somewhere in here I saw one.
22 A: From La Frontera.
23 Q: Wh-- what's that, Rick?
24 A: (Inaudible).

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 MR. BOCK: They say he is -- Jim Stuart has some
2 concerns and offender is at a medical relapse
3 risk? Is that -- is that what -- that's what
4 it's saying to you?
5 A: I don't know. This is not my handwriting.
6 MR. BOCK: Is that Mr. Phillips' handwriting?
7 A: Yeah. Someone (inaudible).
8 MR. BOCK: Some -- Jim Stuart or --
9 A: (Inaudible) problem.
10 MR. BOCK: -- has some concerns.
11 A: (Inaudible, possibly reading from report).
12 MS. STUART: Medium relapse risk.
13 A: (Inaudible), yeah.
14 MR. BOCK: Oh, medium relapse.
15 MS. STUART: He -- these report's have a place to rate
16 that.
17 A: Yeah, probably medium.
18 MR. BOCK: Do we have those reports?
19 A: (Inaudible).
20 MR. BOCK: Did you co-- and --
21 MS. STUART: Yeah, they're in there.
22 MR. BOCK: -- gave Harley a copy of those? Okay.
23 MS. STUART: (Inaudible). Starting in July.

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 Q: You had him do about -- about once a month he
2 was droppin' urines for you; is that right?
3 Yes.
4 A: Yes, I'm sorry. I keep forgettin' we're
5 being recorded.
6 Q: Would he -- would he know the day or around
7 the time frame when he was required to drop
8 the urine?
9 A: Never. Matter of fact, I -- I called on
10 Saturday, so . . . He knew it would
11 probably be a Saturday, that's all he -- he
12 might have known.
13 Q: He would know it would be a Saturday.
14 A: He would -- he would suspect that it would be
15 dropped on Saturdays.
16 Q: Okay. So all of his drops were on a Saturday
17 when you were supervising him.
18 A: I don't know if they were all Saturdays, but
19 I would say a -- a good deal of them were.
20 Q: And so what would be the usual scenario?
21 What day would you call him? He's -- it's
22 only once a month he would dropping; correct?

Requested Documents
for Rule 32 - June 14, 2002

STATE OF ARIZONA VS. SCOTT NORDSTROM
WITNESS: MR. EBENAL EXAMINATION BY MR. KURLANDER

1 A: Right. Unless I found -- unless I suspected
2 or have reason to drop them more often, and
3 then --
4 Q: In this instance you did not because you
5 didn't know that he had had a problem in
6 June.
7 A: Right. Didn't know i-- wasn't aware of it.
8 Prior to that all his UAs had been negative.
9 (Inaudible).
10 Q: You would ask him as to whether he was using
11 typically, wouldn't ya'?
12 A: Right.
13 Q: And they would fill out a form also when they
14 come to see you indicating as to whether they
15 had any police contact, as well as whether
16 they still had (inaudible).
17 A: No, not on home arrest.
18 Q: Would it say whether they had any police
19 contact?
20 A: No, there was no form for that.
21 Q: No form at all.
22 A: Right.