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

NOTICE OF ERRATA TO OPENING BRIEF OF PETITIONER-APPELLANT

JON M. SANDS
Federal Public Defender

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

COUNSEL FOR PETITIONER-APPELLANT

The errata is being filed to correct Excerpt of Record page numbers in the Statement of Facts in the Opening Brief, pages 5 to 14. Those errors do not appear in the Argument sections of the brief. Immediately prior to filing the Opening Brief, counsel added state court opinions to the first volume of ERs, as required by local rule in this capital case. He inadvertently failed to change the ER pages numbers that appear in the Statement of Facts of the Opening Brief. The text of the document has not been modified.

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 742. 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 743. 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 687. 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 689, 697. David had already obtained a .380 handgun from a friend, and the .380 was already in the truck. ER 682, 694. 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 698. 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 700. 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 699. 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 701.

David testified that he drove on separate occasions with Scott and Jones to ponds south of Tucson, where they disposed of the weapons. ER 712-14. 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 740. He immediately returned the money. ER 786. 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 846. 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 672. 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 707. 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 710.

Ebenal testified that he was David's parole officer. ER 286. He described the EMS unit used to monitor David as a transmitter on a rubber ankle bracelet. ER 286-87. It had a particular serial number. ER 290. 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 307.

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 23. 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

---

used to monitor David's curfew, "the inmate was monitored by BI and the monitoring system was maintained electronically by BI." ER 235.

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 557. 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 558. 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 558-59 (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 564. 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 565.

The court imposed sentences of death on each of the six murder counts. ER 566-67.

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 512-520. 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 522. 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 43. 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 81. 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 187-208. 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 192-99.

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 199-203. Coats has averred that the conversations supposedly overheard by Irwin did not contain the inculpatory subject matter to which she testified. ER 529-30.

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 203. 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 204-05.

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 187-89), would now be considered "technically exhausted but procedurally defaulted," as noted in the Court's Memorandum of Decision and Order. ER 20. 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 177-78.

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 178-80. 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 216 (Rule 60(b) Motion); ER 580-87 (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 230-31. In a letter of July 29, 2013, ADC indicated that BI was responsible for monitoring parolees such as Nordstrom with BI's equipment. ER 235. 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

Certificate of Service

I hereby certify that on this 15th 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:

Jeffrey L. Sparks
Arizona Assistant Attorney General
Attorney General's Office
1275 West Washington
Phoenix, AZ 85007-2997

s/Teresa Ardrey
Teresa Ardrey
Legal Secretary
Capital Habeas Unit