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

OPENING BRIEF OF PETITIONER-APPELLANT

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JURISDICTIONAL STATEMENT

Petitioner-Appellant Robert Jones ("Jones") filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, which conferred jurisdiction on the district court. After relief was denied, Jones moved for relief from judgment pursuant to Fed. R. Civ. P. 60(b). ER 172. On September 24, 2013, the district court dismissed Appellant's Motion. ER 1. The order dismissing the motion constitutes a final appealable order. *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 263 n. 7 (1978). The Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253. *See Gonzalez v. Crosby*, 545 U.S. 524 (2005).

Notice of appeal was filed on September 25, 2013, and is, therefore, timely. ER 11. *See* Fed. R. App. P. 4(a)(1)(A).[1]

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[1] The district court neither granted nor denied a certificate of appealability. While the Supreme Court stated in *Gonzalez v. Crosby*, 545 U.S. 524, 536, n. 7 (2005), that it is an open question whether a COA is required under 28 U.S.C. § 2253 (c)(1)(A) to appeal the denial of a Rule 60(b) motion, the Court has more recently ruled that a COA is necessary only with respect to "final orders that dispose of the merits of a habeas corpus proceeding." *See Harbison v. Bell*, 556 U.S. 180, 183 (2009). A Rule 60(b) motion necessarily does not dispose of the merits, but serves only to correct a defect in the proceeding that prevented the court from reaching the merits. *See Gonzalez*, 545 U.S. at 532. Appellant submits the COA is unnecessary.

Due to the expedited nature of this appeal, however, if the Court determines that a COA is necessary, Appellant requests that the Court grant it pursuant to Ninth Circuit Rule 22-1 because reasonable jurists could debate whether, in denying relief, the district court correctly applied *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309 (2012); correctly decided the conflict of counsel issue to which *Martinez* gave rise, *see Gray v. Pearson*, No. 12-5, 2013 WL 2451083 (4th Cir. June 7, 2013); and correctly applied the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), in deciding Appellant failed to demonstrate extraordinary circumstances that would allow for relief from judgment under Rule 60(b)(6).

STANDARD OF REVIEW

The Court reviews a district court's denial of a Rule 60(b) motion for abuse of discretion. *Browder*, 434 U.S. at 263 n. 7; *Lopez v. Ryan*, 678 F.3d 1131, 1133 (9th Cir. 2012). The Supreme Court has ruled that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (*en banc*) (*quoting Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)). In *Hinkson*¸ the Court "clarified" the law of this Circuit with respect to the abuse of discretion standard of review, holding:

> [W]hen we review for abuse of discretion a district court's denial of a motion for a new trial, we first look to whether the trial court identified and applied the correct legal rule to the relief requested. Second, we look to whether the trial court's resolution of the motion resulted from a factual finding that was illogical, implausible, or without sufficient inferences that may be drawn from the facts in the record.

Id. at 1263. With respect to the first prong of that test, the Court stated that "the first step of our abuse of discretion test is to determine *de novo* whether the trial court identified the correct legal rule to apply to the relief requested. If the trial court failed to do so, we must conclude it abused its discretion." *Id*. at 1261-62 (italics added).

The Court applies that test for abuse of discretion with respect to the denial of a Rule 60(b) motion. *See Towery v. Ryan*, 673 F.3d 933, 940 (9th cir. 2012) ("A court abuses its discretion when it fails to identify and apply the correct legal rule to the relief requested, or if its application of the correct legal standard was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.").

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court abused its discretion where it: 1) failed to find that Jones' § 2254 counsel operated under a *per se* conflict where he represented Jones in the state post-conviction proceedings and, therefore, could not raise his own ineffectiveness to excuse his failure to exhaust in state post-conviction proceedings the three claims of ineffective assistance of trial counsel presented here; and, 2) failed to apply the equity conferred by *Martinez* to reach the merits of the three unexhausted claims.

II. Whether the district court abused its discretion in ruling that the duty to disclose evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), does not persist into federal habeas corpus proceedings such as to constitute an extraordinary circumstance that would permit relief from judgment under Rule 60(b)(6), and that Jones merely sought to support new habeas claims with the evidence suppressed in violation of *Brady*.

STATEMENT OF THE CASE

On June 26, 1998, Jones was convicted of six counts of first degree murder and related offenses. The trial court sentenced him to death on the first degree murder counts and to terms of imprisonment. The Arizona Supreme Court affirmed. ER 102. Post-conviction relief was denied, ER 138, and the Arizona Supreme Court declined review. ER 171.

On September 19, 2003, Jones filed in the United States District Court for the District of Arizona a petition for writ of habeas corpus. Dist. Ct. Dkt. 1. An amended petition was filed on March 29, 2004. Dkt. 27. On January 29, 2010, the district court filed a Memorandum of Decision and Order in which it denied merits relief on various claims and further ruled that Jones procedurally defaulted five claims of prosecutorial misconduct. ER 14. The court granted a certificate of appealability as to whether Jones established "cause" to excuse one claim of prosecutorial misconduct. ER 81.

On February 26, 2010, Jones filed a motion for new trial or for reconsideration pursuant to Fed. R. Civ. P 59. Dkt. 84. On March 10, 2010, the court considered the motion a motion to alter or amend judgment under Rule 59(e) and denied the motion in part but expanded the certificate of appealability to consider whether Jones established "cause" to excuse all five allegations of prosecutorial misconduct. Dkt. 85 at 2, 4.

On April 2, 2010, Jones filed a notice of appeal. Dkt. 87. The Notice of Appeal was timely under 28 U.S.C. § 2107(a) and Fed. R. App. P. 4(a).

This Court denied relief on February 16, 2012. *Jones v.* Ryan, 691 F.3d 1093 (9th Cir. 2012) (ER 82). On August 29, 2012, Jones filed a petition for panel and *en banc* rehearing, Ninth Cir. Dkt. 51, which was denied on November 15, 2011. Dkt. 54.

The Supreme Court allowed an extension of time for Jones to file a petition for certiorari, and Jones timely filed the petition on April 11, 2013. *Jones v. Ryan*, U.S.S.Ct. No. 12A742. On April 19, 2013, Jones' counsel, Daniel D. Maynard, moved for the association or substitution of counsel. Ninth Cir. Dkt. 56. On April 24, 2013, this Court granted the motion, ordered Maynard relieved, and appointed the Federal Public Defender ("FPD"). Dkt. 57. The Supreme Court denied the petition for certiorari on June 17, 2013. *Jones v. Ryan*, U.S.S.Ct. No. 12-9753.

On June 25, 2013, the State of Arizona moved the Arizona Supreme Court for a warrant of execution, which was granted on August 27, 2013.

On August 19, 2013, in the district court, Jones filed an oversized Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b). ER 172. On August 21, 2013, the court ordered the motion filed. Dist. Ct. Dkt. 105. After the parties completed briefing, the court dismissed the motion for relief from judgment on September 24, 2013. ER 1.

Jones filed a notice of appeal on September 24, 2013. ER 11.

STATEMENT OF FACTS

A. Trial facts.

At Jones' trial, David Nordstrom ("David") testified he was indicted for six Tucson murders, two at the Moon Smoke Shop ("the Moon") on May 30, 1996, and four at the Fire Fighters Union Hall on June 13, 1996. ER 649. He cut a deal in which he pleaded guilty to armed robbery and agreed to testify against Jones and Scott Nordstrom ("Scott") at their separate trials in exchange for the dismissal of two first degree murder counts for events that occurred at the Moon. ER 650. David was charged with the four murders at the Fire Fighters, but those charges were dismissed. He testified against Jones and his brother, Scott Nordstrom, at their separate trials. Jones and Scott were convicted of all six homicides and sentenced to death. *See State v. Jones*, 197 Ariz. 290, 297, 4 P.3d 345, 352 (2000) (ER102); *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 171 (2002).[2]

At Jones' trial, David testified to a narrative that included riding in the middle seat of Jones' pick-up truck, between Jones and Scott. ER 594. According to David, Jones suggested they rob the Moon after they had broken into a car at a Tucson hospital and obtained a 9 mm. handgun. ER 596, 604. David had already obtained a .380 handgun from a friend, and the .380 was already in the truck. ER 589, 601. Jones drove to a location behind the Moon, where he and Scott exited to commit the robbery and instructed David to drive the truck. ER 605. Three witnesses who survived the Moon shooting testified to the shootings of one customer and one employee, but could not identify the shooters, except to say that one of them wore a long-sleeved shirt, dark sunglasses and a dark cowboy hat.

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

ER 121. David testified that Jones' clothing matched that description that day. ER 607. One survivor saw one of the gunmen move to the back room and yell, "Get the fuck out of there." The bodies of a store patron and employee were found near the front door and in a back room, respectively. David testified that he heard shots, then Jones and Scott returned to the truck and said, "Let's go." ER 606. According to David, Jones claimed to have shot two victims while Scott said he shot one. ER121. David claimed to have received some of the proceeds from the robbery. Noel Engles, one of the Moon survivors, saw a light colored pick-up truck in the alley after the shooting but he saw only two persons in the truck. Jones, ER 121. David drove in the direction of Interstate 10, entered the expressway, and drove home. ER 608.

David testified that he drove on separate occasions with Scott and Jones to ponds south of Tucson, where they disposed of the weapons. ER 619-21. David testified that on January 16, 1997, he took law enforcement to those locations, and obtained $5,000 in reward money, but they were unable to find the weapons and he was arrested upon their return to Tucson. ER 647. He immediately returned the money. ER 693-93. The 9 mm. and .380 were never found, and no physical evidence connected Jones to either the Moon or Fire Fighters.

Prior to trial, Jones moved the prosecution "to produce the following information":

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

ER 753. The prosecution tendered the following response:

> 15. E-M officers for D. Nordstrom: Fritz Evenal (sic), Rebecca Matthews, of the Department of Corrections.[3]

[3] As will be described *supra* the ADC indicated to undersigned counsel on July 29, 2013, that Behavioral Intervention, Inc. ("BI"), the manufacturer of the EMS unit

David testified he was on an electronic home monitoring system ("EMS") after his release from prison in 1995, and his compliance with curfew while on EMS was checked by Fritz Ebenal, a parole officer with the Arizona Department of Corrections ("ADC"). ER 579. David testified that he returned home a half hour before curfew on June 13, 1996, after working that day and being driven home by Scott. ER 614. He testified he was awakened by Jones late that night, and Jones indicated that he and Scott had robbed the Fire Fighters and killed four people. ER 617.

Ebenal testified that he was David's parole officer. ER 193. He described the EMS unit used to monitor David as a transmitter on a rubber ankle bracelet. ER 193-94. It had a particular serial number. ER 197. When David goes home and plugs in the Field Monitoring Device, "the transmitter is automatically picked up by the FMD, and the phone line calls us and tells us he's there and it's hooked up and whether or not it's a good connection or not." Ebenal identified computer printouts that purported to show David's compliance with his curfew for dates during his parole, as well as violations. Ebenal testified that records showed David was not in violation of curfew on either May 30 or June 13, 1996. ER 214.

The prosecution's other key witness was Lana Irwin, who testified to having overheard Jones tell her boyfriend, Stephen Coats, that he killed four people in Tucson. *Jones*, 4 P.3d at 354; Tr. 6/19/98 (a.m.) at 46. She also purportedly heard Jones say a door at one crime scene needed to be kicked in, that victims fled to a back room, that women were killed in a bar or restaurant who were not supposed to be there and that the room in which it occurred was red. ER 20. The state post-conviction court later ruled that two police officers, Brenda Woolridge and Joseph Godoy, testified falsely that perpetrators kicked in a door at the Moon, and that Godoy had testified at Scott Nordstrom's trial eight months earlier that police had

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used to monitor David's curfew, "the inmate was monitored by BI and the monitoring system was maintained electronically by BI." ER 142.

kicked in the door. ER 22-25. Irwin was impeached at trial with illegal drug use, her having had criminal charges dismissed, her having been administered three psychotropic medications for manic-depressive disorder, and a history of head injuries. Tr. 6/19/98 (a.m.) at 56-60. Prosecutor David White stated in closing argument that the officers' testimony concerning the kicked-in door corroborated Irwin's testimony. ER 23-24.

The jury returned a guilty verdict on June 26, 1998.

B. Sentencing facts.

On December 7, 1998, after finding Jones eligible for the death penalty, the trial court addressed the non-statutory mitigating factors proffered by Jones in his sentencing memorandum. ER 464. The court found that Jones presented evidence of his dysfunctional family, including that he and his mother were physically and emotionally abused by his step-father, Ronald O'Neil. ER 465. The court also noted that Jones presented evidence his mother physically abused him, that they moved often and he dropped out of school. *Id*. The court also found photos of Jones were admitted that depicted him as "a happy child in a normal childhood circumstance." *Id*.

The court concluded:

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

ER 465-66 (emphasis added).

The court noted that it "independently reviewed" the trial record and presentence report for the presence of additional statutory and non-statutory

mitigating evidence and made findings that included that Dr. Jill Teresa Caffrey found that Jones "suffers from antisocial personality disorder, has a history of drug use, and a somewhat low IQ." ER 471. The court noted that the personality disorder was "exhibited by his inability to live successfully in accord with society's rules." *Id*. The court also stated:

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

ER 472.

The court imposed sentences of death on each of the six murder counts. ER 473-74.

C. Direct appeal facts relevant to the present appeal.

The Arizona Supreme Court affirmed Jones' convictions for first degree murder and the imposition of the death penalty. ER 102. The Court engaged in independent re-weighing of non-statutory mitigating evidence. ER 136.

With respect to the evidence of Jones' dysfunctional family, the court ruled that "[a] dysfunctional family history may be a mitigating factor if it has a relationship to or affects the defendant's behavior at the time of the crime." *Id*. at 368. The reviewing court found that "although this factor has been proven by a

preponderance of the evidence, the trial court properly gave it no mitigating weight." *Id*.

With respect to substance abuse history, the court found that mistreatment of Jones "led him to spend most of his life under the influence of drugs. As already noted, however, no evidence showed he was intoxicated at the time of the murders. Therefore, although this factor has been proven by a preponderance, of the evidence, the trial court properly gave it no mitigating weight." *Id*.

D. State post-conviction relief ("PCR") proceedings.

Daniel D. Maynard and Jennifer Sparks were appointed to represent Jones in the PCR proceedings.[4] Maynard raised 13 claims of trial counsel's ineffectiveness in the PCR petition. ER 419-427. He also raised a claim of ineffective assistance of direct appellate counsel as "cause" to excuse the failure to raise in the state PCR proceedings claims of prosecutorial misconduct. ER 429. The PCR claims relevant to this appeal are discussed *supra*.

E. Federal habeas corpus and appeal.

As the district court noted, Appellees' conceded that all 13 claims of ineffective assistance of trial counsel raised in the § 2254 petition were exhausted in state court. ER 40. The district court denied relief on all those claims and granted a COA on the claim that ineffective assistance of direct appellate counsel constituted "cause" to excuse the failure to raise the claim that prosecutors suborned perjury from Officers Woolridge and Godoy to bolster the testimony of Lana Irwin. ER 78. On Jones' Rule 59(e) motion, the court expanded the COA to include all claims of prosecutorial misconduct raised in the habeas petition. U.S.D.C. Dkt. 85 at 4.

[4] For ease of reference and because Mr. Maynard served as lead counsel in the state post-conviction and federal habeas matters, Jones simply refers to counsel in his Opening Brief as "Maynard."

This Court denied relief on August 16, 2012. *Jones v. Ryan*, 691 F.3d 1093 (9th Cir. 2012). As noted above, Maynard filed a petition for writ of certiorari on April 11, 2013. *Jones v. Ryan*, U.S.S.Ct. No. 12-9753. Maynard moved this Court for the association or substitution of the Federal Public Defender ("FPD") on April 19, 2013. Dkt. 56. The Court granted the motion on April 24, 2013, and appointed undersigned counsel. Dkt. 57. The Court ordered Ms. Sparks relieved on that same date. Dkt. 59. Certiorari was denied on June 17, 2013.

F. The Motion for Relief from Judgment.

On August 21, 2013, Jones filed the motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). ER 172. The Motion alleged two theories for relief from the district court's judgment of January 29, 2010: 1) the Supreme Court's recent decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and other equities present in the case met the requirements of the Court's Rule 60(b) "change-in-the-law" jurisprudence under *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009); and, 2) Appellees' continued suppression of evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), into the federal habeas case, which would have substantially undermined David Nordstrom's EMS Fire Fighter's Union Hall alibi, constituted a defect in the district court's consideration of the prejudice prong of a claim raised in the § 2254 petition. Dkt. 106.

1. Relief from judgment based on *Martinez*.

Martinez allows a habeas petitioner to establish ineffective assistance of PCR counsel as "cause" to excuse the failure to exhaust claims of ineffective assistance of trial counsel in the PCR proceedings. *Martinez*, 132 S.Ct. at 1313. Jones' alleged that *Martinez* served to excuse the procedural default of three procedurally defaulted constitutional claims. ER 94-115. Two claims alleged ineffective assistance of counsel under *Strickland v.* Washington, 466 U.S. 668 (1984), at the guilt phases.

One claim alleged trial counsel's failure to challenge the guilt phase testimony of key prosecution witness David Nordstorm and the admission of his EMS alibi, which had not previously been found to meet the standard for admissibility under *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923). The trial court had conditionally ruled was inadmissible because the prosecution had not meet the foundation requirement for its admission under state evidence law because no witness testified that a pretrial test of Nordstrom's EMS unit by Detective Woolridge and ADC parole supervisor Matthews was not performed with the actual EMS components used to monitor Nordstrom. ER 99-106.

The second claim alleged trial counsel's ineffectiveness for failure even to interview the other party to Jones' purported conversations with Lana Irwin, Stephen Coats. ER 106-110. Coats has averred that the conversations supposedly overheard by Irwin did not contain the inculpatory subject matter to which she testified. ER 436-37.

The third claim alleges trial counsel's ineffectiveness for failure to object to the state sentencing court's application of an unconstitutional causal nexus test, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). ER 110. Jones alleged the sentencing court's invocation of the causal nexus test prevented it from weighing non-statutory mitigating evidence of Mr. Jones' history of drug abuse, which would have mitigated the present offenses and others used in aggravation, his having been physically abused and exposed to the physical abuse of his mother when he was a child, and a diagnosed personality disorder. ER 111-12.

The three claims described above were not exhausted in state court or raised in § 2254 proceedings but, as Jones argued in the Rule 60(b) motion (ER 94-96), would now be considered "technically exhausted but procedurally defaulted," as noted in the Court's Memorandum of Decision and Order. ER 17. In other words, those claims should be considered procedurally defaulted for Martinez purposes just as unexhausted claims that *were* raised in a § 2254 petition.

Jones alleged there are two reasons why Jones is entitled to restoration of the *status quo ante* so that he may either supplement his § 2254 petition with those claims or to plead those claims in what should, as a matter of law, be considered a first § 2254 petition: 1) the rights in equity conferred by *Martinez* necessarily include restoration to the *status quo ante* and allow the pleading of claims that, prior to *Martinez* were not available due to the default; and, 2) the change in procedural jurisprudence also rendered Mr. Jones' § 2254 counsel conflicted where he also represented Mr. Jones in PCR proceedings and could not raise his own ineffectiveness to establish "cause" to excuse *his* failure to exhaust claims of trial counsel's ineffectiveness in state court. ER 84-85.

2. Relief from judgment based on the violation of *Brady*.

Jones alleged that the FPD's investigation of David Nordstrom revealed a likelihood that either the Pima County prosecutor knew of deficiencies in the EMS systems of Behavioral Intervention, Inc. ("BI"), of Boulder, Colorado, the manufacturer of the unit used by the parole division of the Arizona Department of Corrections ("ADC") on David Nordstrom, *or* failed to inquire of BI, or have ADC, who contracted with BI for EMS services, inquire whether there were deficiencies that would have refuted Nordstrom's alibi, inculpated Nordstrom and exculpated Jones. ER 85-87. Unknown to Jones until his state PCR proceedings, a woman related to a Fire Fighters victim went to Prosecutor David White before trial to complain that David Nordstrom should not be given a pass on the Fire Fighters homicides due to his electronic alibi because she, too, had her parole monitored in Pima County at that time and she was able to defeat her EMS device. ER 123 (Rule 60(b) Motion); ER 487-94 (2009 newspaper article re: Scott Nordstrom's re-sentencing & 1997 Pima County Attorney investigative report).

In addition, Appellees were on notice that the functioning of the BI EMS system was being investigated by undersigned counsel as part of an ineffective assistance claim. Undersigned counsel sent a public records request to ADC on

July 2, 2013. ER 137-38. In a letter of July 29, 2013, ADC indicated that BI was responsible for monitoring parolees such as Nordstrom with BI's equipment. ER 142. Jones argued that the duty of disclosure under *Brady* attached to Appellees when the case entered PCR proceedings and continued in federal court because Appellees were on notice that the functioning of the EMS system was at issue. *See Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992).

The district court dismissed the *Martinez* claims on the basis that they constitute new habeas claims for which authorization to file a second or successive petition must be obtained from this Court pursuant to the Antiterrorism and Effective Death Penalty Act of 196 ("AEDPA"), 28 U.S.C. 2244(b)(3). ER 1, 7 (*citing Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005)).

The district court dismissed the *Brady* claim for two reasons. First, the court ruled that "it is highly questionable whether the type of evidence Petitioner alleges Respondents should have procured and disclosed has any relevance to the IATC [ineffective assistance of trial counsel] claims raised in his federal petition." ER 8. Second, the court ruled that "Respondents were under no duty to disclose the allegedly exculpatory material during these federal habeas proceedings." ER 9 (*citing Dist. Attorney's Office for the Third Judicial Dist. V. Osborne*, 557 U.S. 52, 68-69 (2009)).

SUMMARY OF ARGUMENT

A. The *Martinez* claims require relief from judgment.

The district court misconstrued Jones' claim to be only a conflict of counsel claim, rather than Jones' claim of that a *per se* conflict serves as one of two distinct grounds for granting relief from judgment under *Martinez* once a finding has been made that Rule 60(b) relief is appropriate under the tests announced in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), and *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). The court abused its discretion in failing to find a *per se* conflict of interest

and in failing to apply the additional equities pleaded by Jones in the Rule 60(b) Motion that prove why he is entitled to relief from judgment under *Phelps* as a result of the change in the law in *Martinez*.

1. Jones' § 2254 counsel was conflicted *per se*.

The district court's order dismissing the Rule 60(b) motion rejected Jones' contention that *Martinez*, 132 S.Ct. 1309, rendered his § 2254 counsel conflicted *per se* because he could not raise his own ineffectiveness in the state PCR proceeding, which required that his new § 2254 counsel be permitted to plead the three additional claims of ineffective assistance of counsel outlined above without treating those claims as second or successive under 28 U.S.C. § 2244(b)(3). The district court's decision conflicts with an exceptionally well-reasoned and persuasive decision of the Fourth Circuit in *Gray v. Pearson*, No. 12-5, 2013 WL 2451083 (4th Cir. June 7, 2013), which recognized that the petitioner's "unique circumstance" caused by *Martinez*, *id*. at *2, required, as a matter of law and ethics, that a capital appellant asking for a change of counsel in § 2254 proceedings must be granted independent counsel and allowed to plead new claims, even yet unidentified claims, of ineffective assistance of trial counsel. That is so despite counsel's having raised some claims of ineffective assistance of trial counsel in the state and federal post-conviction proceedings and the petitioner's not having apprised the court what additional claims *could be raised*. *Id*. at *3.

In addition, the claims are not second or successive because the equity conferred by *Martinez* must also recognize that, until *Martinez*, § 2254 counsel had no basis for including the claims in a petition because the law of this Circuit would have barred consideration of their merits under *Coleman v. Thompson*, 501 U.S. 722 (1991). *See Smith v. Baldwin*, 510 F.3d 1127, 1146-47 (9th Cir. 2007); *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9th Cir. 1996). The district court in Arizona warns capital petitioners that the failure to exhaust a claim will result in the claim

later being ruled to be "technically exhaust but procedurally defaulted," as the court informed Jones here. ER 17 (*quoting Coleman*, 522 U.S. at 732, 735 n.1). Thus, these three claims are unexhausted and subject to the "cause" inquiry of *Martinez* but should be treated as though they *were* presented in the § 2254 petition and now available for consideration on their merits to the same extent they would be if PCR Counsel Maynard had raised them in the § 2254 petition.

3. The matter should be remanded.

Although not considered in the district court's dismissal order, Jones reiterates he has made a showing of "good cause" under Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts with respect to the claim that trial counsel rendered ineffective assistance for not challenging the admissibility of the EMS evidence on *Frye* grounds. He should be permitted discovery from BI, which has not responded to an informal request for records, in order to prove the unreliability of BI's Model 9000 and, therefore, its lack of acceptance in the scientific community. The Lana Irwin claim requires an evidentiary hearing because Appellees have challenged the credibility of Stephen Coats, who has averred that Irwin's trial testimony was false as to statements she purportedly heard Jones make to Coats. ER 605. Because remand is required, the district court will also have the opportunity to rule on the merits of the causal nexus claim.

B. *Brady* was violated in the § 2254 proceedings and it meets the extraordinary grounds test for relief under Rule 60(b)(6).

While the case law is meager with respect to whether a *Brady* violation is sufficiently extraordinary to allow relief under Rule 60(b), Jones identified one case where the district court granted relief from judgment and ordered a hearing on the materiality component of a *Brady* claim. ER 842. *See Andazola v. Woodford*, No. C-07-6227-PJH, 2009 WL 4572773, at *1 (N.D.Cal. Dec. 4, 2009). Jones

seeks relief from judgment so that he may attempt to flesh out the contours of a claim that Respondents' withholding of *Brady* material with respect to David Nordstrom's EMS alibi constituted a defect in the consideration of his § 2254 claims that warrants relief under Rule 60(b)(6).

The district court ruled *Brady* does not extend to § 2254 proceedings, citing *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68-69 (2009). ER 9. It is Jones' position that *Osborne* is distinguishable in one extremely important way and that the duty of disclosure continued with Appellees in the § 2254 proceedings. *Osborne* assumed the fairness of the underlying conviction, which occurred before DNA testing became available that gave rise to the *Brady* claim. *Id*. at 69. *Osborne* may not have eliminated the state's obligation to disclose exculpatory information once the case has reached federal habeas corpus where either the trial was *unfair* or where the *Brady* evidence is relevant to a purpose other than pleading a habeas claim in the first instance.

Jones' trial was unfair due, in part, to two prior *Brady* violations. In the first, the prosecution falsely responded that only ADC personnel performed the electronic monitoring of David Nordstrom. ER 760. The second occurred when the prosecution failed to produce at trial the report detailing the complaint of a Fire Fighters victim's relative that she evaded detection of parole curfew violations while on, what proved to be, a BI EMS unit. ER 489. The state PCR court and the district court identified significant prosecutorial misconduct for which this Court failed to grant relief, ER 28-32, although each found insufficient prejudice to Jones due to the testimony of David Nordstrom and Lana Irwin.

The ADC, whose director was a Respondent in the district court and is an Appellee here, disclosed on July 29, 2013, that David Nordstrom's EMS was being monitored by BI and not simply by two ADC personnel at the time of the Fire Fighters. ER 235. That conflicts with the pretrial discovery response that only two

ADC parole personnel monitored Nordstrom's parole. Jones alleges that Appellees had at least constructive knowledge of what was in the files they inherited from the Pima County Attorney at the onset on the state PCR proceedings, which they should have investigated when Jones' began to contest Nordstrom's credibility in the PCR proceedings. Jones seeks evidentiary development, including discovery, with which to determine whether *Brady* was violated.

ARGUMENT

I.

The district court abused its discretion where it: 1) failed to find that Jones' § 2254 counsel operated under a *per se* conflict where he represented Jones in the state post-conviction proceedings and, therefore, could not raise his own ineffectiveness to excuse his failure to exhaust in state post-conviction proceedings the three claims of ineffective assistance of trial counsel presented here; and, 2) failed to apply the equity conferred by *Martinez* to reach the merits of the three unexhausted claims.

Jones' alleged in his Motion for Relief from Judgment that the Supreme Court's change in its procedural law in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), establishes Jones' right to relief from judgment in this habeas corpus case under Fed. R. Civ. P. 60(b)(6) pursuant to this Court's change-in-the-law jurisprudence in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). ER 176. The district court largely ignored *Martinez* and the test set forth in *Phelps* and in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), for when relief from judgment may be granted in a federal habeas corpus case under Rule 60(b)(6), based on a change in the law, but focused on Jones' corollary argument that the *per se* conflict of Jones' § 2254 counsel, to which *Martinez* gave rise, constituted "extraordinary circumstances" that meet the

requirements of *Gonzalez* for relief under Rule 60(b) and allow him to plead the new claims. ER 5-7.

The court ruled that, because the motion seeks to raise new claims, it constitutes a second or successive petition that may not be considered by this Court absent authorization from the Court of Appeals for the Ninth Circuit." ER 1. It further cited *Gonzalez* for the proposition that "a legitimate Rule 60(b) motion '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 proceeding.' 545 U.S. at 532." ER 4.

The district court has taken too narrow a view of "defect," as *Gonzalez*, like *Phelps*, also contemplated that a change in some procedural law could constitute an extraordinary circumstance sufficient to permit relief from judgment in a federal habeas case. Apart from its conflict analysis, the court failed to address Jones' contentions that the equitable principles that informed the Supreme Court's decision in *Martinez* should restore Jones' federal habeas proceeding to the *status quo ante*, which should allow Jones to plead claims not as second or successive claims but as though he were raising them in a first petition or amending them, and that the statute of limitations of the AEDPA, 28 U.S.C. § 2244(d), which is not jurisdictional, could be equitably tolled, as the Supreme Court has permitted previously. ER 177, 829-30.

With respect to the change of law, the only aspect of Jones' Rule 60(b) Motion addressed by the district court in its brief order was the portion of the argument that discusses why Jones' §2254 counsel, Daniel Maynard, could not ethically or practically investigate and allege his own ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984), as he would have been required to do under *Martinez*, to secure relief on unexhausted claims. Jones treats in Argument I the district court's rejection of his argument that a *per se* conflict of

interest on the part of his § 2254 counsel should operate to restore Jones' federal proceeding to the *status quo ante* and allow him to plead federal claims that have not been previously raised.

A. The law of *Martinez* and its retroactivity.

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

Martinez announced a two-pronged test for whether PCR counsel's ineffectiveness constitutes "cause": 1) whether PCR counsel rendered ineffective assistance in failing to raise the claim of trial counsel's ineffectiveness; and, 2) whether the underlying claim of trial counsel's ineffectiveness is a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 1318-19. The standard for whether the underlying ineffective assistance claim is "substantial" is whether reasonable jurists could debate its merits. *Id.* (*quoting* the standard for the granting of a certificate of appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). Thus, Jones had a right to have his § 2254 counsel assert the ineffective assistance of PCR counsel as cause to excuse the failure to exhaust claims of ineffective assistance of counsel in the state PCR courts.

Appellees argued in opposition to the Rule 60(b) Motion that "*Martinez* did not constitute a change in the law *applicable to this proceeding*; Jones did not present the claims in question, [the district court] did not find them procedurally

defaulted, and, as a result, Jones never attempted to show cause and prejudice through PCR counsel's ineffectiveness." ER 597 (italics in original). Appellees continued that "[w]hether this is attributable, as Jones suggests, to the ethical conflict of habeas counsel (who was also PCR counsel) is irrelevant." *Id*.

The district court rejected Jones' conflict claim and agreed with Appellees that the conflict produced by *Martinez* was irrelevant because the proceedings in the district court concluded two years before *Martinez* was decided and because counsel "pursued twelve [claims of ineffective assistance of trial counsel]," which distinguishes this case from those in which a sufficiently egregious conflict could "haunt the integrity of a first federal habeas proceeding." ER 6 (citation omitted). The court stated that it was not persuaded "that the integrity of [Jones'] federal habeas proceeding was undermined as a result of state PCR counsel' continued representation of him from state to federal court." *Id*.

B. The Fourth Circuit's persuasive case for a *per se* conflict in *Gray* .

Each of Appellees' arguments and the points upon which the district court relied for decision for rejecting a *per* se conflict standard are rejected in a Fourth Circuit case Jones cited in the Motion for Relief from Judgment, which the district court did not address. In *Gray v. Pearson*, 2013 WL 2451083, a capital petitioner, brought ten claims of ineffective assistance of trial counsel in the state PCR petition. *Id*. at *1. Relief was denied, and that decision was affirmed on appeal. The district court appointed the same counsel in the § 2254 proceeding. The court denied relief but granted a COA on one substantive claim and the claim that the decision in *Martinez* required the court to appoint "independent counsel" on the § 2254 case. *Id*.

In the Fourth Circuit, Gray argued, *with new counsel and without counsel advancing any new defaulted claim of ineffective assistance of trial counsel*, that, under the reasoning and holding of *Martinez*, "he is entitled to counsel who could

vigorously examine and present *if available* potential claims of ineffective assistance of counsel by those very counsel in his state habeas proceedings." *Id*. (italics added). The Fourth Circuit ruled this was "a correct reading of *Martinez*." *Id*. The court noted the change in the law that now allows a petitioner to established "cause" to excuse a failure to exhaust if the PCR proceeding is the first time a petitioner can, consistent with state law, bring an ineffective assistance of trial counsel claim. *Id*. at *2.

Gray contended that *Martinez* applied to his case, "and that his unique circumstance require[d] the appointment of new counsel to enable him to investigate *any available Martinez claims*." *Id*. (italics added). Gray further argued:

> that because he has been represented by the same counsel in both state and federal post-conviction proceedings, he is unable to identify any potential *Martinez* claims and to rely thereon to assert "cause" to excuse any such otherwise defaulted claims because in order to do so his current counsel would be required to argue their *own* ineffectiveness in their representation of him in state post-conviction proceedings. Gray maintains that such a task would create a conflict of interest that contravenes his counsels' professional ethical duties and thereby corrode their duty of vigorous representation.

Id. at *3.

The court found unpersuasive the warden's arguments in opposition that there was no conflict, that habeas counsels' duties did not change as a result of *Martinez*, and that if prior PCR and § 2254 counsel viewed a claim, they presented it without the need for independent counsel. *Id*. The court concluded:

> We find that a clear conflict of interest exists in requiring Gray's counsel to identify and investigate potential errors that they themselves may have made in failing to uncover ineffectiveness of trial counsel while they represented Gray in his state post-conviction proceedings; the conflict is anything but "theoretical." J.A. 1634. Indeed, the Virginia State Bar Ethics Counsel advised Gray's counsel

> that they are ethically barred from investigating their own ineffectiveness. J.A. 1695.

Id. at *3.

Maynard did not and could not seek the relief Mr. Jones seeks here pursuant to *Martinez* because he could not ethically or practically bring claims of his own ineffectiveness, even if he later discovered and sought to raise the claims he overlooked earlier. At a minimum, Maynard may have suspected that some federal claim went uninvestigated or not presented by him in either the state PCR or § 2254 proceeding, as the ground he stated for withdrawing was that "Mr. Jones has always maintained his innocence and his counsel needs to conduct a thorough investigation into the two witnesses against him." Ninth Cir. Dkt. 56 at 4. That implied the investigation had not yet occurred, which might constitute an ethical breach of the sort that appears to have motivated the request for substitution in *Gray*.

Just recently, and as a result of *Martinez*, the state moved in the federal district court in Nevada for the removal of capital habeas corpus counsel where she also represented the petitioner in state PCR proceedings. *Bergna v. Benedetti*, No. 3:10-CV-00389-RCJ, 2013 WL 3491276, at *2 (D.Nev. July 9, 2013). The court granted the request, noting that "[f]ollowing *Martinez*, there in truth can be no dispute that petitioner does not currently have conflict-free counsel. Following *Martinez*, competent federal habeas counsel would review the state proceedings to determine whether there were (a) possible additional claims of ineffective assistance of trial counsel that (b) were not pursued by state post-conviction counsel through inadequate assistance." *Id*. at *2. Counsel from the FPD's office represented the petitioner as private counsel in his earlier state PCR proceedings.

The reason for a rule that finds a *per se* conflict is that there is strong disincentive for an attorney to seek evidence and argue his own ineffectiveness. This Court recognized as much in *United States v. Del Muro*, 87 F.3d 1078, 1080

(9th Cir. 1996). *Cf. Abbamonte v. United States*, 160 F.3d 922, 925 (2d Cir. 1998) (an attorney is generally disinclined to "seek out and assert his own prior ineffectiveness," excusing procedural default on an ineffective assistance of trial counsel claim in a § 2255 proceeding). Those federal rulings are in accord with the Arizona Supreme Court's view of conflict where the same counsel represents a defendant in successive stages of criminal proceedings. *See State v. Bennett*, 213 Ariz. 562, 566 (2006).

The Court's *de novo* review is particularly apt here because this is a question of first impression as to whether *per se* conflict principles apply, which requires this Court "to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal concerns," which then means that "the concerns of judicial administration will favor the appellate court." *Hinkson*, 585 F.3d at 1260.

C. The Supreme Court and this Court has applied *Martinez* retroactively.

The district court's ruling that *Martinez* does not apply to Jones because it denied relief in his case *two years prior to the decision in Martinez* is misplaced. The *Martinez* Court gave its decision full retroactive effect. *Martinez*, 132 S.Ct. at 1321 (remanding to "determine whether Martinez' attorney in his first state collateral proceeding was ineffective and whether his claim of ineffective assistance of trial counsel is substantial."). *See Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 90, 96 (1993) ("[W]e hold that this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision."). The Supreme Court clearly evinced its intention that its decision be made applicable to cases pending beyond the district courts. Six days after *Martinez* was decided, the Court granted certiorari, vacated decisions, and remanded five federal habeas cases to the United States Courts of Appeals for the Fifth, Sixth and Ninth Circuits for reconsideration in light of

Martinez. *See Smith v. Colson*, No. 10-8629, 2012 WL 986816 (U.S. Mar. 26, 2012); *Cantu v. Thaler*, No. 10-11031, 2012 WL 986818 (U.S. Mar. 26, 2012); *Middlebrooks v. Colson*, No. 11-5067, 2012 WL 986820 (U.S. Mar. 26, 2012); *Newbury v. Thaler*, No. 11-6969, 2012 WL 986822 (U.S. Mar. 26, 2012); *Woods v. Holbrook*, No. 11-7978, 2012 WL 986823 (U.S. Mar. 26, 2012).

After the Supreme Court's decision, this Court remanded *Martinez*, a non-capital case, to the district court for application of the Court's new rule. *See Martinez v. Ryan*, 680 F.3d 1160 (9th Cir. 2012). This Court has stayed multiple Arizona capital § 2254 appeals, including oral argument, and remanded to the district court for consideration of cause and prejudice under *Martinez*. *See Lopez v. Ryan* No. 09-99028, Doc. No. 56. The Court has also affirmed the denial of habeas relief but remanded nonetheless for consideration of cause to excuse the default resulting from PCR counsel's failure to investigate and present entire claims or even facts supporting a claim of ineffectiveness of trial counsel. *See Runningeagle v. Ryan*, 686 F.3d 758 (9th Cir. 2012); *Runningeagle*, Ninth Cir. No. 07-99026, Dkts. 55 at 12-15, 59-1. This Court, sitting *en banc*, heard argument on June 24, 2013, on the parameters of the application of *Martinez* in an Arizona capital habeas appeal. *See Dickens v. Ryan*, Ninth Cir. No. 09-99017, Dkts. 69, 73, 89 (argued and submitted). At least one capital habeas appeal has been stayed for the explicit purpose of awaiting the *en banc* decision in *Dickens*. *See Gallegos v. Ryan*, Ninth Cir. No. 08-99029, January 8, 2013, Dkt. 56 (court vacated the submission of a capital appeal one and one-half years *after* oral argument, pending the *en banc* consideration in *Dickens*).

D. Equity requires that Jones' claims be treated as if they were raised in the § 2254 petition but ruled to be unexhausted.

Apart from not finding a *per se* conflict, the district court abused its discretion by failing to consider Jones' argument that equity conferred by *Martinez* also required that Jones' three ineffective assistance of trial counsel claims be

treated, for *Martinez* purposes, as though they *were* raised in the § 2254 proceedings and found to be unexhausted, to the full extent they would be were Maynard to have raised them in the § 2254 petition.

Doctrinally, there is no principled way to treat the claims any differently. Consistent with the district court's Memorandum of Decision and Order and established federal law, Maynard failed to exhaust them in the state courts, and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." ER 16-17 (*citing Coleman v. Thompson*, 501 U.S. 722, 735 (1991); *Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998). *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). Because there are not state court remedies available, the district court stated that such claims would be "technically exhausted but procedurally defaulted." ER 17. *See Martinez v. Schriro*, U.S.D.C. No. CV-05-1561-PHX-EHC, Dkt. 88 at 6 (March 20, 2008) ("[i]f no remedies are currently available pursuant to Rule 32, the claim is 'technically' exhausted but procedurally defaulted"; *Gulbrandson v. Stewart*, U.S.D.C. No. CV-98-2024-PHX-SMM, Dkt. 46 at 4 (August 30, 2000) (same).

As is true here after *Martinez*, a petitioner with a technically exhausted but procedurally defaulted claim must show cause and prejudice for the federal courts to reach the merits. *See Ortiz*, 149 F.3d at 931. Jones seeks to employ *Martinez* to do so here.

That *Martinez* would find a right in equity to relieve a federal habeas petitioner of the procedural default of claims of ineffective assistance of trial counsel more than twenty years after *Coleman* further requires a remedy in equity for not pleading defaulted claims in the § 2254 petition. Although the question of whether there is a constitutional right to the effective assistance of PCR counsel was left "open" in *Coleman*, this Court historically viewed *Coleman* as denying the

remedy later announced in *Martinez*. *See Smith*, 510 F.3d at 1146-47; *Bonin*, 77 F.3d at 1159.

Jones' claims should not be considered second or successive. As Jones suggested in the Reply to Response to Motion for Relief from Judgment, the Supreme Court has not always characterized a second-in-time petition as second or successive and there are vehicles available for him to present these claims to the district court on remand. *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)."

Appellees argued that such remedies would not help Jones because his claims are now time-barred by the AEDPA's statute of limitations. 28 U.S.C. § 2244(d). ER 600. However, the Supreme Court and this Court have previously recognized that equity can toll the one-year statute of limitations under various circumstances. *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). The conflict of counsel and the equity conferred by *Martinez* should apply to toll the statute of limitations.

II.

The district court abused its discretion in ruling that the duty to disclose evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), does not persist into federal habeas corpus proceedings such as to constitute an extraordinary circumstance that would permit relief from judgment under Rule 60(b)(6), and that Jones merely sought to support new habeas claims with the evidence suppressed in violation of *Brady*.

A. The district court abused its discretion in finding the requested *Brady* material was irrelevant to claims pleaded in the § 2254 petition.

Jones exhausted in the state PCR proceedings claims that trial counsel rendered ineffective assistance for failure to both impeach Nordstrom and to effectively challenge his EMS alibi with other witnesses, and those claims were pleaded in the district court in the habeas proceeding. ER 44-49. The district court characterized the claim as to Nordstrom's alibi as follows:

> Petitioner argues that counsel failed to effectively challenge David Nordstrom's alibi that he could not have been present during the Union Hall murders because the electronic monitoring system indicated he was at home. (Dkt. 27 at 29) Specifically, Petitioner contends that counsel should have more effectively challenged Ebenel's (sic) and Matthews's testimony about the electronic monitoring system used to verify David's whereabouts. (*Id*. at 29-30) Petitioner also contends that additional witnesses could have testified that Petitioner was sometimes out past curfew. (*Id*. at 30).

The Court ruled on the habeas claims that Jones could not prove a reasonable probability of an acquittal. ER 49. The court ruled that the state PCR court was not unreasonable in concluding that Ebenal and Matthews were effectively cross-examined. ER 48. Of significance here, the district court found that even if Jones' trial counsel called the additional witnesses suggested, "it does not establish there were *unrecorded* curfew violations." *Id*. (italics in original).

It is, of course, Jones' contention here that David, not Jones, committed the homicides and that there may have been *unrecorded* curfew violations. A relative of one of the Fire Fighters victims informed the prosecution that she had *unrecorded curfew violations* where she evaded EMS detection in Pima County prior to Jones' trial, and she was concerned David Nordstrom might unfairly avoid responsibility for the Fire Fighters homicides. ER 582. Pima County Attorney Investigator Steve Merrick had investigated her complaint and noted in a June 16, 1997, report that the witness was admitted to house arrest by Pima County in May 1997 and she was monitored by a BI system. ER 582, 586. That report was not disclosed prior to trial and was only disclosed on June 14, 2002, in state PCR proceedings. ER 582.

It is not clear whether counsel for Appellees, the Arizona Attorney General, or the Pima County Attorney produced the report, but the Attorney General certainly had at least constructive notice of that *Brady* violation after it assumed responsibility for defending against Jones' PCR petition in 2002. The state court record reflects that the State was represented by Assistant Attorney General Bruce M. Ferg in *State v. Jones*, Pima Co. No. CR-57526, for example on the Response to Petition for Post-Conviction Relief, Dkt. 56, at 21-24, where Appellees contested the very issues being prosecuted here with respect to David Nordstrom's credibility and alibi.

In addition, Jones placed before the district court research recently obtained on the internet that shows that, around the time of the Moon and Fire Fighters homicides and thereafter, there were press accounts that BI units malfunctioned in other jurisdictions. Most prominent among those reports was that a girl was murdered by her boyfriend in Florida where one of BI's units failed to detect the perpetrator's curfew violation. ER 245. BI was forced to testify at the criminal proceeding, which it moved to seal on the basis that testimony would be adduced that would show how an offender could "slip out of the ankle monitor." ER 252.

A federal district court in California has granted relief from judgment under Rule 60(b)(6) based on a violation of *Brady*. *See Andazola v. Woodford*, No. C-07-6227-PJH, 2009 WL 4572773, at *1 (N.D.Cal. Dec. 4, 2009). Jones seeks relief from judgment so that he may attempt to flesh out the contours of a claim that Respondents' withholding of *Brady* material with respect to David Nordstrom's EMS alibi constituted a defect in the consideration of his § 2254 claims that warrants relief under Rule 60(b)(6).

B. The district court abused its discretion in ruling *Brady* does not apply in federal habeas corpus proceedings.

The district court ruled *Brady* does not extend to § 2254 proceedings, citing *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68-69 (2009). ER 9. *Osborne* is distinguishable because the *Osborne* Court assumed the fairness of the underlying conviction, which occurred before the DNA testing became available that gave rise to the *Brady* claim. *Id*. at 69. *Osborne* may not have abrogated this Court's decision in *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992). There, a federal habeas petitioner claimed violations of *Brady* and *Strickland* based on his semen not having been DNA tested prior to his sexual assault trial. The claims were ruled defaulted for failing to raise them in state PCR proceedings, and the district court denied relief.

This Court ruled that the petitioner was entitled to the DNA testing in order to attempt to prove the miscarriage of justice exception to the rules of procedural default. The court stated, "We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding." *Id*. at 749. While it might not have recognized a freestanding *Brady* claim raised for the first time in federal court ("past duty"), it did recognize a present duty under *Brady* to disclose exculpatory evidence for another purpose.

Jones does not attempt to bring a freestanding *Brady* claim in the guise of a Rule 60(b) motion. What he does seek is to cure the defect in the § 2254 proceeding where he could not prove *Strickland* prejudice because Appellees withheld for some 11 years potentially exculpatory evidence in the possession of BI, an entity with which it had a contractual relationship and which it knew or should have known might possess exculpatory evidence. Since BI was integral to proving whether Nordstrom actually had an electronic alibi for the four homicides at the Fire Fighters Union Hall ("the Fire Fighters") and was therefore allied with the prosecution, the prosecutors had a duty to make requisite inquiries of BI for proof of malfunctions and errors in its monitoring and reporting system. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Conclusion

For the reasons stated above, Jones requests that the Court vacate the order of the district court in which it dismissed his Motion for Relief from Judgment. For the reasons stated in Argument I, Jones requests a remand to the district court with instructions that the court find, as a matter of law, that *Martinez*, 132 S.Ct. 1309, gave rise to a *per se* conflict of interest. Jones further requests that the Court remand with instructions to allow evidentiary development with respect to the guilt phase claims outlined in Argument I and the *Brady* claim outlined in Argument II.

Respectfully submitted this 1st day of October, 2013.

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the typeface and type style requirements of FRAP 32(a)(5). This Opening Brief of Petitioner-Appellant contains 10,051 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: October 1, 2013.

s/Timothy M. Gabrielsen
Counsel for Petitioner-Appellant

STATEMENT OF RELATED CASES

Counsel for Robert Glen Jones, Jr., Petitioner-Appellant herein, states to the best of his knowledge that there are no cases specifically related to this one pending in this Court.

Certificate of Service

I hereby certify that on this 1st day of October, 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:

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