

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 4

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- 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.

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- 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

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- 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
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1 Q. Okay. Now, you've given a number of
2 different statements to the Tucson Police Department,
3 correct?

4 A. Yes.

5 Q. They've talked with you a number of times.

6 A. Yes.

7 Q. And would it be fair to say that each time
8 you spoke with them different information was provided
9 to them?

10 A. I don't understand what you're saying. Did
11 I like add more stuff? Is that what you're saying?

12 Q. Yes.

13 A. Yes.

14 Q. And that was sort of your plan because you
15 didn't want to say too much in your early contacts,
16 correct?

17 MR. WHITE: Can we get a time frame, Judge?

18 THE COURT: Yes, please.

19 Q. That was your plan in December and early
20 January, correct?

21 A. Yes.

22 Q. Because you didn't want to say too much.

23 A. I didn't want to involve myself.

24 Q. Okay.

25 A. I was hoping maybe they could just figure

1 it out by themselves. They're cops.

2 Q. But what they figured out, apparently, was
3 that the information your girlfriend was providing was
4 insufficient and they needed more?

5 A. Yes.

6 Q. So you made some contacts with TPD?

7 A. Yes.

8 Q. Using a fake name?

9 A. Yes.

10 Q. But that didn't get you what you wanted
11 either, correct?

12 MR. WHITE: I'll object to that.

13 THE COURT: Sustained.

14 Q. Did it keep you out of the loop? Did they
15 come back and talk to you some more?

16 A. Yeah, I talked to them a bunch of times.

17 Q. You would prefer just to have that one or
18 two contacts and be done with it, correct?

19 A. Yes.

20 Q. So you didn't get what you wanted, did you?

21 A. I wasn't trying to get nothing.

22 Q. You didn't want them involved in your life,
23 I assume.

24 A. Yeah.

25 Q. On the 9th of January, I guess they

1 arrested you for hindering prosecution, correct?

2 A. On the 9th?

3 Q. Yes.

4 A. Not on the 9th.

5 Q. Were you arrested for hindering
6 prosecution?

7 A. I don't know what I was arrested for,
8 actually.

9 Q. Was that the only time you were arrested,
10 on the 16th?

11 A. That was on the 16th, yes.

12 Q. That's when you spoke to Detectives Salgado
13 and Woolridge and gave them another version of what
14 happened, correct?

15 A. Yes.

16 Q. You indicated to them right off the bat you
17 had no idea about what happened at the Moon Smoke Shop,
18 correct?

19 A. Yes.

20 Q. And that you didn't go to the Tucson
21 Medical Center parking lot and steal a gun, correct?

22 A. That I didn't? Yes.

23 Q. But you did put the blame on Mr. Jones and
24 your brother Scott?

25 A. Yes.

1 Q. You talked with them for about 42 minutes,
2 correct?

3 A. I don't know how long it was.

4 Q. A little more than a half hour?

5 A. Yeah. I don't -- that would be fair.

6 Q. And then you told them that there was
7 nothing about that statement that you wanted to change,
8 correct?

9 A. I don't remember.

10 MR. LARSEN: Your Honor, may I approach?

11 THE COURT: Yes.

12 Q. Showing you what has been marked as
13 Defendant's Exhibit G.

14 Have you had a chance to look at this
15 statement?

16 A. Yes.

17 Q. Would you turn to Page 31.

18 A. Okay.

19 Q. Why don't you go ahead and read Lines 8
20 through 12.

21 A. (Witness complies.)

22 Q. They asked you whether there was anything
23 you wanted to change, correct?

24 A. Yes.

25 Q. And you didn't give them anything that

1 there was to change, correct?

2 A. No.

3 Q. A couple of hours later, as I understand
4 it, Detective Fillipelli talks with you?

5 A. Yes.

6 Q. And after his interview with you, he
7 indicates to you flat out that you're lying, you're
8 being deceptive, correct?

9 A. Yes.

10 THE COURT: Excuse me. Mr. Larsen, the
11 date that we're discussing.

12 MR. LARSEN: I'm sorry. January 16th and
13 probably into the morning hours of January 17th.

14 THE COURT: Thank you.

15 Q. Detective Fillipelli says that you're not
16 going to go home, correct?

17 A. Yeah.

18 Q. That was something that you didn't really
19 want, correct?

20 A. Yes.

21 Q. Now, as I gather, on a break between some
22 of these statements, you and your girlfriend are
23 allowed to talk to each other, correct?

24 A. It was right before I talked to Detective
25 Fillipelli.

1 Q. And she whispers in your ear that the
2 police have found your black Stetson, correct?

3 A. No.

4 THE WITNESS: Is there some way I can use
5 the bathroom?

6 THE COURT: We'll take a couple of minute
7 recess here and allow the witness to use the bathroom.
8 Go ahead.

9 Ladies and gentlemen, if you can just stay
10 in place, if you would like to stand and stretch,
11 that's fine, or get a drink.

12 If counsel would approach, please.

13 (The following proceedings were held at the
14 bench, out of the hearing of the jury:)

15 THE COURT: I don't think it makes any
16 difference to anything, but the jurors passed me this
17 note, which I'll pass on to you.

18 MR. WHITE: I don't either. I think we
19 probably ought to call her up and ask her if there's
20 anything about that that would affect her ability to be
21 fair to either side, just for caution's sake.

22 MR. LARSEN: That would be fine.

23 THE COURT: Just do it right now, you
24 think?

25 MR. LARSEN: Sure.

1 THE COURT: Ms. Lucetti, would you come
2 forward please?

3 (Juror complies.)

4 THE COURT: We received your note here. I
5 have discussed it with the attorneys and we'd just like
6 to know, is there anything about what you related that
7 you think is going to have any effect on your ability
8 to be --

9 JUROR: No. I just heard the name and I
10 thought I would let you know that.

11 THE COURT: You don't think it's going to
12 have any effect on your ability to be fair?

13 JUROR: No. I don't even know if it's the
14 same John. I never knew his last name, just name of
15 Big John and Crazy John. He built my wall and he
16 worked with the builders that built my home, Graybeck.

17 THE COURT: So you don't think it's going
18 to have any effect on you at all?

19 JUROR: No.

20 THE COURT: All right. We appreciate you
21 bringing it to our attention.

22 JUROR: Okay.

23 MR. WHITE: Can I ask her a question?

24 THE COURT: Sure.

25 MR. WHITE: Assuming the Court tells you

1 not to discuss that with other jurors, could you follow
2 that instruction?

3 JUROR: Oh, yeah.

4 THE COURT: We would prefer that you didn't
5 mention anything about it to any other jurors during
6 the course of your service as a juror.

7 JUROR: Okay.

8 THE COURT: Thank you. Please have a seat.
9 (End of bench conference.)

10 THE COURT: All right. The record will
11 show the presence of the jury, counsel, the defendant
12 and the witness.

13 You may proceed.

14 MR. LARSEN: Thank you, Judge.

15 BY MR. LARSEN:

16 Q. We were talking about this whispered
17 conversation that you had with your girlfriend just
18 before you spoke with Detective Fillipelli and you
19 denied having it.

20 Why don't you turn to Page 125 --

21 A. I didn't deny having it.

22 Q. Page 125.

23 A. Did you say that I denied having the
24 conversation?

25 Q. Are you now indicating you did have this

1 whispered conversation with Toni Hurley?

2 A. What you said I said, I said I didn't --
3 wasn't -- excuse me.

4 I had the conversation, but what you said
5 she told me, she never said, is what I'm getting at.

6 Q. Do you recall the subject of that
7 conversation being your black Stetson?

8 A. No. My black Stetson?

9 Q. Right.

10 A. Yes.

11 Q. And do you recall that being in a whispered
12 tone of voice?

13 A. Yeah.

14 Q. Do you recall that that was about the
15 police having your Stetson?

16 A. Yes.

17 Q. All right.

18 A. I was confused there.

19 Q. Do you recall concluding that conversation
20 with her by telling her that you'll talk to Detective
21 Fillipelli and then you'll be able to go home?

22 A. Yes.

23 Q. But Detective Fillipelli believed that you
24 had lied and you don't go home?

25 A. Yes.

1 Q. And somewhere around 3:00 a.m., and now
2 we're probably into the morning hours of the 17th of
3 January, Detective Salgado and Woolridge visit you,
4 correct?

5 A. Yes.

6 Q. And they indicated that you would be
7 released if you gave them another statement with
8 further information, correct?

9 A. I don't recall.

10 Q. They indicate that if you're truthful with
11 them, you would not be prosecuted and you would be
12 released, correct?

13 MR. WHITE: That's a compound question.

14 THE COURT: Sustained.

15 Q. Why don't you turn to Page 132.

16 A. Okay.

17 Q. Lines 19 through 21.

18 A. Okay.

19 Q. They promise you you were not going to be
20 prosecuted. You would be released if you were
21 truthful. Your answer: Yes.

22 A. Yes.

23 Q. And you took those as a promise to be
24 released, correct?

25 A. Yes.

1 Q. They would also tell the prosecutors that
2 the detectives believed you, correct?

3 A. Yes.

4 Q. So you spoke with them again?

5 A. Yes.

6 Q. And this time you gave them different
7 information?

8 A. Yes.

9 Q. Would it be fair to say, sir, that today
10 you are being sincere in your testimony to the jury?

11 A. Yes.

12 Q. And is that sincerely truthful or is that
13 sincerely lying?

14 A. Truthful.

15 Q. How is the jury to know?

16 MR. WHITE: I object to that, Judge.

17 THE COURT: Sustained.

18 Q. Isn't it true, sir, that you were sincere
19 when you told Tucson Police Department that you had
20 nothing to lose and on your fucking life, you weren't
21 at the Moon Smoke Shop?

22 A. I think I said that, yes.

23 Q. Today you are telling the jury with that
24 same false sincerity?

25 MR. WHITE: I object to that. That's

1 argumentative.

2 THE COURT: Sustained.

3 BY MR. LARSEN:

4 Q. Is it with the same degree of sincerity or
5 do you have different degrees of sincerity?

6 A. I'm telling the truth today.

7 Q. But you were sincere with the Tucson Police
8 Department, were you not?

9 MR. WHITE: That's argumentative, Judge.
10 I'll object.

11 THE COURT: Sustained.

12 Q. You did indicate to them that you were
13 sincere, correct?

14 A. I have no idea what I was thinking.

15 Q. All right.

16 A. Obviously I was lying to them all the way
17 through this.

18 Q. Do you recall testifying that when you told
19 Tucson Police Department that you had nothing to lose
20 and on your fucking life, you weren't at the Moon Smoke
21 Shop, that you were sincere?

22 A. I don't know if I said "sincere."

23 Q. Why don't you turn to Page 120.

24 A. Which one?

25 Q. 120. Why don't you read Lines 15 through

1 21.

2 A. (Witness complies.)

3 Q. Do you recall testifying previously last
4 October that: On your fucking life, I wasn't there.

5 Yes. You were real sincere at that time
6 when you were talking, then, weren't you?

7 Your answer: Yes.

8 A. Yes.

9 Q. I read that correctly, did I not?

10 A. Yes, you did.

11 MR. LARSEN: I don't have anything further
12 of this witness, Judge.

13 THE COURT: Redirect?

14

15

REDIRECT EXAMINATION

16 BY MR. WHITE:

17 Q. Do you remember, Mr. Nordstrom, the second
18 interview that you had with the police detectives that
19 night? We're probably now 3:40 in the morning.

20 Do you remember what your belief was
21 whether you were going to go to prison as a result of
22 all this?

23 A. I don't recall exactly what I said.

24 MR. WHITE: May I approach?

25 THE COURT: Yes.

1 BY MR. WHITE:

2 Q. You've got lots of transcripts. Do you
3 recognize this one?

4 A. Yes.

5 Q. Being a transcript of the interview you had
6 with the detectives on the morning of the 17th at 3:40
7 a.m.?

8 A. Yes.

9 Q. On Page 16, do you remember this question
10 and answer? And you tell me if I read it incorrectly.

11 Question: And you know there is still a
12 possibility that you could go to prison?

13 Answer: I'm pretty sure I'll probably go.

14 A. Yes.

15 Q. Is it in that conversation that you told
16 them that you were present at the Moon Smoke Shop?

17 A. That I was present?

18 Q. At the second interview that night?

19 A. Yes.

20 Q. The \$5,000 that you got that you and Mr.
21 Larsen were talking about, you actually got handed
22 \$5,000 by the police?

23 A. Yes.

24 Q. Did you get to keep that \$5,000?

25 A. No.

1 Q. How long did you have it?

2 A. About three minutes.

3 Q. Now, Mr. Larsen asked you about working
4 with your brother in April. When did your brother get
5 out of prison?

6 A. In April.

7 Q. Did you immediately start working with him?

8 A. No. No.

9 Q. So in April, where do you work?

10 A. John Mikiska, with John.

11 Q. The masonry business?

12 A. Yes.

13 Q. Okay. Do you know now the date that you
14 started working with dry wall with your brother?

15 A. The exact date? I don't know the exact
16 date.

17 Q. But it wasn't in April?

18 A. No, it wasn't in April. I know that.

19 Q. Speaking of the job with Mr. Mikiska,
20 that's Star Masonry?

21 A. Yes, it is.

22 Q. Mr. Larsen asked you about falsifying some
23 records.

24 A. Yes.

25 Q. And you said you did.

1 A. Yes.

2 Q. What records did you falsify?

3 A. My check stubs.

4 Q. Why would you falsify check stubs?

5 A. Because he was paying me cash and I wasn't
6 taking no taxes out, but I needed the check stub to
7 show my parole officer that actually I was working.
8 And he would give me -- he had a little check book and
9 he'd give me the stubs out of it. And I didn't know
10 how to do the taxes, so my Aunt Connie did them for me.
11 I'd tell her the time that I worked and she'd write it
12 in and then she'd give me the check stub and I'd take
13 it to my parole officer.

14 Q. So that's the records you're talking about?

15 A. Yes.

16 Q. The check stubs?

17 A. The check stubs, yes.

18 Q. Speaking of your Aunt Connie, Mr. Larsen
19 was asking you about conversations you had with her
20 about getting money from the police, that kind of
21 thing.

22 A. Yes.

23 Q. When did those conversations occur?

24 A. I don't know exactly when.

25 Q. But when in the context of when you started

1 talking to the detectives?

2 A. I think it was then.

3 Q. After you started talking to them?

4 A. Yes.

5 Q. But before you got arrested?

6 A. Before, yeah.

7 Q. So after you start talking with police?

8 A. Yes.

9 Q. But before you got arrested on January
10 16th?

11 A. Yes.

12 Q. All right. Mr. Larsen asked you about your
13 brother's pickup truck.

14 A. Yes.

15 Q. Do you remember the year, the year model?

16 A. '92.

17 Q. A 1992?

18 A. Yes.

19 MR. WHITE: May I approach?

20 THE COURT: Yes.

21 Q. Showing you what's going to be marked as --
22 what's the next exhibit number, Madam Clerk?

23 THE CLERK: 47.

24 Q. -- going to be marked as State's 47.

25 Do you recognize the vehicle in that

1 photograph?

2 A. Yes, Scott's truck.

3 Q. Is that Scott's pickup truck?

4 A. Yes.

5 Q. The same one that you and Mr. Larsen were
6 talking about?

7 A. Yes.

8 Q. Does it look in this picture the way it
9 looked in May of 1996?

10 A. Yes.

11 Q. The doors are open in the picture, but
12 other than that it's --

13 A. Oh, yeah.

14 MR. WHITE: Move the admission of State's
15 47.

16 THE COURT: Exhibit 47 is admitted.

17 MR. WHITE: May I publish it?

18 THE COURT: Yes, you may.

19 BY MR. WHITE:

20 Q. Would you describe that pickup truck as a
21 light blue, Mr. Nordstrom?

22 A. No. It's dark colored.

23 Q. Would you describe that as an older model?

24 A. No.

25 Q. Would you describe that as a Ford pickup

1 truck?

2 A. No.

3 Q. Mr. Larsen was asking you about your plea
4 agreement with the State of Arizona.

5 A. Yes.

6 Q. You've read a copy of that, haven't you?

7 A. Yes, I have.

8 Q. Showing you what's going to be marked as
9 State's 48.

10 Is that a copy of your plea agreement?

11 A. Yes.

12 Q. Now, look at it carefully. Does that plea
13 agreement contain every agreement you've got with the
14 State of Arizona?

15 A. Yes.

16 MR. WHITE: Move the admission of 48.

17 MR. LARSEN: No objection.

18 THE COURT: Exhibit 48 is admitted.

19 Q. Does that have on it a range of sentence
20 that you're eligible for?

21 A. Yes, it does.

22 Q. What's the range of sentence as a result of
23 the plea agreement you entered into with the State of
24 Arizona?

25 A. Three to ten years.

1 Q. Three to ten years?

2 A. Yes.

3 Q. You could get up to ten years?

4 A. Yes, I could.

5 Q. Could you get probation?

6 A. No.

7 Q. You'd have to go to prison?

8 A. Yes.

9 Q. Is there an agreement that the State may
10 recommend a certain sentence?

11 A. Yes.

12 Q. Is it your understanding that's some kind
13 of guarantee you're going to get what the State
14 recommends?

15 A. No.

16 Q. You could get the full ten years?

17 A. Yes.

18 Q. After the Moon Smoke Shop, did you ever see
19 blood on the boots or hat or clothing worn by the
20 defendant?

21 A. No.

22 Q. Did he ever tell you there was blood?

23 A. No.

24 Q. The night of the Fire Hall, when he came to
25 your house and told you these things, Mr. Larsen asked

1 you if you saw any blood while you were walking through
2 the living room. Were you looking for blood?

3 A. No.

4 Q. At that time or at any other time, did he
5 ever tell you that he had gotten blood on his clothing?

6 A. No.

7 Q. Did you ever see any blood on his clothing?

8 A. No.

9 Q. Now, the gun you said you kept at your
10 house sometimes, this .380.

11 A. Yes, I did.

12 Q. Why would you keep it at your house?

13 A. Because Robert would be drinking or Scott
14 would be drinking and they didn't want to have it in
15 the truck and I would just keep it at the house.

16 Q. Why didn't they want to keep it in the
17 truck when they were drinking?

18 A. Felons.

19 Q. Pardon me?

20 A. They were felons, convicted -- they were
21 both on parole.

22 Q. And they didn't want it in the truck if
23 they got pulled over by police, is that what you are
24 saying?

25 A. Yeah. If they got pulled over, then they'd

1 be in trouble having a gun.

2 Q. All right. Now, when the defendant kept
3 the gun, did he keep it in the truck occasionally?

4 A. Yes.

5 Q. Where would he keep it?

6 A. Under his leg while he's driving, or on the
7 seat or under the seat.

8 Q. On the seat or under the seat?

9 A. Yeah, or under his leg.

10 Q. Okay. Now, if there are three people in
11 the truck and he had to put it under the seat, how
12 would he do that?

13 A. Bend down and put it under the seat.

14 Q. And you don't know whether he did that the
15 day of the Moon Smoke Shop or not?

16 A. Yeah, I don't know if he did or not.

17 Q. You weren't paying attention to him?

18 A. No.

19 Q. On the day of the Moon Smoke Shop, Mr.
20 Larsen asked you if your curfew was 5:30. Do you know
21 for sure what your curfew was?

22 A. No.

23 Q. Would the best way to tell be check with
24 your parole officer, do you think?

25 A. Yes.

1 Q. You took the police to a place in the
2 desert where a wallet was supposedly burned.

3 A. Yes.

4 Q. Is that a wallet taken from one of the
5 victims in the Fire Hall?

6 A. Yes.

7 Q. Now, I think we've agreed the Fire Hall
8 occurred on June 13th of 1996.

9 A. Yes.

10 Q. When did you take the police there?

11 A. June maybe? I'm not real -- exactly -- I
12 don't even know what month. It was late -- it was hot,
13 sometime.

14 Q. What year?

15 A. '97.

16 Q. A year later?

17 A. Yeah.

18 Q. Did it surprise you there wasn't the
19 remnants of a burned wallet there?

20 A. No.

21 MR. LARSEN: Objection. Argumentative.

22 THE COURT: Sustained.

23 Q. Now, Mr. Larsen asked about whether the
24 guns were ever found in the stock pond or whatever pond
25 where they got thrown.

1 A. Yes. He asked me that.

2 Q. You said something about golf balls. At
3 some point after you begin to cooperate with the State,
4 did you go back out to that pond?

5 A. Yes.

6 Q. When was this, approximately?

7 A. I don't remember.

8 Q. Was it 1996?

9 A. No, it was '97.

10 Q. Okay, 1997.

11 A. June or July.

12 Q. And what was the purpose for you going out
13 there?

14 A. To try and help them find the guns again.

15 Q. Okay.

16 A. To point them out maybe a little better.

17 Q. And did somebody ask you to do something to
18 show where you had tossed those guns?

19 A. There was another detective and I don't
20 remember his name.

21 Q. Okay.

22 A. But he gave me maybe three or four or five
23 golf balls and said, throw these the best place where
24 you know, you know. Actually, I was showing them where
25 the nine-millimeter was and I threw the golf balls, and

1 from my understanding, they went right after it and
2 they couldn't even find the golf balls down there.

3 Q. They couldn't even find the golf balls?

4 A. No.

5 Q. You lied to the police on a number of
6 occasions about this case, right?

7 A. Yes.

8 Q. You even lied to them in that last
9 statement in the early morning hours of the 17th when
10 you lied about where the .380 came from?

11 A. Yes.

12 Q. Does that plea agreement that I showed you,
13 State's 48, does it talk about what happens if you lie?

14 A. Yes.

15 Q. What happens?

16 A. They take my plea bargain away and I get
17 charged with the regular murders.

18 Q. At the Moon?

19 A. At the Moon.

20 Q. Do you want that to happen?

21 A. No.

22 MR. WHITE: Thank you. That's all I have.

23 THE COURT: Any reason that this witness
24 can't be excused?

25 We have some juror notes. Would counsel

1 approach.

2 (The following proceedings were held at the
3 bench, out of the hearing of the jury:)

4 MR. LARSEN: I have no objection to either
5 one of those.

6 While we're here, I would like to renew my
7 motion to mistrial based on his response to Mr. White's
8 question about not wanting the guns in the truck
9 indicated that the reason he didn't want it in the
10 truck because they were both felons.

11 That could have been answered any number of
12 ways. Again, Mr. Nordstrom has ignored Mr. White's and
13 this Court's instructions and prior rulings, and I
14 think he's fully intent on doing whatever he can to
15 make sure this jury is aware of other bad acts and now
16 prior convictions that my client has.

17 We can instruct this jury until we're blue
18 in the face, but after a while it begins to mount up
19 and it has now mounted to a point where Mr. Nordstrom
20 has prejudiced my client.

21 THE COURT: Mr. White, I'm going to ask
22 that you be a little more careful in those opening
23 questions, especially in areas that are likely to
24 result in these kinds of statements.

25 MR. WHITE: Absolutely. I was attempting

1 to obtain what he said on cross, that they wouldn't
2 want to be found drunk in the truck with the gun.

3 That's what I thought he was going to say,
4 because he said it on cross and I was just trying for a
5 repeat of that.

6 MR. LARSEN: I don't think Mr. White
7 intentionally asked that.

8 And there probably was some room for error
9 there.

10 I relied on his conversation yesterday with
11 Mr. Nordstrom, but that doesn't unring the bell.

12 The jury has heard it.

13 The jury has heard Mr. Nordstrom again talk
14 about prior bad acts and felony acts that he was
15 involved with my client.

16 Judge, there's just no way around there.

17 THE COURT: Well, there's no way to
18 eliminate it entirely, but I think we can contain it
19 with the usual instructions.

20 --

21 --

22

23

24

25

1 Once this witness is finished testifying,
2 which I think will be very shortly, I will again read
3 to them the same cautionary instruction that I did
4 before.

5 So to the extent that you're moving for
6 mistrial, the mistrial is denied.

7 (End of bench conference.)

8 THE COURT: Mr. Nordstrom, the jury has
9 proposed a couple of questions to you.

10 The first is: Did your curfew change daily
11 or on a weekly basis?

12 THE WITNESS: Daily.

13 THE COURT: So it wasn't the same day to
14 day?

15 THE WITNESS: No, it varied. Sometimes I
16 would go to A.A. meetings so it would be later, you
17 know. Sometimes I'd just come straight home from work.
18 It depends. Sometimes I'd get free time.

19 THE COURT: But you worked it all out with
20 your probation officer?

21 THE WITNESS: With my parole officer, yes.

22 THE COURT: Parole officer.

23 Secondly, do you recall looking back at
24 someone after you left the Moon Smoke Shop prior to
25 exiting the rear of shopping center before you drove

1 out in the street?

2 THE WITNESS: No, I didn't look back. I
3 just kept driving.

4 THE COURT: Any reason this witness can't
5 be excused at this point?

6 MR. WHITE: No.

7 MR. LARSEN: No.

8 THE COURT: You may step down, sir. You
9 are excused.

10 Ladies and gentlemen, I again instruct you
11 that references have been made in the testimony as to
12 other alleged criminal acts by the defendant unrelated
13 to the charges against him in this trial.

14 You are reminded that the defendant is not
15 on trial for any such acts, if in fact they occurred.
16 You must disregard that testimony and you must not use
17 this testimony as proof that the defendant is of bad
18 character and therefore likely to have committed the
19 crimes with which he is charged in this case.

20 The State may call its next witness.

21 MR. WHITE: Call Toni Hurley.
22
23
24
25

EXHIBIT C

98-1767

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

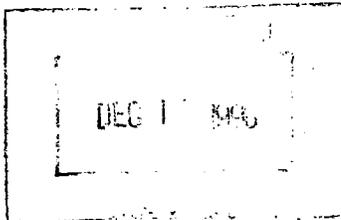
JURY TRIAL -- DAY SIX

June 25, 1998

REPORTED BY:

TONI HENSON
Official Court Reporter
Division Ten
Pima County Superior Court

PROSECUTION



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1 MR. LARSEN: Yes, Judge. We will call
2 Carol Stevenson.

3 THE COURT: Very well.

4 (Ms. Stevenson not present.)

5 MR. LARSEN: All right. If I can
6 substitute, Judge, I'll call Teresa Nordstrom.

7 THE COURT: Mr. Larsen, the name again,
8 please?

9 MR. LARSEN: Teresa Nordstrom.
10

11 TERESA NORDSTROM,
12 having been first duly sworn to state the truth, was
13 examined and testified as follows:

14
15 DIRECT EXAMINATION

16 BY MR. LARSEN:

17 Q. Would you state your name, please?

18 A. Teresa Mae Nordstrom.

19 Q. And you are married to Richard Nordstrom?

20 A. Yes.

21 Q. And you have a stepson?

22 A. Yes.

23 Q. Is one of your stepsons named David?

24 A. Yes, it is.

25 Q. How long have you lived with David?

1 A. Ever since he was four years old.

2 Q. Can you give the jury some idea of how long
3 that might be?

4 A. Twenty-some years.

5 Q. Do you have a close relationship with him?

6 A. Yes, I do.

7 Q. Do you know friends of his?

8 A. Yes.

9 Q. Is one of the people that you know Robert
10 Jones?

11 A. Yes.

12 Q. Does Robert Jones look about the same as
13 when you saw him in June of '96?

14 A. Yes.

15 Q. And you would have seen him right around
16 the time of your son's stabbing incident when he went
17 to Kino, correct?

18 A. Yes.

19 Q. Your other stepson would be Scott?

20 A. Yes, it is.

21 Q. Can you describe for the jury what Scott
22 looked like back in May and June of '96?

23 A. He had short hair down to his collar and he
24 always carried a heavy beard.

25 Q. How about David?

1 Q. But beyond the mustache and the fact that
2 he would go a number of days without shaving, other
3 than that he was --

4 A. Right.

5 Q. So you're not saying he had one of those,
6 like the Three Musketeers with a goatee and a beard,
7 you're not saying that?

8 A. No.

9 Q. Okay.

10 A. He would just look rough.

11 Q. Looked rough as in unshaven?

12 A. Correct.

13 Q. Lawyers aren't very clear sometimes, Ms.
14 Nordstrom, so I hope you'll bear with us here.

15 Now, you said that you lived with David
16 Nordstrom as his stepmom, I guess as his mom?

17 A. As his mom.

18 Q. Since he was four years old?

19 A. That's correct.

20 Q. Is his real mother dead?

21 A. No. She lived here in Tucson until just
22 about two years ago, she moved to New Mexico.

23 Q. So she was right here in town?

24 A. Yes, she was.

25 Q. And she never had much contact with David,

1 did she?

2 A. No, she didn't.

3 Q. She basically ignored him, didn't she?

4 A. Yes, she did. In fact, when he was six
5 years old, him and his brother Rick went to spend the
6 weekend with her and his aunt brought him home crying.

7 And he come running up to me and I hugged
8 him and picked him up and I asked him what was the
9 matter. And he said, "Mama said she didn't love me and
10 she didn't want me."

11 Q. Now, David was in prison for a while,
12 wasn't he?

13 A. Yes.

14 Q. And he got out of prison in January of '96?

15 A. Yes.

16 Q. January two years ago?

17 A. Right.

18 Q. And he wasn't done with conditions -- I
19 mean, he was still on parole, right?

20 A. Yes, he was.

21 Q. And he had some kind of ankle monitor on?

22 A. Yes, he did.

23 Q. Was there something plugged into your phone
24 there?

25 A. Yes.

1 Q. A little black box?

2 A. Yes.

3 Q. The phone plugged into the box?

4 A. Yes.

5 Q. And then the box plugged into the wall?

6 A. Yes. Like an answering machine.

7 Q. Right. Okay. And something would happen
8 occasionally that parole officers would call asking
9 where David was?

10 A. They did that a few times, yes.

11 Q. Do you remember one time you were sweeping
12 or vacuuming or something and you accidentally unplugged
13 the box, moving furniture or something?

14 A. I was moving furniture and it accidentally
15 hit it. I plugged it back in right away, but I called
16 Fritz Ebenal and he called Phoenix and said it hadn't
17 been off long enough for that to make any -- to affect
18 it.

19 Q. In fact, do you remember telling us back in
20 June of '97 that after you unplugged that accidentally,
21 the parole called you?

22 A. Yes, after I called Fritz, and they said it
23 was okay.

24 Q. So they knew that that was unplugged?

25 A. Yes.

1 Q. Now, did David ever try to beat that thing?

2 A. No, he didn't.

3 Q. As a matter of fact, he was conscious of
4 it, wasn't he?

5 A. He was very conscious of the bracelet.

6 Q. And I think you said on direct the
7 defendant looks pretty much the same now as he did
8 then?

9 A. Pretty much. The only thing, back then he
10 had tight curly hair.

11 Q. Tight curly hair?

12 A. Yes, it was like curls.

13 Q. It was shorter than it is now?

14 A. Yes.

15 Q. More collar-length?

16 A. It was cut just a little bit shorter. It
17 was up above his collar.

18 Q. Up above his collar?

19 A. Yes. Like I said, it was curly.

20 Q. Right. It wasn't hanging down like it is
21 now?

22 A. No.

23 Q. And in addition to that difference, he
24 dressed western all the time, didn't he?

25 A. Each time I had seen him, yes.

1 Q. Western shirts?

2 A. Western shirts, western black hat, usually
3 black trousers, Levi's.

4 Q. Cowboy boots?

5 A. Yes.

6 Q. Now, do you remember, he would come over to
7 the house and visit David, right?

8 A. Yes, he would.

9 Q. And Scott would come over and visit?

10 A. After Scott got out, yes.

11 Q. And the three of them would sit on the
12 porch and talk and socialize, that kind of thing?

13 A. Yes.

14 Q. Now, the defendant didn't come over there
15 late at night very often?

16 A. No. He was usually there between 5:00 and
17 5:30, because that was about the time David would get
18 home from work.

19 Q. But he didn't stay late into the night
20 hours, did he?

21 A. No. He was usually gone by 9:30.

22 Q. And Scott was usually gone also?

23 A. Well, Scott would usually leave before
24 Robert did.

25 Q. Do you remember a night that the defendant

1 showed up to your house late at night?

2 A. Yes.

3 Q. Now, when this occurred, where were you at
4 in the house?

5 A. I was sitting on my sofa watching the news
6 on TV.

7 Q. The news, you mean CNN, the cable news?

8 A. No, it was local news.

9 Q. Okay. One of the network stations, NBC,
10 ABC, CBS, one of those?

11 A. ABC.

12 Q. So we're talking after 10:00 o'clock
13 actually?

14 A. Yes.

15 Q. He shows up at the house, bangs on the
16 door?

17 A. He knocked on the door and I got up.

18 Q. Okay.

19 A. And he would come over to the house, and
20 each time he'd see me, he'd call me ma'am or Mrs.
21 Nordstrom.

22 Q. Very polite?

23 A. He was very polite.

24 Q. That night was he polite like that?

25 A. He says, "I need to talk to David."

1 And I says, "Well, David's sleeping."

2 And he pushed the door wide open and walked
3 past me and said, "I need to talk to David."

4 He went in David's room and then David
5 walked out with him.

6 Q. Where did they go?

7 A. They went out on the porch.

8 Q. Okay.

9 A. I heard David say a couple of cuss words
10 and then they walked out to a picnic table that was
11 underneath the mesquite tree right there in front of
12 the house.

13 Q. And you didn't hear what was said?

14 A. No, I didn't.

15 Q. Now, you didn't mark this date on your
16 calendar or anything like that, right?

17 A. No.

18 Q. So of your own independent knowledge, you
19 don't know the specific date we're talking about in
20 terms of July 1st, May 27th, I mean, right?

21 A. No.

22 Q. I understand you've put two and two
23 together since then, right?

24 A. Yes, and --

25 Q. Wait for the question.

1 And you have an idea what night that was?
2 A. Yes.
3 Q. But in fairness, you don't specifically
4 remember the date?
5 A. No.
6 Q. And you didn't hear anything they were
7 saying, you told us, right?
8 A. That's right. I didn't.
9 Q. Now, do you remember being asked by -- do
10 you remember the police coming to your house and
11 executing a search warrant?
12 A. Yes.
13 Q. And do you remember them asking you if you
14 were aware of David or Robert or anybody being involved
15 in criminal activity --
16 A. All I --
17 Q. -- or words to that effect. Do you
18 remember them asking you that?
19 A. Yes.
20 Q. Okay. And you didn't tell them about this
21 conversation that you just told us?
22 A. No.
23 Q. You didn't have any reason to at that
24 point, did you?
25 A. No, I didn't.

1 Q. Didn't know it had anything to do with
2 criminal activity?

3 A. No.

4 Q. Did David have a job when he got out of
5 prison on parole?

6 A. Yes. He managed to get one within three or
7 four days.

8 Q. He got a job working with Star through John
9 Mikiska, something like that?

10 A. Something like that.

11 Q. And then after Scott got out, Scott got a
12 job, to your knowledge, at a dry wall company, right?

13 A. That's correct.

14 Q. And David starting working with him?

15 A. That's right.

16 Q. And David would drive to work with Scott?

17 A. Yes.

18 Q. Because David didn't have a driver's
19 license.

20 A. That's right.

21 Q. And to your knowledge, he didn't drive, did
22 he?

23 A. No.

24 Q. Did you and your husband let him use your
25 guys' cars?

1 A. No way. If anything happened, I wanted to
2 be behind the wheel for the insurance company.

3 Q. I understand. Now, was there a time when
4 David was stabbed?

5 A. Yes.

6 Q. And his brother was stabbed also?

7 A. Yes.

8 Q. Do you remember the date?

9 A. That was June 21st. That day I remember.

10 Q. June 21st. A Friday?

11 A. Right.

12 Q. Now, you're not -- I take it you like David
13 Nordstrom very much.

14 A. I love that little boy. Or young man.

15 Q. You're not willing to lie for him, though,
16 are you?

17 A. No. That's something I've never done for
18 him.

19 Q. You've come in here and told us that you
20 think he is a liar.

21 A. He is.

22 Q. Can you tell when he is lying?

23 A. Yes, I can.

24 Q. How can you tell when he's lying?

25 A. When I ask him a question and he can't tell

1 the truth, he'll always look down and twitch around or
2 fiddle with his hands.

3 Q. It sounds like he's not a very good liar.

4 A. No, he's not. I could catch him every
5 time.

6 MR. WHITE: Thank you, Ms. Nordstrom.

7 THE COURT: Redirect?

8 MR. LARSEN: No, Judge.

9 THE COURT: Any reason this witness can't
10 be excused?

11 Thank you, ma'am. You may step down. You
12 are excused.

13 You may call your next witness.

14 MR. LARSEN: Carol Stevenson.

15

16

17 CAROL STEVENSON,
18 having been first duly sworn to state the truth, was
19 examined and testified as follows:

20

21

DIRECT EXAMINATION

22 BY MR. LARSEN:

23 Q. Would you state your name, please?

24 A. Carol Stevenson.

25 Q. Ms. Stevenson, do you know a person by the
name of Robert Jones?

1 THE COURT: Thank you for calling attention
2 to it. You may resume your seat.

3 (Whereupon, the bench conference was
4 concluded.)

5 THE COURT: Any reason this witness can't
6 be excused?

7 You may step down. Thank you. You are
8 excused.

9 You may call your next witness, Mr. Larsen.

10 MR. LARSEN: Your Honor, at this time the
11 only thing that the defense has left is a couple of
12 stipulations.

13 THE COURT: Very well.

14 MR. LARSEN: The first stipulation will be
15 State and defense have agreed that the hat and boots in
16 State's 31 and 32 were tested by the Tucson Police
17 Department Crime Lab and they were tested negative for
18 any blood at all.

19 THE COURT: That's for the presence of
20 blood?

21 MR. LARSEN: The presence of blood, yes,
22 sir.

23 The other stipulation between State and
24 counsel for the defense, the testimony of Cindy
25 Wasserburger, if called to the stand, Ms. Wasserburger

1 would testify to the following:

2 Number 1: That she is the natural mother
3 of Scott and David Nordstrom.

4 Number 2: That in her opinion, Scott
5 Nordstrom is a manipulative person.

6 Number 3: That David Nordstrom is a
7 manipulating and conniving person.

8 Number 4: That David Nordstrom is not a
9 truthful person.

10 Number 5: That Ms. Wasserburger knew Art
11 and Judy Bell.

12 Number 6: That she was a member of the
13 Fire Fighters Hall in the early 1990s.

14 Number 7: That she had a party at her
15 house where Art and Judy Bell were present. And she
16 has told Detective Woolridge that Scott Nordstrom was
17 at that party on approximately June 20, 1993 or 1994.

18 Number 8: That she has met Robert Jones on
19 a couple of occasions, one of which was at the hospital
20 while Scott and David Nordstrom were being cared for
21 from their injuries from the stabbing incident.

22 Another time was out in the community.

23 The extent of the contact was only a few
24 minutes in length and no issues of substance were
25 discussed.

1 And with that, Your Honor, the defense
2 rests.

3 THE COURT: Very well. Have those
4 stipulations been reduced to writing?

5 MR. LARSEN: The second one --

6 MR. WHITE: I think the second one also.
7 We can get it reduced to writing.

8 THE COURT: Please do. Make them part of
9 the record.

10 Ladies and gentlemen, now the State has the
11 opportunity to present rebuttal evidence, if they wish
12 to do so.

13 Mr. White, do you wish to present rebuttal?

14 MR. WHITE: Yes, I do.

15 Call Detective Woolridge to the stand.

16 THE COURT: Very well. Detective, if you
17 will resume the stand, and I remind you that you remain
18 under oath.

19
20 BRENDA WOOLRIDGE,
21 having been previously sworn, was examined and
22 testified as follows:

23

24

FURTHER EXAMINATION

25 BY MR. WHITE:

Jon M. Sands
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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

**REPLY TO RESPONSE TO
MOTION FOR RELIEF
FROM JUDGMENT**

DEATH PENALTY CASE

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

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

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

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

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

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

Significantly, the court cautioned:

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

Id.

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

proceedings. Mr. Jones was also deprived of a “fair shot” because, despite notice that Mr. Jones tried to undermine David Nordstrom’s trial testimony from trial to the present §2254 proceeding, especially as it concerned Nordstrom’s novel but untested electronic monitor system (“EMS”) alibi, Respondents have failed to acquire or disclose evidence from BI, Inc. that would demonstrate the reliability of the units and whether they were accepted in the relevant scientific or technological community at the time of trial. BI had a contractual relationship with, and sold the EMS unit used to monitor Nordstrom to, Respondents. Mr. Jones permissibly “attacks, not the substance of the federal court’s resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.” *Gonzalez*, 545 U.S. at 532.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Timeliness.

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

rendered IAC that constitutes “cause.” Motion at 2-3.

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

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

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

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

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

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

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

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

for failure to move for a *Frye* hearing to test the acceptance of BI, Inc.'s Model 9000 that was attached to suspect-turned-informant David Nordstrom. Resp. at 12-15. Respondents' arguments include that Mr. Jones cannot prove: 1) that "that the EMS recording system and the data it generated were, at the time of his trial, a novel scientific process or theory to which *Frye* would apply"; 2) "that the Model 9000 was not accepted in the scientific community"; 3) that malfunctioning units identified by Mr. Jones were "the same model used to monitor David." Resp. at 13-14.

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

2. Foundation.

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

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

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

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

3. Stephen Coats.

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

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

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

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

4. The causal nexus claim.

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

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

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

IV. The *Brady* Claim.

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

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

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

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

B. Reply to Respondents' substantive arguments.

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

1. Materiality of the BI evidence.

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

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

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

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

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

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

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

2. Duty to acquire *Brady* material.

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

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

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

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

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

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

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

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

Reply Ex. 2.

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

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

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

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

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

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

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

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

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

Conclusion

For the foregoing reasons, Mr. Jones respectfully requests that the Court grant his Motion for Relief from Judgment. In the alternative, he requests that the Court order evidentiary development, including the discovery of the EMS records and other relevant information described above that reside with BI, Inc.

Respectfully submitted this 6th day of September, 2013.

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

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

Certificate of Service

I hereby certify that on this 6th day of September, 2013, I electronically transmitted the attached document to the Clerk's office of the United States Court of Appeals for the Ninth Circuit using the CM/ECF System for filing and transmitted a Notice of Electronic Filing to the following registrants:

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

s/Teresa Ardrey
Teresa Ardrey
Legal Secretary
Capital Habeas Unit

Reply Exhibit 1

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ERIC A. LARSEN
LAW OFFICES OF ERIC A. LARSEN
135 West Council Street
Tucson, Arizona 85701
(520) 791-2320
PCC No. 33485
Attorney for defendant

FILED
JAMES N. CORBETT
CLERK SUPERIOR COURT

97 SEP 24 PH 4:51

M. BARRIOS, DEPUTY

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

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

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

1. The statement that David Nordstrom gave to defense counsel in State of Arizona v. Scott Nordstrom.
2. Scott Nordstrom's statement, if any.
3. Christine Davis's statement, if any.
4. Joe Wick's statement, if any.
5. Holly Pritchard's statement, if any.
6. A priors check on all civilian witnesses.

LAW OFFICES OF
ERIC A. LARSEN
135 W. COUNCIL ST.
TUCSON, ARIZONA 85701
TELEPHONE (520) 791-2320
STATE BAR 010337
PIMA COUNTY COMPUTER 33485

56

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(3)

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

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

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

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

11. The composite drawings broadcast by the media.

12. Any scientific reports regarding tire impressions.

13. Any statement from Cynthia Inman.

14. Any employment records of David Nordstrom.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESPECTFULLY SUBMITTED this 24 day of September, 1997.


ERIC A. LARSEN
Attorney for defendant

A copy foregoing mailed/delivered this ___ day of September, 1997, to:

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

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

David Braun, Esq.
2221 E. Broadway Blvd., #109
Tucson, AZ 85719-0000
Co-counsel for Mr. Jones

59

M-O

Reply Exhibit 2

PIMA COUNTY ATTORNEY
32 North Stone
14th Floor
Tucson, AZ 85701
602-740-5600

FILED
JAMES N. CORBETT
CLERK SUPERIOR COURT

97 OCT 14 PM 3:47

1	IN THE SUPERIOR COURT OF THE STATE OF ARIZONA	
2	IN AND FOR THE COUNTY OF PIMA	M. BARRIOS, DEPUTY
3	THE STATE OF ARIZONA,)
4	Plaintiff,)
5	vs.)
6	ROBERT JONES,)
7	Defendant.)

No. CR-57526

RESPONSE TO MOTION FOR
DISCOVERY

Assigned: Div. IV^R

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

14 Respectfully submitted this 14th day of October, 1997.

15 BARBARA LAWALL
16 PIMA COUNTY ATTORNEY

David R White

17 DAVID R. WHITE
18 Deputy County Attorney
19

20 Copy mailed/delivered this
21 14th day of October, 1997, to:

22 Hon. William Tinney,
23 Division IV

24 Eric Larsen, Esq.
25 Attorney for Defendant

71

37

PIMA COUNTY ATTORNEY
32 North Stone
14th Floor
Tucson, AZ 85701
602-740-5600

1 disclosed.

2 2. S. Nordstrom's Statement: Previously disclosed.

3 Will re-disclose.

4 3. Christine Davis' Statement: See response to Number
5 2 above.

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

8 5. Holly Pritchard's Statement: See response to Number
9 2 above.

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

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

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

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

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

PIMA COUNTY ATTORNEY
32 North Stone
14th Floor
Tucson, AZ 85701
602-740-5600

- 1 11. Composite Drawings: See response to Number 2.
- 2 12. Reports re Tire Impressions: None.
- 3 13. Statement from C. Inman: See response to Number 2.
- 4 14. Employment Records of D. Nordstrom: See response
5 to Number 2, above.
- 6 15. E-M Officers for D. Nordstrom: Fritz Evenal,
7 Rebecca Matthews, of the Department of Corrections.
- 8 16. E-M Records for 6/13/96: See Response to Number 2.
- 9 17. Polygraph Sheets: The State objects to disclosure
10 of this material. Polygraph evidence is not admissible in Arizona
11 courts absent stipulation and the State does not stipulate to any
12 polygraph evidence in this case.
- 13 18. D. Nordstrom Probation File: The State is not in
14 possession of this "file." The Defendant has equal ability to
15 obtain that material from the Adult Probation Department.
- 16 19. D. Nordstrom Parole File: See Response to Number
17 2.
- 18 20. Detective's Notes of D. Nordstrom Statements: Any
19 notes taken by the detectives re D. Nordstrom have been
20 incorporated into their supplements, which have been disclosed.
- 21 21. D. Nordstrom Statements prior to 1/16/97: See
22 response to Number 2.
- 23 22. Color Copies of Photographs: There are hundreds of
24 photographs in this case, all of which are available for inspection
25 by defense counsel. The State will be happy to have copied at

PIMA COUNTY ATTORNEY
32 North Stone
14th Floor
Tucson, AZ 85701
602-740-5600

1 Defendant's expense any or all of these photographs.

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

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

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

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

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

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

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

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

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

PIMA COUNTY ATTORNEY
32 North Stone
14th Floor
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602-740-5600

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

3 Respectfully submitted this 14th day of October, 1997.

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BARBARA LAWALL
PIMA COUNTY ATTORNEY

David R White
DAVID R. WHITE
Deputy County Attorney

M-K

APPEAL,CLOSED,CMX,DEATH-PENALTY

**U.S. District Court
DISTRICT OF ARIZONA (Tucson Division)
CIVIL DOCKET FOR CASE #: 4:03-cv-00478-DCB**

Jones, et al v. Ryan, et al
Assigned to: Judge David C Bury
Demand: \$0

Case in other court: 9th Circuit Court of
Appeals, 10-99006
9TH CIRCUIT COURT
OF APPEALS, 13-16928

Cause: 28:2254 Petition for Writ of Habeas
Corpus (State)

Date Filed: 09/18/2003
Date Terminated: 01/29/2010
Jury Demand: None
Nature of Suit: 535 Prisoner:
Death Penalty - Habeas
Corpus
Jurisdiction: Federal Question

Petitioner

Robert Glen Jones, Jr.

represented by **Daniel D Maynard**
Maynard Cronin Erickson
Curran & Reiter PLC
3200 N Central Ave., Ste.
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Phoenix, AZ 85012-2443
602-279-8500
Fax: 602-263-8185
Email: stanner@mmcec.com
LEAD ATTORNEY
ATTORNEY TO BE
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Jennifer Ann Reiter
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Gabrielsen**
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Email: dale_baich@fd.org
ATTORNEY TO BE
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V.

Respondent

Charles L Ryan

represented by **Donna Jeanne Lam**

Office of the Attorney
General
Criminal Appeals Section
400 W Congress St
Ste 315
Tucson, AZ 85701-1367
520-628-6764
Fax: 520-628-6878
Email:
CADOCKET@AZAG.GOV
TERMINATED: 02/02/2010
LEAD ATTORNEY
ATTORNEY TO BE
NOTICED

Lacey Stover Gard
Office of the Attorney
General
Capital Litigation Section
400 W Congress St., Ste.
S315
Tucson, AZ 85701-1367
520-628-6520
Email: lacey.gard@azag.gov
ATTORNEY TO BE
NOTICED

Respondent

Charles Goldsmith
Warden, Arizona State Prison
Central Complex - Florence

represented by **Donna Jeanne Lam**
(See above for address)
TERMINATED: 02/02/2010
LEAD ATTORNEY
ATTORNEY TO BE
NOTICED

Lacey Stover Gard
(See above for address)
ATTORNEY TO BE

*NOTICED***Respondent**

Terry L Goddard
Arizona Attorney General

represented by **Donna Jeanne Lam**
 (See above for address)
TERMINATED: 02/02/2010
LEAD ATTORNEY
ATTORNEY TO BE
NOTICED

Lacey Stover Gard
 (See above for address)
ATTORNEY TO BE
NOTICED

Date Filed	#	Docket Text
09/18/2003	1	PETITION for Writ of Habeas Corpus (STAY OF EXECUTION) (MAP) (Entered: 09/22/2003)
09/18/2003	1	MOTION for stay of execution by petitioner Robert Glen Jones Jr [1-1] (MAP) (Entered: 09/22/2003)
09/18/2003	2	MOTION to proceed in forma pauperis by petitioner Robert Glen Jones Jr [2-1] (MAP) (Entered: 09/22/2003)
09/18/2003	3	MOTION for appointment of counsel by petitioner Robert Glen Jones Jr [3-1] (MAP) (Entered: 09/22/2003)
09/22/2003	4	ORDER FOR STAY OF EXECUTION by Judge Cindy K. Jorgenson That Petitioner's Warrant of Execution is stayed pending the filing of an Amended Petition for Writ of Habeas Corpus detailing all of Petitioner's known federal claims and resolution of the issues raised in the Amended Petition for Writ of Habeas Corpus FURTHER ORDERED that Petitioner remain in the custody of the AZ Dept of Corrections pending further order of this Court FURTHER ORDERED that the Clk of Court shall

		<p>make immediate telephonic notice of this Order to Dora Schriro, Director AZ Dept of Corrections; Terry Goddard, AZ Atty Genl's Office (c/o Kent Cattani); Noel Dessaint, Clk AZ Supreme Court; and Bennie Rollins, Warden AZ State Prison and that a copy of this Order be served on these individuals by the US Marshal forthwith FURTHER ORDERED that the Clk of Court shall forward a copy of this Order to Petitioner Robert Glen Jones, Jr (cc: all counsel) (MAP) (ADI-ICMS,). (Entered: 09/22/2003)</p>
09/22/2003		<p>REMARK: Telephone (and fax) notification of Stay Order to the following on this date: Terry Goddard, AZ Atty Genl (spoke w/Kent Cattani); Dora Schriro, Director of ADOC (spoke w/Sally Delbridge); Charles Goldsmith, Warden AZ State Prison (spoke w/Lisa Sylvas); Noel Dessaint, Clerk, AZ Supreme Court (spoke w/Kim Boretsky) (MAP) (Entered: 09/22/2003)</p>
09/23/2003		<p>USM 285, Stay of Execution Order forwarded to USMS this date for svc upon the following: Goddard, Schriro, Dessaint and Rollins (MAP) (Entered: 09/23/2003)</p>
10/08/2003	<u>5</u>	<p>ORDER OF APPOINTMENT AND GENERAL PROCEDURES by Judge Cindy K. Jorgenson granting motion for appointment of counsel by petitioner Robert Glen Jones Jr [3-1]. Appointing Daniel D Maynard as Counsel and Jennifer A. Sparks as Co-Counsel FURTHER ORDERED granting motion to proceed in forma pauperis by petitioner Robert Glen Jones Jr [2-1] FURTHER ORDERED that the AZ Atty General file a Notice of Appearance w/the Court w/in 10 days from the entry of this Order FURTHER ORDERED Case Management Conference set for 10:30 11/10/03 FURTHER ORDERED that this case having been randomly assigned by lot to Judge Cindy Jorgenson, the case shall remain designated as CIV-03-478-TUC-CKJ FURTHER ORDERED that the Clk of Court shall forward a copy of the Petition for Writ of Habeas</p>

		Corpus, the Order Staying Execution and this Order to Petitioner's counsel FURTHER ORDERED that a copy of the Petition for Writ of Habeas Corpus and this Order be served by the Clk of Court upon Respondents Dora Schriro and Charles Goldsmith and upon Kent Cattani, Asst AZ Atty General by certified mail FURTHER ORDERED that the Clk of Court forward a copy of this Order to the Petitioner. FURTHER ORDERED that the Clk of Court forward a copy of this Order to the CJA Voucher Review Analyst (cc: all counsel) (MAP) (ADI-ICMS,). (Entered: 10/08/2003)
10/08/2003	<u>6</u>	EX PARTE COST MANAGEMENT ORDER by Judge Cindy K. Jorgenson (cc: Maynard/Sparks/CJA VRA/DPLC) re: order filed [6-1] (MAP) (ADI-ICMS,). (Entered: 10/08/2003)
10/08/2003		REMARK: COPIES of Petition/Appt Order forwarded to Respondents Schriro, Goldsmith and Cattani by certified mail. Copies of Petition/Stay Execution Order/ Appt Order forwarded to Petitioner's Counsel (MAP) (Entered: 10/08/2003)
10/08/2003	7	RETURN OF SERVICE EXECUTED stay of execution order upon respondent Dora Schriro on 10/3/03 (ABU) (Entered: 10/09/2003)
10/08/2003	8	RETURN OF SERVICE EXECUTED stay of execution order upon respondent Terry Goddard on 10/3/03 (ABU) (Entered: 10/09/2003)
10/08/2003	9	RETURN OF SERVICE EXECUTED stay of execution order on 10/3/03 upon Noel Dessaint (ABU) (Entered: 10/09/2003)
10/10/2003	10	RETURN OF SERVICE EXECUTED petition/order on 10/9/03 addressed to Office of the Attorney General, Kent Cattani (ABU) (Entered: 10/14/2003)
10/14/2003	11	RETURN OF SERVICE EXECUTED summons/complaint on 10/9/03 addressed to Director

		Arizona Department of Corrections (ABU) (Entered: 10/15/2003)
10/14/2003	12	RETURN OF SERVICE EXECUTED summons/complaint upon respondent Charles Goldsmith on 10/9/03 (ABU) (Entered: 10/15/2003)
10/15/2003	13	MOTION to appear telephonically for case management conference by petitioner Robert Glen Jones Jr [13-1] (ABU) (Entered: 10/16/2003)
10/15/2003	14	ATTORNEY APPEARANCE for respondent Dora Schriro, respondent Charles Goldsmith, respondent Terry Goddard by Donna Jeanne Lam (ABU) (Entered: 10/16/2003)
10/23/2003	<u>15</u>	ORDER by Judge Cindy K. Jorgenson granting motion to appear telephonically for case management conference by petitioner Robert Glen Jones Jr [13-1] Petitioner's counsel shall call the court's judicial assistant on 11/10/03 (cc: all counsel) (ABU) (ADI-ICMS,). (Entered: 10/23/2003)
10/24/2003	16	USM285/Afdvt of srvc of stay of execution order on 10/22/03 upon Warden FCI Florence (PAB) (Entered: 10/27/2003)
11/05/2003	17	NOTICE by petitioner Robert Glen Jones Jr of filing under seal ex parte affidavit (ABU) (Entered: 11/06/2003)
11/05/2003	18	SEALED Document re: ex parte affidavit in support of proposed budget re order filed [6-1] by petitioner Robert Glen Jones Jr (ABU) (Entered: 11/06/2003)
11/10/2003	<u>22</u>	MINUTE ENTRY telephonic status conference before Judge Cindy K. Jorgenson . Crt Rptr: Mary Riley. ; status hearing held Court states it will be recusing itself after today's case management hearing in that the state trial judge on this case is a personal friend. Both parties have no objection to the court hearing today's matter. [cc: all

		cnsll]] [22-2] (ABU) (ADI-ICMS,). (Entered: 11/14/2003)
11/12/2003	<u>19</u>	ORDER by Judge Cindy K. Jorgenson Case reassigned to Judge David C. Bury (with notice sent)counsel are to designate all further filings in this case as CV-03-478-TUC-DCB. (cc: all counsel) (ABU) (ADI-ICMS,). (Entered: 11/12/2003)
11/12/2003	20	SEALED Phase I Budget Order (Death Penalty Case) by Judge Cindy K. Jorgenson re: sealed order [20-1] (ABU) (Entered: 11/12/2003)
11/12/2003	<u>21</u>	CASE MANAGEMENT ORDER by Judge Cindy K. Jorgenson; ordered an amended petition for writ of habeas corpus shall be filed no later than 3/26/04. The amended petition shall conform with the format set forth in the court's order of appointment and general procedures filed 10/8/03. Respondents shall file an answer to petitioner's amended petition no later than 5/28/04. Any Traverse to respondents answer shall be filed no later than 7/12/04. Any motions for evidentiary development shall be filed no later than 8/12/04. Ordered that no later than 12/10/03, petitioner's counsel shall prepare and submit ex parte and under seal a final voucher for Phase I, and a proposed Phase II Budget, including a detailed declaration in support thereof. Ordered that within 10 days of the filing of respondents answer, petitioners' counsel shall prepare and submit ex parte a final voucher for Phase II and a proposed Phase III Budget, including a detailed declaration in support thereof. (cc: all counsel) re: order filed [21-1] (ABU) (ADI-ICMS,). (Entered: 11/12/2003)
12/11/2003	23	SEALED Document re: ex parte affidavit in support of proposed budget by petitioner Robert Glen Jones Jr (ABU) (Entered: 12/15/2003)
01/05/2004	24	SEALED Phase II Budget Order by Judge Cindy K. Jorgenson re: sealed order [24-1] (ABU) (Entered: 01/05/2004)

		01/06/2004)
01/28/2004	25	Ex Parte MOTION to amend Phase II Budget by petitioner Robert Glen Jones Jr [25-1] (ABU) (Entered: 01/29/2004)
02/20/2004	26	Amended Phase II Budget SEALED Order by Judge David C. Bury re: sealed order [26-1] (ABU) (Entered: 02/23/2004)
03/29/2004	27	AMENDED pet for hc (stay of exec) [1-1] (PAB) (Entered: 03/30/2004)
03/29/2004	28	EXHIBITS Re: amd petition for writ H/C (amended [27-1] by petitioner Robert Glen Jones Jr (PAB) (Entered: 03/30/2004)
05/14/2004	29	MOTION to extend time to answer by respondent for 45 days [29-1] (PAB) (Entered: 05/17/2004)
05/19/2004	<u>30</u>	ORDER by Judge David C. Bury granting motion to extend time to answer by respondent for 45 days [29-1] respondents' answer shall be filed no later than 7/12/04, any traverse to respondents' answer shall be filed no later than 8/27/04; any motions for evidentiary development shall be tiled no later then 9/27/04 (cc: all counsel) (BAR) (ADI-ICMS,). (Entered: 05/19/2004)
07/07/2004	31	MOTION to extend time to file respondents answer to petition for writ of habeas corpus by respondent [31-1] (ABU) (Entered: 07/08/2004)
07/12/2004	<u>32</u>	ORDER by Judge David C. Bury granting motion to extend time to file respondents answer to petition for writ of habeas corpus by respondent [31-1]; Respondent's answer shall be filed no later than July 27, 2004. Any Traverse to respondent's answer shall be filed no later than 9/13/04. Any motions for evidentiary development shall be filed no later than 10/13/04. (cc: all counsel) (ABU) (ADI-ICMS,). (Entered: 07/12/2004)
07/13/2004	33	RESPONSE by petitioner Robert Glen Jones Jr to motion

		to extend time to file respondents answer to petition for writ of habeas corpus by respondent [31-1] [31-1] (ABU) (Entered: 07/14/2004)
07/27/2004	34	RESPONSE by respondent to petition for writ H/C (amended, pet for hc (stay of exec) (ABU) (Entered: 07/28/2004)
08/12/2004	35	NOTICE by petitioner Robert Glen Jones Jr of filing under seal ex parte affidavit (ABU) (Entered: 08/13/2004)
08/12/2004	36	SEALED Document re: ex parte affidavit in support of proposed budget-Phase III by petitioner Robert Glen Jones Jr (ABU) (Entered: 08/13/2004)
08/25/2004	37	SEALED Phase III Budget Order by Judge David C. Bury re: sealed order [37-1] (ABU) (Entered: 08/25/2004)
08/25/2004	38	MOTION to extend time for 45 days to file traverse by petitioner Robert Glen Jones Jr [38-1] (ABU) (Entered: 08/26/2004)
08/26/2004	<u>39</u>	ORDER by Judge David C. Bury granting motion to extend time for 45 days to file traverse by petitioner Robert Glen Jones Jr [38-1] any traverse to respondents answer shall be filed no later than 10/28/04. Any motions for evidentiary development shall be filed no later than 11/29/04. (cc: all counsel) (ABU) (ADI-ICMS,). (Entered: 08/26/2004)
08/30/2004	<u>40</u>	ORDER by Judge David C. Bury granting motion to extend time for 45 days to file traverse by petitioner Robert Glen Jones Jr [38-1] traverse now due on 10/27/04. (cc: all counsel) (ABU) (ADI-ICMS,). (Entered: 08/30/2004)
09/02/2004	<u>41</u>	ORDER by Judge David C. Bury; ordered that the clerk of the Arizona Supreme Court transmit a certified copy of petitioner's entire state court record excluding trial

		exhibits to: Capital Case Staff Attorney. Ordered that the clerk of court send a copy of this order to: Noel K Dessaint (cc: all counsel) re: order filed [41-1] (ABU) (ADI-ICMS,). (Entered: 09/02/2004)
10/18/2004	42	MOTION to extend time for 30 days to file traverse by petitioner Robert Glen Jones Jr [42-1] (ABU) (Entered: 10/20/2004)
10/22/2004	<u>43</u>	ORDER by Judge David C. Bury granting motion to extend time for 30 days to file traverse by petitioner Robert Glen Jones Jr [42-1] Any Traverse to respondents answer shall be filed no later than 11/29/04. Any motions for evidentiary development shall be filed no later than 12/29/04. (cc: all counsel) (ABU) (ADI-ICMS,). (Entered: 10/22/2004)
11/23/2004	44	MOTION to extend time to file traverse for 10 days by petitioner Robert Glen Jones Jr [44-1] (ABU) (Entered: 11/24/2004)
11/29/2004	<u>45</u>	ORDER by Judge David C. Bury granting motion to extend time to file traverse for 10 days by petitioner Robert Glen Jones Jr [44-1] Any Traverse to respondents answer shall be filed no later than 12/9/04. Any motions for evidentiary development shall be filed no later than 1/10/05. (cc: all counsel) (ABU) (ADI-ICMS,). (Entered: 11/29/2004)
12/10/2004	46	TRAVERSE by petitioner Robert Glen Jones Jr to petition for writ H/C (amended [27-1] (ABU) (Entered: 12/13/2004)
01/03/2005	47	MOTION to obtain Arizona State Bar Records by petitioner Robert Glen Jones Jr [47-1] (ABU) (Entered: 01/04/2005)
01/07/2005	49	RESPONSE by respondent to motion to obtain Arizona State Bar Records by petitioner Robert Glen Jones Jr [47-1] (ABU) (Entered: 01/10/2005)

01/10/2005	48	CASE Record received from AZ Supreme Court(3 box state court record) (ABU) Modified on 01/10/2005 (Entered: 01/10/2005)
01/12/2005	50	MOTION to extend time to file motions for evidentiary development for 45 days by petitioner Robert Glen Jones Jr [50-1] (ABU) (Entered: 01/13/2005)
01/13/2005	<u>51</u>	ORDER by Judge David C. Bury granting motion to extend time to file motions for evidentiary development for 45 days until 2/24/05 by petitioner Robert Glen Jones Jr [50-1] (cc: all counsel) (ABU) (ADI-ICMS,). (Entered: 01/13/2005)
01/18/2005	52	REPLY by petitioner Robert Glen Jones Jr to response to motion to obtain Arizona State Bar Records by petitioner Robert Glen Jones Jr [47-1] (ABU) (Entered: 01/19/2005)
02/01/2005	<u>53</u>	ORDER by Judge David C. Bury denying without prejudice motion to obtain Arizona State Bar Records by petitioner Robert Glen Jones Jr [47-1] (cc: all counsel) (ABU) (ADI-ICMS,). (Entered: 02/01/2005)
02/23/2005	54	MOTION to continue deadline for motions for evidentiary development by petitioner Robert Glen Jones Jr [54-1] (REC) (Entered: 02/24/2005)
03/01/2005	<u>55</u>	ORDER by Judge David C. Bury granting motion to continue deadline for motions for evidentiary development by petitioner Robert Glen Jones Jr [54-1] Any motions for evidentiary development shlal be filed no later than March 24, 2004. (cc: all counsel) (ABU) (ADI-ICMS,). (Entered: 03/01/2005)
05/16/2006		Notice of request for e-notices by Dale A. Baich. (Baich, Dale) (Entered: 05/16/2006)
05/16/2006		Notice of request for e-notices by Jennifer Bedier. (Bedier, Jennifer) (Entered: 05/16/2006)
09/25/2006	<u>56</u>	MOTION for Access to State's File by Robert Glen

		Jones, Jr. (Attachments: # <u>1</u>)(Maynard, Daniel) (Entered: 09/25/2006)
10/03/2006	<u>57</u>	OBJECTION <i>Respondents' Opposition to Jones' Motion for Access to State's File/Respondents' Request that this Court Resolve Claims at Issue</i> by Respondents Dora Schriro, Dora Schriro filed by Dora Schriro, Dora Schriro. (Lam, Donna) (Entered: 10/03/2006)
10/16/2006	<u>58</u>	REPLY in Support re <u>56</u> MOTION for Access to State's File filed by Robert Glen Jones, Jr. (Attachments: # <u>1</u>) (Sparks, Jennifer) (Entered: 10/16/2006)
10/30/2006	<u>59</u>	ORDER granting <u>56</u> Petitioner's Motion for Access to State file. IT IS FURTHER ORDERED that Respondents shall arrange for the Pima County Attorney's case file to be made available to Petitioner's counsel at a mutually acceptable time and place no later than 12/1/06. IT IS FURTHER ORDERED suspending application of LRCiv 7.2.(1), Rules of Practice of the U.S. District Court for the District of Arizona. Signed by Judge David C Bury on 10/27/06. (CAB,) Modified spacing on 10/30/2006 (CAB,). (Entered: 10/30/2006)
11/30/2006	<u>60</u>	STATUS REPORT <i>RE: JONES' ACCESS TO PCAO FILE</i> by Dora Schriro. (Lam, Donna) (Entered: 11/30/2006)
04/25/2007	<u>61</u>	MOTION to Compel Review of State's File by Robert Glen Jones, Jr. (Attachments: # <u>1</u>)(Sparks, Jennifer) (Entered: 04/25/2007)
05/07/2007	<u>62</u>	RESPONSE to Motion re <u>61</u> MOTION to Compel Review of State's File filed by Dora Schriro. (Lam, Donna) (Entered: 05/07/2007)
05/15/2007	<u>63</u>	REPLY in Support re <u>61</u> MOTION to Compel Review of State's File filed by Robert Glen Jones, Jr. (Sparks, Jennifer) (Entered: 05/15/2007)
06/25/2007	<u>64</u>	ORDER denying <u>61</u> Petitioner's Motion to Compel

		Review of State's File. Signed by Judge David C Bury on 6/22/07.(CAB,) (Entered: 06/25/2007)
07/02/2007	<u>65</u>	MOTION for Reconsideration by Robert Glen Jones, Jr. (Maynard, Daniel) (Entered: 07/02/2007)
07/27/2007	<u>66</u>	ORDER denying <u>65</u> Motion for Reconsideration. Signed by Judge David C Bury on 7/23/07.(CAB,) (Entered: 07/27/2007)
01/29/2010	<u>79</u>	ORDER, Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt.27) is DENIED. The Clerk of Court shall enter judgment accordingly. The stay of execution entered by the Court on 9/22/2003 (Dkt.4) is VACATED. Certificate of Appealability Issued; With regards to the following issues: Whether Petitioner has established cause to overcome the procedural default of Claim 1-A, which alleges that the prosecutor suborned perjury from detectives to bolster the credibility of Lana Irwin. The Clerk of Court forward a copy of this Order to Rachelle M. Resnick, Clerk of the AZ Supreme Court, 1501 W. Washington, Phoenix.. Signed by Judge David C Bury on 1/28/2010. (JKM) (Entered: 01/29/2010)
01/29/2010	<u>80</u>	CLERK'S JUDGMENT, Petitioner's Amended Petition for Writ of Habeas Corpus (Doc.27) is DENIED. This case is DISMISSED.. Signed on 1/28/2010. (JKM) (Entered: 01/29/2010)
02/02/2010	<u>81</u>	NOTICE of Attorney Substitution by Lacey Stover Gard adding Lacey Stover Gard,Lacey Stover Gard for Dora Schriro (Gard, Lacey) (Entered: 02/02/2010)
02/08/2010	<u>82</u>	MOTION for Extension of Time Time to File Motion for Reconsideration by Robert Glen Jones, Jr. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Text of Proposed Order)(Maynard, Daniel) (Entered: 02/08/2010)
02/09/2010	<u>83</u>	ORDER denying <u>82</u> Motion for Extension of Time to File Motion for Reconsideration. Signed by Judge David C Bury on 2/9/10.(BAR) (Entered: 02/09/2010)

02/26/2010	<u>84</u>	MOTION for New Trial <i>or Reconsideration</i> by Robert Glen Jones, Jr. (Attachments: # <u>1</u> Exhibit)(Maynard, Daniel) (Entered: 02/26/2010)
03/10/2010	<u>85</u>	ORDER as to Petitioner's <u>84</u> Motion for New Trial is DENIED in part and GRANTED in part. Motion to alter or amend the judgment is denied. Motion seeking an amended Certificate of Appealability is granted to include: Whether Petitioner has established cause and prejudice to overcome the procedural default of Claim 1, which alleges various instances of prosecutorial misconduct. Signed by Judge David C Bury on 3/9/10.(MLH) (Entered: 03/10/2010)
04/02/2010	<u>87</u>	NOTICE OF APPEAL to 9th Circuit, by Robert Glen Jones, Jr. (Maynard, Daniel) (Entered: 04/02/2010)
04/12/2010	<u>88</u>	9th Circuit Court of Appeals Case Number 10-99006 for <u>87</u> Notice of Appeal. (MLH) (Entered: 04/13/2010)
04/12/2010	<u>89</u>	TIME SCHEDULE ORDER of 9th Circuit, appeal case number 10-99006, as to <u>87</u> Notice of Appeal filed by Robert Glen Jones, Jr (MLH) (Entered: 04/13/2010)
09/20/2012	<u>97</u>	ORDER of USCA as to <u>87</u> Notice of Appeal filed by Robert Glen Jones, Jr. Appellee Charles Ryan is ordered to file a response to Appellant Jones's Petition for Panel Rehearing and Petition for Rehearing En Banc. Response must be filed no later than 21 days from the date of this order. (BAC) (Entered: 09/24/2012)
02/04/2013	<u>98</u>	Appeal Document: Supreme Court letter received. (BAC) (Entered: 02/05/2013)
04/24/2013	<u>99</u>	ORDER of USCA, The motion of appellant's appointed counsel, Daniel Maynard, for the association or substitution of counsel is granted as follows: Counsel Maynard is relieved as counsel of record and the Office of the Federal Public Defender for the District of Arizona is appointed as counsel of record as to <u>87</u> Notice of Appeal filed by Robert Glen Jones, Jr.. (JKM) (Entered: 04/24/2013)

		04/25/2013)
05/06/2013	<u>100</u>	NOTICE of Appearance by Dale A Baich on behalf of Robert Glen Jones, Jr. (Baich, Dale) (Entered: 05/06/2013)
06/17/2013	<u>101</u>	WRIT OF CERTIORARI is denied by US Supreme Court re: <u>87</u> Notice of Appeal. (JKM) (Entered: 06/26/2013)
06/26/2013	<u>102</u>	MANDATE of USCA as to <u>87</u> Notice of Appeal filed by Robert Glen Jones, Jr.. AFFIRMED. (Attachments: # <u>1</u> opinion, # <u>2</u> nef)(KAD) (Entered: 06/26/2013)
08/19/2013	<u>103</u>	MOTION for Leave to File Excess Pages for Motion for Relief from Judgment by Robert Glen Jones, Jr. (Gabrielsen, Timothy) (Entered: 08/19/2013)
08/19/2013	<u>104</u>	*(Filed at Doc. 106)LODGED Proposed Motion for Relief from Judgment. Document to be filed by Clerk if Motion or Stipulation for Leave to File or Amend is granted. Filed by Robert Glen Jones, Jr. (Attachments: # <u>1</u> Exhibit Exhibits 1-21, # <u>2</u> Proposed Order)(Gabrielsen, Timothy) Modified on 8/21/2013 (JKM). (Entered: 08/19/2013)
08/21/2013	<u>105</u>	ORDER granting <u>103</u> Motion for Leave to File Excess Pages. The Clerk of Court shall file Petitioner's lodged Motion for Relief from Judgment (Doc.104). Respondents shall file a response to Petitioner's Motion for Relief from Judgment no later than 8/30/2013. Petitioner may file a reply no later than 9/6/2013.. Signed by Senior Judge David C Bury on 8/20/2013.(JKM) (Entered: 08/21/2013)
08/21/2013	<u>106</u>	MOTION For Relief From Judgment by Robert Glen Jones, Jr. (JKM) (Entered: 08/21/2013)
08/30/2013	<u>107</u>	*Response to Motion re <u>106</u> MOTION For Relief From Judgment , filed by Dora B Schriro. (Attachments: # <u>1</u> Exhibit A - C)(Gard, Lacey) Modified on 9/3/2013

		(JKM).*Modified to correct event type on 9/3/2013. (Entered: 08/30/2013)
08/30/2013	<u>108</u>	MOTION Exceed the Page Limit by Dora B Schriro. (Gard, Lacey) (Entered: 08/30/2013)
09/06/2013	<u>109</u>	ORDER granting <u>108</u> Motion To Exceed Page Limit. The Clerk of Court shall file Respondents' Response to Motion for Relief from Judgment(Doc.107).. Signed by Senior Judge David C Bury on 9/6/2013.(JKM) (Entered: 09/06/2013)
09/06/2013	<u>110</u>	RESPONSE to Motion re <u>106</u> MOTION For Relief From Judgment filed by Terry L Goddard, Charles Goldsmith, Dora B Schriro. (JKM) (Entered: 09/06/2013)
09/06/2013	<u>111</u>	MOTION for Leave to File Excess Pages for Reply to Response to Motion for Relief from Judgment by Robert Glen Jones, Jr. (Gabrielsen, Timothy) (Entered: 09/06/2013)
09/06/2013	<u>112</u>	*(Filed at Doc.114)LODGED Proposed Reply to Response to Motion for Relief from Judgment re: <u>111</u> MOTION for Leave to File Excess Pages for Reply to Response to Motion for Relief from Judgment . Document to be filed by Clerk if Motion or Stipulation for Leave to File or Amend is granted. Filed by Robert Glen Jones, Jr. (Attachments: # <u>1</u> Exhibit Exhibit 1 & 2) (Gabrielsen, Timothy) Modified on 9/9/2013 (JKM). (Entered: 09/06/2013)
09/09/2013	<u>113</u>	ORDER granting <u>111</u> Motion for Leave to File Excess Pages. The Clerk of Court shall file Petitioner's Reply to Response to Motion for Relief from Judgment(Doc.112).. Signed by Senior Judge David C Bury on 9/9/2013. (JKM) (Entered: 09/09/2013)
09/09/2013	<u>114</u>	REPLY to Response to Motion re <u>106</u> MOTION For Relief From Judgment filed by Robert Glen Jones, Jr. (JKM) (Entered: 09/09/2013)

09/23/2013	<u>115</u>	MOTION Authorization of Counsel To Appear in Ancillary State Court Litigation by Robert Glen Jones, Jr. (Gabrielsen, Timothy) (Entered: 09/23/2013)
09/24/2013	<u>116</u>	ORDER that Petitioner's Motion for Relief from Judgment <u>106</u> is dismissed as an unauthorized second or successive petition. Signed by Senior Judge David C Bury on 9/23/13.(MAP) (Entered: 09/24/2013)
09/24/2013	<u>117</u>	NOTICE OF APPEAL to 9th Circuit Court of Appeals re: <u>116</u> Order on Motion for Miscellaneous Relief by Robert Glen Jones, Jr. (Gabrielsen, Timothy) (Entered: 09/24/2013)
09/24/2013	<u>118</u>	USCA Case Number re: <u>117</u> Notice of Appeal. Case number 13-16928, 9TH CIRCUIT COURT OF APPEALS. (JKM) (Entered: 09/25/2013)
09/25/2013	<u>119</u>	ORDER granting <u>115</u> Motion for Authorization to represent Petitioner in State Court. By issuance of this order, the Court does not purport to encourage, approve, or convey any position with respect to the merits of the proposed litigation.. Signed by Senior Judge David C Bury on 9/24/2013.(JKM) (Entered: 09/25/2013)
09/25/2013	<u>120</u>	IT IS ORDERED that the Clerk of Court shall expeditiously return the state court records received on January 10, 2005, and docketed in this Courts file as document number 48, to the Clerk of the Arizona Supreme Court, 1501 W. Washington Street, Phoenix, Arizona 85007-3329.IT IS FURTHER ORDERED that the Clerk of Court update the caption in this matter to reflect the substitution of Charles L. Ryan as Respondent in place of Dora B. Schriro.. Signed by Senior Judge David C Bury on 9/24/2013. (JKM) (Entered: 09/25/2013)

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