No. 13–16928

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT GLEN JONES, JR.,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV–03–00478–TUC–FRZ

RESPONDENTS-APPELLEES' ANSWERING BRIEF

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QUESTION PRESENTED FOR REVIEW

Jones attempted to present for the first time, through a Rule 60(b)(6) motion relying on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Brady v. Maryland*, 373 U.S. 83 (1963), three ineffective-assistance-of-trial-counsel claims that he conceded were not included in his amended habeas petition. Did the district court abuse its discretion when it treated Jones' motion as a second or successive petition that it was without jurisdiction to consider absent this Court's authorization? Do *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and Jones' allegation that Respondents violated *Brady v. Maryland*, 373 U.S. 83 (1963), constitute extraordinary circumstances warranting reopening the habeas proceeding?

STATEMENT OF THE CASE

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

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

On August 21, 2013, Jones filed a motion in the federal district court in which he sought to reopen the habeas proceeding under Federal Rules of Civil Procedure 60(b)(3) and (b)(6) in order to litigate three claims of trial counsel's

ineffectiveness that he had never before raised.[1] (ER 172.) After Respondents filed a response and Jones replied (ER 590, 821), the district court dismissed Jones' motion. (ER 1.)

The district court concluded that because Jones' motion did not demonstrate any defect in the integrity of the habeas proceedings, but instead sought to raise new substantive claims of trial counsel's alleged ineffectiveness, it was a second or successive petition that had not been authorized by this Court. (ER 10.) The district court first addressed Jones' contention that he should be permitted to reopen the habeas proceeding to raise newly asserted claims of trial counsel's ineffectiveness: 1) failure to challenge the admissibility of evidence from an electronic monitoring system (EMS) used to track David Nordstrom, a prosecution witness; 2) failure to call a certain rebuttal witness, Steven Coat's; and 3) failure to object to the trial court's alleged refusal to consider mitigating evidence absent a causal connection to the murders. (ER 5, 189–208.) Jones argued that under the Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), he did not receive a fair opportunity to raise these claims of trial counsel's ineffectiveness because his original habeas counsel also represented him in the state post-conviction relief (PCR) proceeding and therefore operated

[1] Jones withdrew the Rule 60(b)(3) component of his motion in his reply. (ER 1 n.1, 836–37.)

under a conflict of interest preventing them from assessing their own ineffectiveness in failing to exhaust these trial IAC claims in state court. (ER 5, 184–87.)

Although the district court acknowledged that habeas counsel's conflict of interest may constitute a defect in the integrity of the proceedings in support of a Rule 60(b) motion, the allegation of conflict here did not rise to that level. (ER 6.) The district court habeas proceeding concluded 2 years before *Martinez* was decided; thus, at the time of initial habeas counsel's representation of Jones, PCR counsel's ineffective assistance could not serve as cause to excuse the procedural default of other claims. (*Id.*) Furthermore, the district court noted that the "underlying premise" of the conflict allegation was that initial habeas counsel failed to identify additional trial IAC claims for inclusion in Jones' habeas petition. (*Id.*) Thus, Jones was not actually alleging a defect in the integrity of the habeas proceeding, but was "attempting, under the guise of a Rule 60(b) motion, to gain a second opportunity to pursue federal habeas relief on new grounds." (*Id.* at 7.) The motion was therefore a second or successive petition that the district court was without jurisdiction to consider absent an authorization from this Court. (*Id.*)

The district court next addressed Jones' contention that Rule 60(b)(6) relief was appropriate because Respondents allegedly suppressed exculpatory

evidence during the habeas proceeding in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (ER 7, 213–19.) Jones argued that Respondents violated *Brady* by suppressing evidence possessed by BI Incorporated, the manufacture of the EMS device used to monitor David Nordstrom, relating to the reliability of the EMS device. (ER 212–19.) This information, he asserted, was at issue because Jones' habeas petition alleged IAC of trial counsel for failing to challenge testimony regarding the EMS system and call witnesses that could have testified that David was sometimes out past curfew. (ER 216–17.) Thus, he argued, Respondents had a duty to seek and disclose information from BI regarding the operation and functioning of the EMS equipment and that this information would have supported one of his newly-asserted IAC claims he argued should have been pursued by PCR counsel. (ER 7–8, 218–19.)

The district court concluded that Jones failed to show that Respondents' failure to obtain evidence regarding the EMS device "undermined the integrity of the proceedings relevant to the claims actually raised" in Jones' habeas petition. (ER 9.) First, the evidence had no bearing on whether trial counsel effectively cross-examined those who monitored the EMS device and would have been inadmissible in federal court since the state court adjudicated these IAC claims on the merits. (ER 8.) Second, citing to *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), the district court noted that

the *Brady* right of pretrial disclosure does not extend to post-conviction proceedings, such as federal habeas. (ER 9.) Thus, because Jones' Rule 60(b) motion in effect pursued a new habeas claim based on alleged IAC of trial counsel for failing to contest the admissibility of records generated by the EMS device, it was really a second or successive petition that the court was without jurisdiction to consider absent this Court's authorization. (*Id.*)

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

STANDARD OF REVIEW

This Court reviews the district court's denial of a Rule 60(b)(6) motion for an abuse of discretion. *See Towery v. Ryan*, 673 F.3d 933, 940 (9th Cir. 2012); *Delay v. Gordon*, 475 F.3d 1039, 1043 (9th Cir. 2007); *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir. 1971) (*per curiam*) ("60(b) motions are addressed to the sound discretion of the district court."). Relief under Rule 60(b)(6) requires the moving party to make a showing of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). "Such circumstances will rarely occur in the habeas context," and "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Id.*

SUMMARY OF ARGUMENT

The district correct ruled that Jones' Rule 60 petition was an effort to obtain habeas relief on newly asserted substantive claims, and therefore constitutes a second or successive (SOS) petition barred under 28 U.S.C. § 2254(b)(1). Under the guise of *Martinez*, Jones was attempting to assert brand-new claims of trial counsel's alleged ineffectiveness, arguing that his prior habeas counsel—who also represented him in his state PCR proceeding—had a conflict of interest because counsel could not argue his own ineffectiveness as cause to overcome the procedural default from his failure to exhaust these claims in state court.

First, *Martinez* is inapplicable to this case: Jones never presented the three newly-asserted IAC claims in his habeas petition, the district court never found them procedurally defaulted, and consequently, Jones never attempted to show cause and prejudice through PCR counsel's ineffectiveness. Additionally, Jones had no right to effective habeas counsel, and habeas counsel's negligence does not constitute extraordinary cause to warrant Rule 60(b)(6) relief. *See Towery v. Ryan*, 673 F.3d 933, 941 (9th Cir. 2012) (per curiam). And, furthermore, there could have been no conflict on the part of prior habeas counsel because *Martinez* was decided 2 years after the district court habeas proceeding in this case concluded.

Second, no "equity" conferred by *Martinez* entitled Jones to relief, and *Martinez* does not constitute "extraordinary cause" supporting reopening of the habeas proceeding. Not only is *Martinez* inapplicable here, but the new IAC claims Jones asserts are time-barred and not substantial. *See Martinez*, 132 S. Ct. at 1318 (to overcome procedural default, underlying IAC claim must be "a substantial one"). The claims are time-barred because Jones' convictions and sentences have been final for over a decade and his habeas proceeding did not toll the limitations period. *See Rhines v. Weber*, 544 U.S. 269, 274–75 (2005). Further, the claims are not substantial because: 1) it is not apparent whether *Frye* applied to the EMS evidence or, if it did, that the evidence would have fallen short of *Frye's* standard; 2) ample strategic reason existed for counsel's failure to call Steven Coats; and 3) the sentencing judge did not impose an unconstitutional causal-nexus bar.

Third, although the district court dismissed Jones' motion as an SOS petition, this Court may alternatively affirm because the factors set forth in *Phelps v. Alameida*, 569 F.3d 1120, 1133–40 (9th Cir. 2009), weigh against the conclusion that Jones has established "extraordinary circumstances" warranting Rule 60(b)(6) relief.

Finally, Jones' allegation that Respondents violated *Brady* in the habeas proceeding does not constitute "extraordinary circumstances." Not only is

Brady inapplicable in a habeas proceeding, *Osborne*, 557 U.S. at 68–69, but even if it was, no *Brady* violation occurred. The EMS records are not material because Jones failed to explain how they are relevant to the claims raised in his habeas petition or to his newly asserted claim that counsel should have objected to the EMS evidence admitted at trial. Nor did Respondents have a duty to obtain and disclose the records. Jones' habeas claims were adjudicated on the merits in state court and so any new evidence would not have been inadmissible in the federal habeas proceeding. *See Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). Moreover, BI did not act on behalf of the State, but simply had a contractual relationship with it, and Jones had the same notice of and access to the EMS evidence as did Respondents. Thus, no *Brady* violation occurred, and Jones' *Brady* allegation therefore could not establish "extraordinary circumstances" warranting Rule 60(b)(6) relief.

ARGUMENT

BECAUSE JONES SOUGHT TO LITIGATE NEW GROUNDS FOR RELIEF, THE DISTRICT COURT CORRECTLY DISMISSED HIS RULE 60(b) MOTION AS A SECOND OR SUCCESSIVE PETITION; ADDITIONALLY, JONES FAILED TO ESTABLISH "EXTRAORDINARY CIRCUMSTANCES" ENTITLING HIM TO REOPEN HIS HABEAS PROCEEDING.

Jones argues that his Rule 60 motion was not a second or successive petition and that he is entitled to relief under Rule 60(b)(6). The district court

properly dismissed the motion on this ground because it did not attack some defect in the integrity of the habeas proceedings, but instead attempted to gain a second opportunity to obtain habeas relief on new grounds. Furthermore Jones has not shown extraordinary circumstances to justify reopening his habeas proceeding.

A. JONES' RULE 60(b)(6) MOTION WAS A SECOND OR SUCCESSIVE HABEAS PETITION, WHICH THE DISTRICT COURT LACKED JURISDICTION TO CONSIDER.

1. *Relevant law.*

The Anti-terrorism and Effective Death Penalty Act ("AEDPA") significantly "restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." *Tyler v. Cain*, 533 U.S. 656, 661 (2001), and requires a petitioner to obtain authorization from the United States Court of Appeals before filing such a petition. *See* 28 U.S.C. § 2244(b)(3)(A); Rule 9, Rules Governing § 2254 Cases; *Burton v. Stewart*, 549 U.S. 147, 152–53 (2007) (per curiam). This requirement is jurisdictional. *See Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001) ("'When the AEDPA is in play, the district court may not, in the absence of proper authorization from the court of appeals, consider a second or successive habeas application.'") (quoting *Libby v. Magnusson*, 177 F.3d 43, 45 (1st Cir.

1999)); *see also Burton*, 549 U.S. at 152–53 (determining that district court lacked jurisdiction to consider unauthorized successive habeas petition).

A proper Rule 60(b) motion challenges "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). A Rule 60(b) motion is proper if "neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction." *Id.* at 533. If a motion "seeks to add a new ground" for relief, however, it constitutes a second or successive petition. *Id.* at 532; *see also Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) ("*Thompson II*") (treating habeas petitioner's Rule 60(b) motion as an SOS petition governed by AEDPA where the motion's factual predicate stated a claim for a successive petition).

A movant seeking relief under Rule 60(b)(6) must show "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535. "Such circumstances will rarely occur in the habeas context." *Gonzalez*, *Id.* Rule 60(b) proceedings are subject to only limited and deferential review. *Id.*; *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 263 n.7 (1978). It is unclear whether Section 2253 imposes an additional limitation on appellate review by requiring a habeas petitioner to obtain a COA as a

prerequisite to appealing the denial of a Rule 60(b) motion. *Gonzalez*, 545 U.S. at 535.

2. *The district court correctly concluded that Jones' Rule 60(b)(6) motion was a barred SOS petition because it did not attack some defect in the prior proceeding but was an attempt to raise new claims for habeas relief.*

The district court correctly concluded that because Jones' Rule 60(b) motion did not "demonstrate any defect in the integrity of these habeas proceedings" but instead sought "to raise several new substantive claims of ineffectiveness against trial counsel," it was therefore "a second or successive petition" that the court lacked jurisdiction to consider absent authorization from this Court under 28 U.S.C. § 2244(b)(3). (ER 10.) This Court should affirm the district court's order and reject Jones' claim as a barred SOS application.

Here, Jones attempted to present, through his Rule 60(b)(6) motion, three trial IAC claims that he conceded were not included in his amended habeas petition. (ER 177, 187–88.) Jones' motion did not challenge a "defect in the integrity of the federal habeas proceedings," *Gonzalez*, 545 U.S. at 532, but instead asserted that Jones was entitled to habeas relief for newly asserted substantive reasons. The motion was therefore an SOS petition. *See id.* at 531 ("Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be

dismissed unless it relies on either a new rule of constitutional law or newly discovered facts."); *Thompson v. Calderon*, 122 F.3d 28, 30 n.2 (9th Cir. 1997) ("*Thompson I*") ("[W]here a habeas petitioner tries to raise new facts or new claims not included in prior proceedings in a Rule 60(b) motion, such motion should be treated as the equivalent of a second petition for writ of habeas corpus.") (quotations omitted); *Lopez v. Ryan*, 2012 WL 1520172, *7 (D. Ariz. April 30, 2012) (aspect of Rule 60(b) motion asserting new claim for relief constituted an SOS petition). And because this Court did authorize the petition,[2] the district court lacked jurisdiction to consider it. *See* 28 U.S.C. § 2244(b)(3)(A); Rule 9, Rules Governing § 2254 Cases; *Burton*, 549 U.S. at 152–53; *Cooper*, 274 F.3d at 1274.

B. *MARTINEZ* DOES NOT CONSTITUTE "EXTRAORDINARY CIRCUMSTANCES" ENTITLING JONES TO RULE 60(b)(6) RELIEF.

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[2] Even if Jones had requested authorization from this Court to file an SOS petition, such a request would have been properly denied. 28 U.S.C. § 2244(b)(2) permits successive petitions *only* if (1) the claim raised is based on a new, retroactively-applicable rule of constitutional law, or (2) the claim's factual predicate "could not have been discovered previously through the exercise of due diligence" and the "facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Martinez* is an equitable rule and not a new rule of constitutional law. And, for the reasons set forth *infra*, Jones cannot show that his claim rests on newly-discovered evidence that he could not have discovered earlier through the exercise of due diligence.

Despite the fact that his motion was a barred SOS petition, Jones offers two reasons why *Martinez* constitutes "extraordinary circumstances" entitling him to Rule 60(b)(6) relief. First, he argues that *Martinez* rendered his habeas counsel, who also represented him in state PCR, "conflicted *per se*" because counsel could not raise his own ineffectiveness in state court as cause to overcome the procedural default of the three trial IAC claims raised for the first time in the 60(b) motion. (O.B. at 14–15, 18–25.) Thus, Jones concludes, the district court abused its discretion when it failed to permit him to plead the new claims without treating them as second or successive. (*Id.*) Second, Jones contends that "equity conferred by *Martinez*" required that the district court treat his newly-asserted IAC claims as though they had been raised in his habeas petition. (*Id.* at 15–16, 25–26.) For the following reasons, both claims fail.

1. *The Martinez decision.*

In *Martinez*, the Supreme Court recognized, for the first time, a "narrow exception" to *Coleman v. Thompson*, 501 U.S. 722 (1991)[3]: When the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, "[i]nadequate assistance of counsel

[3] In *Coleman*, the Court held that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Martinez*, 132 S. Ct. at 1315.

at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 132 S. Ct. at 1315, 1317. A prisoner may show cause for a default of an ineffective-assistance-of-trial-counsel claim if he shows that initial-review-collateral-proceeding counsel was ineffective under *Strickland*, and also demonstrates that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, meaning that the claim has "some merit." 132 S. Ct. at 1318.

2. *Martinez did not create an ex post facto conflict of interest requiring the district court to permit Jones to raise new claims for the first time in a Rule 60(b) motion.*

As an initial matter, *Martinez* is inapplicable to this case: Jones never presented the three newly-asserted IAC claims in his habeas petition, the district court never found them procedurally defaulted, and consequently, Jones never attempted to show cause and prejudice through PCR counsel's ineffectiveness. As a result, *Martinez*—which addresses only cause to overcome the procedural default of a trial IAC claim—has no bearing on Jones' Rule 60(b) motion.

Jones nonetheless contends that the failure to present these claims in a habeas petition was attributable to habeas counsel's purported conflict of interest. This is irrelevant. As the Supreme Court has clearly stated, "an attack based on . . . habeas counsel's omissions, ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits

determined favorably." *Gonzalez*, 545 U.S. at 532 n.5. Jones possessed no right to effective habeas counsel, and habeas counsel's decision not to withdraw does not constitute an extraordinary circumstance justifying relief under Rule 60(b)(6). *See Towery v. Ryan*, 673 F.3d 933, 941 (9th Cir. 2012) (per curiam) ("A federal habeas petitioner—who as such does not have a Sixth Amendment right to counsel—is ordinarily bound by his attorney's negligence, because the attorney and the client have an agency relationship under which the principal is bound by the actions of the agent."); *Harris v. United States*, 367 F.3d 74, 77, 81–82 (2d Cir. 2004) (existence of extraordinary "circumstances will be particularly rare where the relief sought [in a Rule 60(b)(6) motion] is predicated on the alleged failures of counsel in a prior habeas petition. That is because a habeas petitioner has no constitutional right to counsel in his habeas proceeding, and therefore, to be successful under Rule 60(b)(6), must show more than ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984)."") (citation and parallel citations omitted).[4]

[4] *See also Gray v. Mullin*, 171 Fed.Appx. 741, 743–44 (10th Cir. 2006) (habeas counsel's failure to transmit the necessary record on appeal was not a basis for Rule 60(b)(6) relief); *Post v. Bradshaw*, 422 F.3d 419, 424–25 (6th Cir. 2005) (habeas counsel's failure to undertake discovery permitted by district court was not a basis for Rule 60(b)(6) relief); *Gurry v. McDaniel*, 49 Fed.Appx. 593, (9th Cir. 2005) (Rule 60(b)(6) motion seeking relief based "on the allegedly ineffective assistance provided by . . . previous habeas counsel" was in reality a second or successive petition).

Furthermore, as the district court noted, Jones' district court habeas proceeding ended more than two years before the Supreme Court decided *Martinez*. Thus, at the time prior habeas counsel raised claims on Jones' behalf in federal court, it was well-settled that ineffective assistance of PCR counsel was neither an independent claim for habeas relief, *see* 28 U.S.C. § 2254(i), nor could it serve as cause to excuse the procedural default of other habeas claims. *See Martinez*, 132 S. Ct. at 1315 (citing *Coleman*, 501 U.S. 722). In other words, prior habeas counsel had no conflict of interest, and *Martinez* did not create one *ex post facto* that would undermine the principle that a Rule 60(b)(6) motion is not an appropriate vehicle to seek habeas relief on newly asserted claims. *See Gonzalez*, 545 U.S. at 531.

Next, Jones' reliance on the Fourth Circuit's unpublished decision in *Gray v. Pearson*, 2013 WL 2451083 (4th Cir. June 7, 2013), to support his contention that *Martinez* mandates Rule 60(b)(6) relief in this case is unpersuasive. There, the federal district court appointed the same attorneys who had represented the petitioner in state collateral proceedings to represent him in his federal habeas proceeding. *Id.* at *1. The district court denied habeas relief, and one of the two claims on which the court issued a certificate of appealability was whether the petitioner "was entitled to the appointment of independent counsel under" *Martinez*, "which was handed down during the pendency of [the petitioner's]

federal habeas proceedings." *Id.* The appellate court answered this question in the affirmative, reasoning that under *Martinez*, "a clear conflict of interest exists in requiring [petitioner'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 [petitioner] in his state post-conviction proceedings." *Id.* at *3.

Gray is easily distinguishable from the case at hand. There, *Martinez* was decided—thus alerting habeas counsel of a potential conflict—during the district court proceeding. Here, as noted, *Martinez* was not decided until 2 years after the district court habeas proceeding concluded. Also, in *Gray*, the petitioner asked for new counsel pursuant to *Martinez* on appeal from the denial from habeas relief; here, in contrast, Jones seeks to assert new claims through a Rule 60(b)(6) motion. *Gray's* vastly different procedural posture renders that case inapposite and unpersuasive here.

Jones next asserts that the district court should have recognized a "*per se* conflict" requiring Rule 60(b)(6) relief because attorneys have a strong disincentive to argue their own ineffectiveness. (O.B.at 23.) Respondents accept that requiring counsel to argue their own ineffectiveness may constitute a conflict of interest. *See United States v. Del Muro*, 87 F.3d 1078, 1080 (9th Cir. 1996). But even habeas counsel other than the lawyer who represented Jones in

PCR would have had no additional incentive to raise unexhausted claims of trial counsel's ineffectiveness because, as noted above, at the time of Jones' habeas proceeding, PCR counsel's ineffectiveness was not grounds to excuse a procedural default. *See Coleman*, 501 U.S. at 722. Thus, the conflict on which Jones based his 60(b)(6) motion simply did not exist during the representation.

Finally, Jones contends that the district court erroneously concluded that *Martinez* did not apply in this case since it was decided 2 years after the district court habeas proceedings concluded, because *Martinez* applies retroactively. (O.B. at 24–25.) Indeed, this Court has applied *Martinez* retroactively—to assess whether PCR counsel's ineffectiveness established cause *to overcome the procedural default* of a trial IAC claim. *See, e.g.*, *Samuel Lopez v. Ryan (Samuel Lopez II)*, 678 F.3d 1131, 1135–39 (9th Cir. 2012) (concluding *Martinez* did not entitle petitioner to relief under Rule 60(b) on a procedurally defaulted trial IAC claim); *Runningeagle v. Ryan*, 9th Cir. No. 07–99026, Docket # 59–1 (ordering limited remand "for the limited purpose of reconsidering the procedural default holdings on Runningeagle's ineffective assistance of counsel claims . . . in light of *Martinez* . . .").

Here, however, there was no procedurally defaulted trial IAC claim. (ER 42–43.) And Jones provides no authority for the proposition that *Martinez* can create an *ex post facto* conflict of interest permitting consideration of claims

asserted for the very first time in Rule 60 motion for relief from judgment. Rather, the district court correctly acknowledged that there was no conflict sufficient to undermine the integrity of the habeas proceeding for Rule 60(b) purposes because, before *Martinez*, no habeas counsel, whether that counsel had also represented Jones in PCR or not, had any incentive to raise a newly asserted claim of trial counsel's ineffectiveness and argue that PCR counsel's incompetence excused any procedural default. *See Martinez*, 132 S. Ct. at 1315 (citing *Coleman*, 501 U.S. 722).

In sum, *Martinez* applies only where a habeas petitioner seeks to overcome the procedural default of a claim of trial counsel's ineffectiveness. Because the district court never found that any of Jones' IAC claims were procedurally defaulted, *Martinez* has no bearing in this case. Instead, Jones' Rule 60(b)(6) motion was properly treated as an SOS petition by the district court and dismissed because it sought "to add a new ground" for relief. *Gonzalez*, 545 U.S. at 532.

3. Martinez's *"equities" do not entitle Jones to Rule 60(b)(6) relief.*

Jones' final *Martinez*-based argument is that the "equity conferred by *Martinez*" required the district court to treat his newly asserted IAC claims as though they were raised in his habeas petition and found to be unexhausted and procedurally defaulted. (O.B. 25–27.) This contention lacks merit.

As previously noted, *Martinez* is inapplicable here because Jones did not assert any procedurally defaulted claims of trial counsel's ineffectiveness. He claims, however, that were this Court to afford him Rule 60(b)(6) relief, he could then amend his habeas petition to include the three newly-asserted IAC claims and then argue that PCR counsel's ineffectiveness excused any procedural default. But the underlying IAC claims "do[] not present a compelling reason to reopen the case," *Samuel Lopez II*, 678 F.3d at 1137, because they are 1) time-barred and 2) not substantial under *Martinez*.

The new claims are time-barred because Jones' convictions and sentences have been final for over a decade, *see* 28 U.S.C. § 2244(d), and his habeas proceeding did not toll AEDPA's 1-year limitations period. *See Rhines v. Weber*, 544 U.S. 269, 274–75 (2005). Although Jones claims that initial habeas counsel's conflict and "the equity conferred by *Martinez*" should toll AEDPA's limitations period (O.B. at 27), the alleged conflict does not explain Jones' failure, in the first instance, to raise the newly-asserted trial IAC claims in the habeas petition. Additionally, Jones' filed his Rule 60(b)(6) motion (which included the first-ever assertion of the three trial IAC claims as well as PCR counsel's ineffectiveness) 17 months after the *Martinez* decision. Any new habeas claims are therefore time-barred, and even if Jones were entitled to

equitable tolling to the date of *Martinez*'s issuance, his newly asserted claims are still untimely by 7 months.

Untimeliness aside, to establish cause to excuse a procedural default under *Martinez*, Jones must 1) show that PCR counsel was ineffective under *Strickland*[5], and 2) "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S. Ct. at 1318–19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (discussing standards for issuing certificate of appealability)); *see Cook v. Ryan*, 688 F.3d 598, 610 n.13 (9th Cir. 2012) (noting that, under *Miller-El*, a court should only assess claim's merits generally and should not decline to issue certificate of appealability merely because it believes the applicant will not be entitled to relief).

However, "[i]n order to show ineffectiveness of PCR counsel, [a prisoner] must show that PCR counsel's failure to raise the claim that trial counsel was ineffective was an error 'so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment,' and caused [the prisoner] prejudice." *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012)

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[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

(quoting *Strickland*, 466 U.S. at 687); *see also Samuel Lopez II*, 678 F.3d at 1138 ("To have a legitimate IAC claim a petitioner must be able to establish both deficient representation *and* prejudice."). Because PCR "[c]ounsel is not necessarily ineffective for failing to raise even a nonfrivolous claim," he "would not be ineffective for failure to raise an ineffective assistance of counsel claim with respect to trial counsel who was not constitutionally ineffective." *Sexton*, 679 F.3d at 1157 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009)).

a. Failure to challenge admissibility of EMS evidence under *Frye*[6] and to renew foundational objection to that evidence.

Jones contends that trial counsel was ineffective for failing to challenge the admission of EMS evidence, which supported David Nordstrom's alibi, under *Frye*. (O.B. at 12; ER 192–94.) Jones has not shown trial counsel's ineffectiveness and, as a result, cannot show PCR counsel's ineffectiveness.

Jones argued that counsel was ineffective for failing to request a *Frye* hearing or object when the State purportedly failed to establish that 1) the BI Model 9000 "was generally accepted in the scientific community," 2) the techniques employed to secure the data it generated and recorded were accepted, and 3) the system used to monitor David Nordstrom was installed "consistent with BI's protocol." (ER 192–94.) Relying on newspaper accounts and public

[6] *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923).

records purportedly reflecting occasions on which the BI Model 9000 either failed or was defeated by an offender, Jones speculates that, if counsel had raised a *Frye* challenge, the EMS evidence would not have been admitted. (ER 192–94, 244–76.)

But reasonable counsel could easily have declined to raise a *Frye* challenge, because *Frye* does not clearly apply to the EMS evidence. *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 790 (2011) (*Strickland*'s deficient performance inquiry focuses on whether counsel's decisions were objectively reasonable). At the time of Jones' trial, "Arizona courts used the *Frye/Logerquist* standard to determine the admissibility of expert opinions that relied on 'the application of novel scientific principles, formulae, or procedures developed by others.'" *State v. Benson*, 307 P.3d 19, 26, ¶ 20 (Ariz. 2013) (quoting *Logerquist v. McVey*, 1 P.3d 113, 133, ¶ 62 (Ariz. 2000)). "By its own words, *Frye* applies to the use of *novel* scientific theories or processes to produce results." *Logerquist*, 1 P.2d at 118–19, ¶ 19 (emphasis added). "It is inapplicable when a witness reaches a conclusion by inductive reasoning based on his or her own experience, observation, or research." *Id.* at 133, ¶ 62. In such cases, "the validity of the premise is tested by interrogation of the witness," whereas, when *Frye* applies, the premise's validity "is tested by inquiring into [its] general acceptance." *Id.*

Jones assumes, but fails to prove, that the EMS recording system and the data it generated were, at the time of his trial, a novel scientific process or theory to which *Frye* would apply. And that fact is not readily apparent. The system at issue here is distinct from, for example, the novel DNA testing methods that form the bulk of Arizona's *Frye* jurisprudence. *See, e.g.*, *State v. Bible*, 858 P.2d 1152, 1179–93 (Ariz. 1993). Reasonable counsel could have decided that electronic monitoring was not a new scientific process, determined that *Frye* did not apply, and declined to raise a *Frye* challenge. *See Benson*, 307 P.3d at 26, ¶ 20 (*Frye* does not apply if no novel scientific theories or processes are used; under these circumstances, admissibility is governed by Arizona Rules of Evidence 403, 702, 703).

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

Here, Jones claimed that BI monitoring systems either malfunctioned or were defeated in certain other, unrelated cases. (ER 190–92.) But it is not clear from the material he supplied that these systems were the same model as the one used to monitor David. (ER 244–83.) Assuming it was the same model, Jones fails to supply data about the number of BI Model 9000 units in use, in order to place in context the instances on which it failed or was compromised.[7] And evidence of the system's reliability was presented at trial: Parole Supervisor Rachel Matthews testified that the system was approximately 99% accurate, thereby conceding that it had a small failure rate. (ER 648.) The instances Jones now cites could easily represent the system's 1% failure rate. This claim is not substantial and does not justify reopening the habeas proceeding.

b. Failure to call Steven Coats.

Jones argues that trial counsel should have impeached testimony from Jones' acquaintance Lana Irwin—who described having overheard Jones and another man, Stephen Coats, discuss obscure details of the murders for which Jones was convicted—with testimony from Coats. (O.B. at 12; ER 199–203.) *See Jones v. Ryan*, 691 F.3d 1093, 1098–99 (9th Cir. 2012). Jones proffers a recent affidavit from Coats, in which Coats claims that Jones never discussed the

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[7] One of the newspaper articles upon which Jones' relied suggests that BI monitored 900 offenders in Florida alone. (ER 245–46.)

murders with him and that Jones' trial counsel never interviewed him to test the veracity of Irwin's testimony. (ER 528–31.) But numerous strategic reasons could have supported trial counsel's decision not to involve Coats. *See Strickland*, 466 U.S. at 689–90 (counsel's decisions presumed to be strategic); *see also Richter*, __ U.S. __, 131 S. Ct. at 790. For example, Coats and Jones were jointly charged with murder in Maricopa County,[8] a highly-prejudicial fact that could have emerged at trial if Jones involved Coats. And Coats was represented by counsel in the Maricopa County case, which would have impeded Jones' counsel's ability to interview him. This ineffective-assistance claim is not substantial.

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

Jones contends that PCR counsel was ineffective for neglecting to challenge trial counsel's failure to object to the sentencing judge's purported refusal to consider Jones' difficult childhood, antisocial personality disorder, and

[8] Jones pleaded guilty to first-degree murder and numerous other counts, and was sentenced to natural-life imprisonment for the first-degree murder conviction. *See* http://www.courtminutes.maricopa.gov/docs/Criminal/022000/m0105938.pdf (Sentencing Minute Entry, filed 2/11/00) (accessed October 4, 2013). Coats also pleaded guilty to a number of counts, including first-degree murder, for which he was also sentenced to natural-life imprisonment. *See* http://www.courtminutes.maricopa.gov/docs/Criminal/012000/m0092821.pdf (Sentencing Minute Entry, filed 1/11/00) (accessed October 4, 2013).

history of substance abuse in mitigation absent a causal nexus to the offenses. (O.B. at 12; ER 203–08.) But the sentencing judge did not refuse to *consider* the above mitigation; instead, he permissibly gave it little *weight*. Moreover, the state court did not hinder Jones' ability to present mitigation evidence. Accordingly, trial counsel was not ineffective for failing to object, and PCR counsel was not ineffective for failing to challenge trial counsel's performance.

Before discussing Jones' proffered non-statutory mitigation, the sentencing judge recognized that "[n]on-statutory mitigating circumstances include any factors proffered by either side relevant to whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record, and any of the circumstances of the offense." (ER 557.) The judge then addressed each proffered mitigating factor. (ER 557–66.) The judge specifically found that Jones had proven his difficult childhood, but found that factor not mitigating under the facts of this case:

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

(ER 558–59.) With respect to Jones' mental-health issues and history of drug abuse, the judge expressly confirmed that he had "*carefully considered* the report and testimony of Dr. Jill Teresa Caffrey, *especially findings* that the defendant suffers from antisocial personality disorder, has a history of drug use, and a somewhat low IQ." (ER 564.) The judge noted the absence of "evidence of defendant's use of drugs at or near the time of these murders" and cited his statement to Dr. Caffrey that he "committed crimes both when he was and when he was not under the influence of drugs." (ER 564–65.) The judge concluded:

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

(ER 565.) Before pronouncing sentence, the judge reaffirmed that he had considered *all* proffered mitigation:

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

(ER 566, emphasis added.)

"To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). During a capital penalty phase, the sentencer must be allowed to consider all relevant mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.") (emphasis in original). A state sentencing scheme complies with the Eighth Amendment unless it places mitigation evidence "beyond the effective reach of the sentencer." *Graham v. Collins*, 506 U.S. 461, 474–76 (1993).

Although the sentencer must *consider* all mitigation, the Supreme Court has never held that it must find such evidence relevant, or afford it any mitigating weight. *See Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("Equally settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer."). Rather, so long as it considers mitigating evidence, the sentencer may afford such evidence whatever weight it deems appropriate. *See Eddings*, 455 U.S. at 113–14 ("The sentencer … may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by *excluding such evidence from their consideration*.")

(emphasis added); *see also McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment) ("*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.").

Under these standards, the Ninth Circuit has "granted habeas relief when state courts have applied a causal nexus test as a *screening mechanism* to deem evidence *irrelevant or nonmitigating as a matter of law.*" *Poyson v. Ryan*, 711 F.3d 1087, 1098 (9th Cir. 2013) (emphasis added) (citing *Williams (Aryon) v. Ryan*, 623 F.3d 1258 (9th Cir. 2010), and *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008)). But this Court has "refused to find a constitutional violation when the state court employed a causal nexus test as a *permissible weighing mechanism*." *Poyson*, 711 F.3d at 1098 (emphasis added). And under AEDPA, this Court may not presume from a silent or ambiguous record that a state court employed an impermissible causal-nexus test. *See Poyson*, 711 F.3d at 1099 ("We recognize the possibility that the Arizona Supreme Court applied an unconstitutional causal nexus test. The record, however, contains no clear indication that the court did so. We may not presume a constitutional violation from an ambiguous record.") Rather, "[a]bsent a clear indication in the record

that the state court applied the wrong standard," this Court "cannot assume the [state] courts violated *Eddings*'s constitutional mandates." *Schad v. Ryan,* 671 F.3d 708, 724 (9th Cir. 2009).

Here, the sentencing judge expressly stated that he had "*considered all mitigating factors*," both collectively and individually. (ER 566, emphasis added). This statement ends the inquiry. *See Parker v. Dugger*, 498 U.S. 308, 314 (1991) ("We must assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did."); *Samuel Lopez v. Ryan (Samuel Lopez I)*, 630 F.3d 1198, 1203 (9th Cir. 2010) ("[T]here is no indication that the state court applied an impermissible requirement of a causal nexus between mitigating evidence and the crime. Indeed, the state court said the opposite—i.e., that it considered all the mitigating evidence on an independent review of the record and found that it did not warrant the exercise of leniency."); *George Lopez v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007) ("[A] court is usually deemed to have considered all mitigating evidence where the court so states."). And if the judge's general statement that he considered all mitigation were not enough, he also explicitly affirmed that he had had "carefully *considered*" Dr. Caffney's report and testimony, including her diagnosis of antisocial personality disorder and her opinion that Jones had a history of drug use. (ER 564.) After considering that mitigation, the judge found—consistent

with *Lockett* and *Eddings*—that it was entitled to little or no weight in the sentencing calculus. (ER 565.) And the judge found that Jones had proven that he had a dysfunctional family background, revealing that he necessarily *considered* that evidence in mitigation. (ER 558–59.)

Jones contends that the sentencing judge's special verdict "parrots the Arizona Supreme Court's ruling for which the Ninth Circuit granted the writ in *Styers*." (ER 207.) He further argues that the Arizona Supreme Court's "failure to consider similar evidence … led the [court to] grant the writ" in *Aryon Williams*. But these cases are readily distinguishable. In *Styers* and *Aryon Williams*, the state court "applied a causal nexus test as a *screening mechanism* to deem evidence *irrelevant or nonmitigating as a matter of law*." *Poyson*, 711 F.3d at 1098 (emphasis added). Conversely, here, the judge expressly stated that he had *considered all mitigation*. Jones' claim is not substantial and does not warrant Rule 60(b) relief.

Thus, even if *Martinez* was applicable to Jones' motion for relief from judgment, it does not "present a compelling reason to reopen the case," because the underlying IAC claims are insubstantial. *See Samuel Lopez II*, 678 F.3d at 1137.

4. *The Phelps factors weigh against Rule 60(b)(6) relief.*

When a party, like Jones, argues that a change in the law constitutes an extraordinary circumstance supporting a Rule 60(b)(6) motion, this Court considers several factors: (1) whether "the intervening change in the law … overruled an otherwise settled legal precedent"; (2) whether the petitioner was diligent in pursuing the issue; (3) whether "the final judgment being challenged has caused one or more of the parties to change his legal position in reliance on that judgment;" (4) whether there is "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief;" (5) whether there is a "close connection" between the original and intervening decisions at issue in the Rule 60(b) motion; and (6) whether relief from judgment would upset the "delicate principles of comity governing the interaction between coordinate sovereign judicial systems." *Phelps v. Alameida*, 569 F.3d 1120, 1133–40 (9th Cir. 2009) (quotations omitted).

Here, the district court did not address these factors because it concluded that Jones' motion was a barred SOS petition. Even so, these factors weigh against Jones, and provide an additional reason for affirming the district court's denial of his Rule 60(b)(6) motion. *See id.* at 1134–35 (although *Phelps* factors are generally addressed by the district court in the first instance, "appellate

courts may, in their discretion, decide the merits of a Rule 60(b) motion in the first instance on appeal").

Change in the law. As argued, *supra*, *Martinez* did not constitute a change in the law *applicable to this proceeding*: Jones did not present the claims in question, this Court did not find them procedurally defaulted, and, as a result, Jones never attempted to show cause and prejudice through PCR counsel's ineffectiveness. Moreover, whether this failure was attributable to habeas counsel's alleged conflict is irrelevant because there is no right to effective habeas counsel. *See Towery*, 673 F.3d at 941; *Harris*, 367 F.3d at 77, 81–82. Jones seeks to use *Martinez* and Rule 60(b)(6) as a vehicle to circumvent AEDPA and raise claims omitted from his habeas petition. *Phelps*' first factor weighs against Jones' motion.

Diligence. This factor also weighs against Jones because he filed the present motion—and alleged PCR counsel's ineffectiveness for the first time—17 months after *Martinez* was decided. *See Samuel Lopez II*, 678 F.3d at 1136 (diligence factor weighed against petitioner where he raised IAC of PCR counsel claim for the first time after *Martinez*). Jones attempted to explain this delay by pointing to his prior habeas counsel's ethical conflict, and noting that that attorney failed to withdraw in a timely manner to allow *Martinez* claims to be raised. (ER 210–11.) At bottom, Jones presents a challenge to prior habeas

counsel's effectiveness, to which he had no right. *See Towery*, 673 F.3d at 941; *Harris*, 367 F.3d at 77, 81–82. And even if this factor weighed in Jones' favor, it does so only minimally.

Reliance. Jones contended in the district court that Respondents have not relied on that court's judgment, that they may not carry out the death sentence "until all state and federal legal proceedings have ceased," and that the reliance factor therefore weighs in his favor. (ER 211.) This is incorrect because Jones' of-right legal proceedings are complete, *see Schad*, 133 S.Ct. at 2550, and an execution warrant has issued. "The State's and the victim's interests in finality, especially after a warrant of execution has been obtained and an execution date set, weigh against granting post-judgment relief." *Samuel Lopez II*, 678 F.3d. at 1136; *see also Styers v. Ryan*, 2013 WL 1149919, *7 (D. Ariz. Mar. 20, 2013) ("[R]eopening the case to permit relitigation of Claim 8 would further delay resolution of Petitioner's case and interfere with the State's legitimate interest in finality."). This is particularly true where Jones seeks to litigate new claims never previously presented in any proceeding. This factor thus weighs heavily against Jones.

Delay. Jones argued below that his Rule 60(b)(6) motion was "prompt under the circumstances" because present counsel filed it within 4 months of his appointment. (ER 211–12.) This may be true, but the motion (along with the

first-ever allegation of PCR counsel's ineffectiveness) was still filed *17 months* after the *Martinez* decision. Moreover, the underlying claims of trial counsel's ineffectiveness are untimely by years. This factor therefore weighs against Jones.

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

Comity. Jones argued below that "[c]omity suffers no damage, in these limited circumstances where the change in the law also renders counsel conflicted." (ER 212–13.) But habeas counsel's ethical conflict does not explain his omission, in the first instance, of the trial-level IAC claims from the habeas petition. Further, in litigation spanning over a decade, the state and

federal courts have considered Jones' claims for relief, which included several challenges to trial counsel's ineffectiveness. *See Samuel Lopez II*, 678 F.3d at 1137 ("In light of [the Ninth Circuit's] previous opinion and those of the various other courts that have addressed the merits of several of Lopez's claims, and the determination regarding Lopez's lack of diligence, the comity factor does not favor reconsideration."). This factor weighs against reopening the habeas proceeding.

Even if Jones' Rule 60(b)(6) motion were not a barred SOS petition, the *Phelps* factors nonetheless militate against relief. This Court should therefore decline to reopen Jones' habeas case.

C. JONES' *BRADY* ALLEGATION DOES NOT PRESENT "EXTRAORDINARY CIRCUMSTANCES" WARRANTING RULE 60(B)(6) RELIEF.

Jones contends that because his habeas petition asserted that trial counsel should have more effectively challenged testimony about the EMS that verified David Nordstrom's alibi, Respondents had notice that they were required to obtain and disclose information regarding the effectiveness of BI's electronic monitoring systems. (O.B. at 28–31.) He argues that this evidence would support his newly asserted claim that trial counsel was ineffective for failing to challenge the admissibility of the EMS evidence supporting David's alibi, and that the district court erred when it concluded that *Brady* does not apply in habeas proceedings. (*Id.*) For several reasons, this claim fails.

1. *The alleged Brady evidence is potentially relevant only to one of Jones' newly-asserted IAC claims in the Rule 60(b)(6) motion that was properly dismissed as an SOS petition.*

Jones contends that the alleged *Brady* evidence he seeks is relevant to his newly-asserted claim that trial counsel was ineffective for failing to challenge the admissibility of evidence regarding the EMS monitoring that supported David Nordstrom's alibi. (O.B. at 29–30.) As previously noted, however, that IAC claim was not presented in Jones' habeas petition and his attempt to assert it for the first time in a Rule 60(b)(6) motion was properly dismissed as an SOS petition. *See Gonzalez*, 545 U.S. at 531. Furthermore, as shown above, the trial-level IAC claim Jones argues that this evidence would support is not substantial. His contention that the alleged *Brady* violation entitles him to Rule 60(b)(6) relief is therefore without merit.

2. *Brady does not apply in habeas proceedings.*

Under *Brady*, the prosecution is required to disclose "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment [or impeachment], irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. "[E]vidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quotations omitted). "In order to comply with *Brady*, . . . the individual

prosecutor has a duty to learn of any favorable evidence *known to the others acting on the government's behalf in this case,* including the police." *Id*. at 280–81 (internal quotation marks omitted; emphasis added). But because "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man," *Brady's* disclosure obligation does not continue "after the defendant was convicted and the case was closed." *Osborne*, 557 U.S. at 68–69.

Because the habeas proceeding took place after Jones was proven guilty and convicted, *Brady's* disclosure obligation no longer applied. *See id.* Thus, any failure on Respondents part to obtain and disclose information regarding the electronic monitoring system cannot have undermined the integrity of the proceedings for purposes of Rule 60(b)(6). Although Jones claims that at least one federal court has granted Rule 60(b)(6) relief "based on a violation of *Brady*" (O.B. at 30), the case to which he cites involved Rule 60(b)(6) relief regarding a habeas claim asserting a *Brady* violation *at trial* and, thus, has no applicability here. *See Andazola v. Woodford*, 2009 WL 4572773 (N.D. Cal. December 4, 2009). Consequently, Jones' allegation of a *Brady* violation does not constitute "extraordinary circumstances" supporting his motion to reopen the habeas proceeding.

3. *There was no Brady violation.*

Even if *Brady* applied to the habeas proceeding, no violation occurred. Jones has failed to establish what the BI records would have shown and his claim that those records are material and exculpatory is speculative; his *Brady* allegation therefore cannot form the basis for Rule 60(b) relief. Moreover, even assuming that the records would show what Jones suspects they would, the information is not material and Respondents had no duty to obtain it from BI.

First, the evidence was not material. Jones argues that the evidence he seeks "was integral to proving whether [David] Nordstrom actually had an electronic alibi for the four homicides at the Fire Fighters Union Hall . . . and was therefore allied with the prosecution . . . ." (O.B. at 31.) But the IAC claims Jones asserted in his habeas petition did not allege counsel's ineffectiveness for failing to obtain BI's records, and such records would have no bearing on their resolution. Nor does Jones explain how this information had any bearing on whether trial counsel effectively cross-examined the witnesses who monitored Nordstrom's EMS system. And Jones provides no explanation why, if the BI evidence was so critical to his claims, he did not request it from Respondents or from BI itself, or even mention BI in his pleadings. Finally, even if such records exist and would demonstrate the failure of some of BI's EMS units, this would have been irrelevant to impeach David Nordstrom's

credibility and his statement that he believed there was no way to defeat the EMS unit (ER 702–04), because no records from BI or testimony from its representatives could have undermined the truthfulness of this claim.

Second, Respondents had no duty to obtain EMS information from BI. The IAC claim that Jones argued should have alerted Respondents to the BI information's relevance was adjudicated on the merits in state court. (ER 47–48). As a result, habeas review of this claim was limited to the record before the state court. *See Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). Respondents cannot have had any duty to obtain and disclose information that would have been inadmissible in the habeas proceeding.

Furthermore, the prosecutor is obligated under *Brady* to "learn of any favorable evidence *known to the others acting on the government's behalf in this case*, including the police." *Strickler*, 527 U.S. at 280–81 (internal quotation marks omitted; emphasis added). Here, BI was not "acting on the government's behalf" in Jones' case merely by virtue of having a contract with the state to provide monitoring equipment. Therefore, Respondents had no duty to obtain BI's records, especially when those records did not relate specifically to Jones' case. *See, e.g.*, *State v. Bernini*, 207 P.3d 789, 791, ¶ 8 (Ariz. App. 2009) (State had no obligation to obtain and disclose source code for Intoxilyzer 8000 because "the state has neither possession of the source code nor control over [the

company]." Nor did the state have "better access than defendants to [the] source code."); *State v. West*, 279 P.3d 354, 359 (Or. App. 2012) ("*Brady* is not authority for a defendant obtaining evidence of unknown import to test whether it helps or hurts his case.").

Jones has not cited any law requiring the State to obtain information from parties with whom it has contractual relationships. *See, e.g., Carriger v. Stewart*, 132 F.3d 463, 492 (9th Cir. 1997) (Kozinski, J., dissenting) ("*Brady* does not require the prosecutor to direct a counter-investigation to destroy its own case."). Further, even had Respondents attempted to obtain the requested information from BI, the company likely would have refused to produce it. *See Bernini*, 207 P.3d at 791, ¶ 8 (company refused to provide intoxilyzer source code "without protective conditions it sought to impose"). Jones admitted as much when he stated that "BI would produce those records if compelled by this Court to do so pursuant to a subpoena *duces tecum*," and his materials establish that, in at least one other case, BI obtained a protective order covering the type of records Jones seeks. (ER 219, 252.) Respondents had no duty to investigate on behalf of Jones and obtain information from BI to aid his defense.

Further, "where the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a *Brady* violation by not bringing the evidence to the attention of the

defense." *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (internal quotation marks omitted); *see also United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) ("The prosecution is under no obligation to turn over materials not under its control. When, as here, a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government."). Here, Jones had the same information that was available to the State regarding possible failures in BI's monitoring equipment. Jones attached to his motion news articles dated from 1996 through 1999, before his trial in this matter, in which it was alleged that BI's monitoring devices failed. (*See* ER 244–55, 276, 278–80.) Because Jones had the same access to this public information that the State had, he cannot complain that the State violated *Brady* "by not bringing the evidence to the attention of the defense." *Raley*, 470 F.3d at 804.

In sum, no *Brady* violation occurred. Hence, even if *Brady* applied to the habeas proceeding, any claim that such a violation supported Jones' Rule 60(b)(6) motion fails.

CONCLUSION

For the above reasons, this Court should affirm the district court's conclusion that Jones' Rule 60 motion constitutes a barred SOS petition. Alternatively, this Court should conclude that the district court did not abuse its discretion by denying Jones' motion for relief under Rule 60(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 7, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 9,962 words.

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No. 13–16928

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT GLEN JONES, JR., Petitioner-Appellant, –vs– CHARLES L. RYAN, et al., Respondents-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV 03–00478–TUC–FRZ **STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases.

Respectfully submitted this 7th day of October, 2013.

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