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

REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

FEDERAL STATUTES

REPLY BRIEF

I. MARTINEZ CONSITUTES AN EXTRAORDINARY CIRCUMSTANCE REQUIRING RELIEF FROM JUDGMENT UNDER RULE 60(B).

Appellees contend that Jones' Motion for Relief from Judgment under Fed. R. Civ. P. 60(b) constituted a second or successive ("SOS") petition for writ of habeas corpus and is proscribed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2241 *et seq*., because Jones did not obtain authorization from this Court to file it under § 2244(b)(3). Answering Brief at 11. Appellees argue that Jones failed to allege a "defect" in his § 2254 proceeding and violated *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Instead, Appellees claim, he merely posits three new habeas corpus claims for which he seeks relief. *Id*.

Appellees further argue: 1) *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309 (2012), does not constitute an "extraordinary circumstance" that allows him to plead his new claims without the federal courts treating the Rule 60(b) motion as an SOS petition; 2) § 2254 counsel's *per se* conflict does not rescue his Rule 60(b) motion from SOS status; and, 3) *Martinez*, if it applies, does not confer equity in these circumstances sufficient to rescue the Rule 60(b) motion from SOS status. Ans. Br. at 13.

A. The mere presence of new claims did not render Jones Rule 60(b) motion an SOS petition.

Jones includes three claims of ineffective assistance of trial counsel ("IAC") in Argument I of the Rule 60(b) motion, two of which are supported with new evidence and one that is record-based. Jones included the claims to dispel the certain claim of speculation that would have attended Appellees' response in the district court were Jones not to suggest a single IAC claim upon which relief might be granted were the court to have found Jones meets the test for relief from

judgment under Rule 60(b)(6) under *Gonzalez* and this Court's decision in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). Litigation of *Martinez* while under warrant and in a Rule 60(b) posture presents equities stronger than those of the petitioner in *Gray v. Pearson*, No. 12-5, 2013 WL 2451083 (4th Cir. June 7, 2013). Gray alleged a *per se* conflict on the part of his § 2254 counsel based on *Martinez*, which was decided during the pendency of his § 2254 proceeding. *Id*. at *1. Like Jones, Gray was represented by the same counsel in both the state post-conviction relief ("PCR") proceeding and in the § 2254 proceeding.

In the Fourth Circuit, Gray asked for, and was granted, new, "independent" counsel – without any showing he actually had any federal claim whose procedural default might be excused by the cause and prejudice test of *Martinez*. The Fourth Circuit rejected the Respondent-Warden's argument that the absence of an allegation of a "potential" federal constitutional claim was fatal to Gray's argument that he was entitled to discover and plead any defaulted claims based on *Martinez*. *Id*. at *3. The court ruled that the same ethical constraints that bar such counsel from investigating or advancing her own errors apply equally with respect to counsel even identifying and producing a list of her errors. *Id*. at *3-4.

In *In re Pickard*, 681 F.3d 1201, 1206 (10th Cir. 2012), the court noted that its prior decision in *Spitznas v. Boone*, 464 F.3d 1213 (10th Cir. 2006), was the first post-*Gonzalez* § 2254 case in that circuit to distinguish an SOS petition from a Rule 60(b) motion. *Spitnas* stated in dictum that "a Rule 60(b) motion in a habeas proceeding is a 'true' 60(b) motion if it 'challenges a defect in the integrity of the federal habeas proceeding, *provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior habeas petition*.'" *Id*. (italics in original) (*quoting Gonzalez*, 545 U.S. at 532).

Significantly, the *Pickard* Court cautioned:

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

Id.

Jones' petition is not an SOS petition because he did not get a fair shot because Daniel Maynard represented him in both the state PCR proceedings, as well as in the § 2254 proceeding. *Martinez* considers Maynard to have been conflicted. *See Gray v. Pearson*. He raised precisely the same claims in each proceedings. The ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) contemplate that the same counsel will *not* represent the client is successive stages of litigation. Guideline 10.7(B)(1) states that "[c]ounsel at every stage have an obligation to conduct a full examination of the defense provided at all prior phases of the case."

Another federal court, relying on *Martinez*, has also recognized the duty of § 2254 counsel to review PCR counsel's performance. In *Bergna v. Benedetti*, No. 3:10-CV-00389-RCJ, 2013 WL 3491276, at *1 (Nev. July 9, 2013), the Nevada Attorney General moved in a federal habeas corpus case to remove a Federal Public Defender attorney on the basis that *Martinez* rendered that attorney conflicted in the § 2254 proceedings because she represented the petitioner in state PCR proceedings. The district court agreed and ordered the attorney removed, finding that "current [§ 2254] counsel thus is placed in a position of having to review the performance of a state post-conviction litigation team on which she worked—including as an attorney—to determine whether the team inadequately

failed to raise additional claims of ineffective assistance of trial counsel." *Id*. The court concluded that, "[f]ollowing *Martinez*, there in truth can be no dispute that petitioner does not currently have conflict-free counsel." *Id*.

There is no showing of record that *Martinez* caused any introspection on Maynard's part of the type that led to the removal of federal habeas counsel in *Gray* and *Bergna* due to the decision in *Martinez* and the appointment of independent counsel. There is no showing Maynard ever communicated with Jones about IAC claims he defaulted for which *Martinez* might have established "cause" to excuse. As in *Pickard*, Jones simply requests a fair shot at presenting his claims with independent counsel in his capital habeas corpus case.

B. The extraordinary change in the procedural law of *Martinez* constituted a defect in the integrity of Jones' § 2254 proceeding.

Gonzalez requires proof of a "defect" in the habeas corpus proceeding before relief from judgment may be granted. There, the Court found that Rule 60(b) applied to a change in the interpretation of the tolling provision of the AEDPA's statute of limitations, although the Court went on to find that the change was not extraordinary because, unlike here, there was a circuit split that caused the Court's necessary resolution of the issue to not be "extraordinary." *Id*. at 536.

Despite *Martinez'* novelty, this Court has already recognized it may be employed in an Arizona capital habeas corpus case to allow for relief from judgment. *See Lopez* (*Samuel*) *v. Ryan* 678 F.3d 1131 (2012). In *Lopez*, the Court went so far as to consider the change in the law of *Martinez* a factor under *Phelps* that tipped in the petitioner's favor as it balanced the equities in the case. *Id*. at 1136. Unlike in *Gray*, this Court was not confronted with a situation in *Lopez* in which *Martinez* resolved a circuit split that would deprive that change in the law of its "extraordinary"character. As the Court noted, since *Coleman v. Thompson*, 501

U.S. 722 (1991), "it was settled law that post-conviction counsel's effectiveness was irrelevant to establishing cause for procedural default." 678 F.3d at 1136.

C. *Martinez* gave rise to a *per se* conflict that requires that Jones, with independent counsel, be permitted to raise his three federal claims without being subject to SOS restrictions.

Appellees posit that *Martinez* does not apply because "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." Ans. Br. at 14. Appellees conclude that his counsel's conflict does not cure these defects, citing cases that address mere attorney negligence. *Id*. at 15 (*citing Towery v. Ryan*, 673 F.3d 933, 941 (9th Cir. 2012) (per curiam); *Harris v. United States*, 367 F.3d 74, 77 (2nd Cir. 2004)).

1. § 2254 counsel dwelled under a *per se* conflict of interest.

Contrary to Appellees' assertion, Jones does not allege mere attorney negligence but a conflict brought about by *Martinez* and the ethical imperative that counsel not investigate, allege or litigate his own ineffectiveness. This Court stated in *Lopez* that "*Martinez* forges a new path for habeas counsel to use ineffectiveness of state PCR counsel as a way to overcome procedural default in federal habeas proceedings." 678 F.3d at 1133. It is as extraordinary an event as the Supreme Court's decisions that have removed attorney abandonment from the realm of mere negligence within the agency relationship and now allow it to be raised to excuse procedural default and to equitably toll AEDPA's statute of limitations. *See Maples v. Thomas*, ___ U.S. ___, 132 S.Ct. 912 (2012) (cause to excuse procedural default); *Holland v. Florida*, ___ U.S. ___, 130 S.Ct. 2549 (2010) (equitable tolling).

The Fourth Circuit in *Gray* noted that three legal ethicists, one of whom was State Bar Counsel and not an expert retained by Gray, rendered opinions in the matter which the district court rejected, but which that led the circuit to conclude that "a clear conflict 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." *Gray*, 2013 WL 2451083, at *3. The circuit further noted that the legal literature further supported Gray's position that his counsel were conflicted.

Jones should not suffer diminution in his right to the benefit of *Martinez* because his appointed § 2254 counsel was not cognizant of the Supreme Court's decision, or he was and yet stuck his head in the sand rather than fulfill his duty under the ABA Guidelines to review his own performance in the PCR proceeding to determine whether he overlooked claims that might be excused from procedural default due to M*artinez*.

Appellees' effort to distinguish *Gray* is the proverbial distinction without a difference. Appellees concede that the Supreme Court and this Court have given *Martinez* retroactive effect but claim that retroactivity does not extend to the *per se* conflict to which *Martinez* gives rise because the district court denied relief to Jones two years before *Martinez* was decided. Ans. Br. at 16-18. Appellees cite no case for the proposition that the retroactivity of *Martinez* is somehow divisible depending on the purpose to which the case would be put. Jones was in federal habeas corpus proceedings at the time *Martinez* was decided and remains there today. He is aware of no case that has circumscribed the reach of *Martinez* depending on which federal court a petitioner was in when *Martinez* was decided.

2. Doctrinally, Jones' three proposed IAC claims are in the same posture as they would have been if raised and ruled to have been procedurally defaulted in the § 2254 proceeding.

The real crux of Appellees' argument is that "Jones never presented the three newly-asserted IAC claims in his habeas petition" and, therefore, "there was no procedurally defaulted trial IAC claim." Ans. Br. at 14, 18. While Jones has conceded since filing the Rule 60(b) motion that the claims were not raised by Maynard in the § 2254 petition, the question *not answered* by Appellees is why does that matter?

As Jones notes in his Opening Brief (at 25), and which Appellees fail to answer, an alternative course would have been for Jones to seek a stay to return to state court to exhaust these claims, but that would have been futile. In theory, a federal court might allow Jones a stay of his § 2254 case and hold it in abeyance in order to permit him to return to the state courts to exhaust these three claims, *see Rhines v. Weber*, 544 U.S 269 (2005), but the Arizona courts would now find the claims defaulted under Ariz. R. Crim. P. 32.2(a)(3). Jones, like all other capital habeas petitioners in Arizona, received a standing order from the district court that the failure to exhaust his claims in state court now means that the claims are "technically exhausted but procedurally defaulted" because "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 17 (*citing Coleman*, 501 U.S. at 735). The interest of judicial economy requires that the federal courts consider claims such as those submitted by Jones in his Rule 60(b) motion as though they *were* presented in the § 2254 petition.

In the district court, Martinez raised two claims of ineffective assistance of trial counsel. *Martinez*, 132 S.Ct. at 1314. The claims were ruled to be procedurally defaulted because they were raised previously only in a second state

PCR petition and ruled to be "precluded" under Arizona law. *Id*. Thus, the facts before the Supreme Court included that Martinez presented ineffective assistance claims in the district court. In announcing the right conferred in equity to effective assistance of PCR counsel that could serve as "cause" to excuse a procedural default, the Supreme Court did not rule that a petitioner necessarily had to raise a procedurally defaulted claim in the district court prior to announcement of the *Martinez* decision, to benefit from the new equitable principle. Its holding included merely the facts before it.[1]

The Supreme Court has recognized that the common law "is to be derived from the interstices of prior opinions and a well-considered judgment of what is best for the community." *Gregory v. Ashcroft*, 501 U.S. 452, 466 (1991). This Court has recognized that "[t]he common law, at its core, was a reflection of custom, and custom had a built-in flexibility that allowed it to change with circumstance." *Hart v. Massanari*, 266 F.3d 1155, 1167 (9th Cir. 2001). It is the common law that informed *Ring*, 536 U.S. at 612 (Scalia, J. concurring), and countless other cases. Jones asks the Court to recognize that his factual circumstance was not at issue in *Martinez* but that there is no doctrinal reason not to apply *Martinez* in *Jones.* Jones is entitled to the equity that *Martinez* conferred.

Equity conferred by Martinez should also serve to toll AEDPA's statute of limitation, which Jones argues in the Opening Brief (at 27). Jones cites decisions of the Supreme Court and this Court in which equity has tolled the one-year statute of limitations, which Appellees fail to address in their Answering Brief.

---

[1] As the Court is aware the Supreme Court deals in cases and controversies, not hypotheticals. In *Ring v. Arizona*, 536 U.S. 584 (2002), for example, the Court ruled Arizona's death penalty statute unconstitutional because it failed to require jury sentencing. The Court employed a later Arizona case to determine that *Ring* did not apply retroactively. *See Schriro v. Summerlin*, 542 U.S. 348 (2004).

Appellees argue that "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." Ans. Br. at 21. Appellees cite no case for the proposition that any equitable tolling under *Martinez* would be of one year's duration.

The argument is actually contrary to the law of this Circuit, where the Court, in *Phelps*, considered on a case-by-case basis the length of delay in bringing a Rule 60(b) motion based on a change in the law. 569 F.3d at 1138. Appellees argument also fails to consider Jones' argument that delay cannot be attributed to counsel who was rendered conflicted by *Martinez* but who did not move to withdraw and allow new, independent counsel to more timely represent Jones' interests.

D. Jones' constitutional claims are substantial.

1. The district court failed reach Jones' three federal claims.

Appellees argue the three claims do not meet the requirement in *Martinez* that the underlying claims of IAC of trial counsel be "substantial" in order for PCR counsel's ineffectiveness to excuse their default. Ans. Br. at 21. The district court failed to reach the three claims to determine whether they are "substantial," a requirement of the test for cause and prejudice under *Martinez*. ER 1-10. In a footnote, the district court described the claims as follows:

> The claims allege that trial counsel failed to challenge the admissibility of evidence generated from an electronic monitoring system used to track a prosecution witness (based on *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and foundational objections, failed to call a rebuttal witness, and failed to object to the trial court's refusal to consider mitigating evidence absent a causal connection.
>
> ER 5 n. 2.

Because the district court did not reach the claims, and because they were not central to the decision the court made to deny relief, undersigned counsel did not brief them in the Opening Brief. The matter should be remanded because the first two claims, both guilt phase claims, require evidentiary development and factual findings. The district court is uniquely suited to perform those functions. This Court cannot apply an abuse of discretion standard of review to the question whether Jones' claims are "substantial" for *Martinez* purposes in the absence of such findings.

Martinez requires the prisoner "to demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the claim has some merit." *Martinez*, 132 S.Ct. at 1318-19. The Supreme Court compared the test favorably to the test for issuance of a certificate of appealability ("COA") in *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), to wit, whether the petitioner has made a substantial showing of the violation of a constitutional right. Put another way, the question asks whether reasonable jurists could debate the resolution of the petitioner's constitutional claim. *Id*. *Miller-El* states that a petitioner need not show that he is entitled to relief in order to qualify for a COA.

Appellees address only one of the two omissions of trial counsel that comprise the IAC trial counsel claim in the Rule 60(b) motion. Appellees only attempt to justify the failure of Jones' trial counsel to request a hearing pursuant to *Frye*, 293 F. 1013, but not on counsel's failure to renew a foundation objection to admission of the EMS evidence, which was also alleged in the Rule 60(b) motion. ER 192 (*Frye*), 197 (foundation).

2. Application of M*artinez* to the undeveloped claims.

a. *Frye* and the absence of foundation for admission of EMS.

Appellees cite *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770 (2011), and speculate that "reasonable counsel could easily have declined to raise a *Frye* challenge, because *Frye* does not apply to the EMS evidence." Ans. Br. at 23. *Harrington*, however, counsels that courts "may not indulge in '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *Id*. at 790 (*quoting from Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003)).

Appllees fail to cite any case, article, pamphlet or technical bulletin that would have influenced Jones' trial counsel to not challenge the EMS evidence on *Frye* grounds. The speculation about counsel having some strategy is undermined by the fact that counsel had been successful in convincing the trial court to bar the admission of the EMS evidence on the basis the prosecution could not prove foundation. ER 631. The EMS evidence was the most important evidence the prosecution had to attempt to credit the testimony of former suspect David Nordstrom and convince the jury it was Jones and not Nordstrom who, along with Scott Nordstrom, shot and killed four persons at the Fire Fighters Union Hall, and the burden would have been on the prosecution to prove the acceptance of the BI Model 9000 in the relevant technological community. Reasonably competent defense counsel would clearly not have made a decision to forego an objection to the admission of the EMS on *Frye* grounds.

Appellees argue Jones cannot prove his claim of IAC of trial counsel for failure to move for a *Frye* hearing to test the acceptance of BI, Inc.'s Model 9000 that was attached to suspect-turned-informant David Nordstrom. Ans. Br. at 22-24. Appellees' arguments include that Mr. Jones cannot prove: 1) "that the EMS

recording system and the data it generated were, at the time of his trial, a novel scientific process or theory to which *Frye* would apply"; 2) "that the Model 9000 was not accepted in the scientific community"; 3) that malfunctioning units identified by Jones were "the same model used to monitor David." Ans. Br. at 24-25.

The remainder of Appellees' argument proves in large measure why Jones requires discovery pursuant to Rule 6 of the Rules Governing Section § 2254 Cases in the United States District Courts and other evidentiary development with which he can prove his IAC claim based on trial counsel's failure to challenge, on *Frye* grounds, the EMS evidence admitted at trial to prove David Nordstrom's alibi for the four Fire Fighters Union Hall homicides. He is caught in the bind recognized in *Banks v. Dretke*, 540 U.S. 668, 696 (2004), where the Supreme Court cautioned in the *Brady* context that "[a] rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." The BI evidence should have been gathered by the Pima County Attorney prior to trial from BI, Inc, the EMS manufacturer, and Arizona Department of Corrections ("ADC"), which contracted with the ADC, oversaw David Nordstrom's home monitoring, and whose personnel testified at trial to his alibi. BI had been sued in multiple jurisdictions and its officers were even made to testify in criminal proceedings that exposed flaws in its EMS units. BI now refuses to communicate with undersigned counsel or produce records (ER 227, 233 at¶ 6) and the ADC claims that its modest records retention policy has resulted in its no longer having records pertaining to its contracts with BI and purchase, repair, and other records concerning BI's EMS equipment sold to ADC, including that of David Nordstrom. ER 235. Jones persists in his request that the court remand to the district court for evidentiary development.

Although it is not responded to by Appellees, and the district court should rule in the first instance on whether the IAC/foundation claim is substantial, Jones submits that the admission of EMS evidence was critical to the assessment of the credibility of David Nordstrom's testimony that Jones and Scott Nordstrom committed the four Fire Fighters homicides. The trial court promised to rule it inadmissible if the prosecution could not produce Teresa Nordstrom, David's step-mother, at trial to provide foundation that the phone at the Nordstrom residence that was in use when David Nordstrom was being monitored was the same phone tested a year later by the prosecution prior to trial in an effort to prove the EMS system's effectiveness. ER 631. Prosecutor David White assured the trial court the phone was the same even though Teresa Nordstrom testified eight months earlier at Scott Nordstrom's trial, a case White prosecuted, that it was *not* the same phone. ER 147. To prevent admission of the EMS evidence, trial counsel only had to renew the foundation objection the following day when Teresa Nordstrom testified, but he failed to do so. ER 802-17. No foundation for the admission of the EMS evidence was provided at trial, nor has it ever been provided.

In the absence of argument by Appellees with respect to the IAC/foundation claim, Jones rests on the claim as he presented it in detail in the Motion for Relief from Judgment and in the Reply to Appellees' opposition. ER 604-05, 833-34.

b. Stephen Coats.

Appellees speculate that "numerous strategic reasons could have supported trial counsel's decision not to involve Coats." Ans. Br. at 26. Lana Irwin was the prosecution's other key witness, and Coats was her live-in boyfriend. Appellant's Supplemental Excerpts of Record ("SER") 878. Coats' testimony would refute her testimony that Jones made admissions concerning the homicides in Tucson. *See* SER 881-88. Appellees speculate that another criminal act committed by Jones

with Coats might have been admitted had Coats testified, and that Coats' counsel "would have impeded Jones' counsel's ability to interview him." Ans. Br. at 26.

However, Coats avers he was not interviewed by Jones' counsel prior to trial, but he would have testified if he had been called at trial. ER 529 at ¶ 3. The failure of Jones' counsel even to interview such a critically important witness casts doubt on all of the other speculation in which Appellees engage as to why Jones' counsel failed to call Coats to testify. If counsel does not know what the witness will say because he has not investigated, he has not made a strategic judgment as to whether to call the witness at trial. *See Rompilla v. Beard*, 545 U.S. 374, 395 (2005); *Wiggins*, 539 U.S. at 527-28.

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

c. The causal nexus claim.

At sentencing, the sentencing court found:

> 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 (italics added).

> Concerning Jones' drug abuse, the court noted:
>
> 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 (italics added).

> In its independent review, **t**he Arizona Supreme Court noted:
>
> Jones argued he is the product of a dysfunctional family. *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. See State v. Mann*, 934 P.2d 784, 795 (1997). Jones produced evidence his parents were divorced when he was young and he had no contact with his father after he turned seven years old. His mother remarried twice and had children by each of these marriages. Both step-fathers, Eugene and Ronnie, were physically and emotionally abusive, as were Jones' mother and grandmother. Jones was introduced to drugs by his stepfather, Ronnie, when Jones was only fourteen years old. Ronnie also beat Jones, his mother and his siblings on a regular basis, and threatened to kill them all. Ronnie kicked Jones out of the home, and Jones became homeless and dropped out of school. As a result, he began to use drugs almost continuously.

> Even if these facts were proven, they do not necessarily constitute mitigating factors . . . the [trial] court noted that no causal connection existed between the childhood abuse and the murders. *A defendant is not entitled to mitigating weight in the absence of a nexus between his family history and violent behavior. Jones argues that, at the very least, his treatment during childhood 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.*

ER 136.

In addition to Appellees' facts, Jones would add only that the Arizona Supreme Court's opinion on direct appeal, where it purported to weigh aggravation and mitigation, constitutes the last reasoned state court judgment and it is that court's decision that is ordinarily scrutinized. *See Ylst v. Nunemaker*, 501 U.S. 797, 803-07 (1991); *Hurles v. Ryan*, 706 F.3d 1021, 1038 (9th Cir. 2013). However, the reviewing court unreasonably determined the facts pursuant to 28 U.S.C. § 2254 where it found that the sentencing court gave the drug use "no mitigating weight." ER 136. The sentencing court actually said that the drug abuse *had not been proven*. As a result, the federal courts review the claim *de novo*.

For *Martinez* purposes, the question is whether Jones' underlying claims of IAC of trial counsel are "substantial," that is, whether reasonable jurists could disagree on the proper resolution of the claim. *Miller-El*, 537 U.S. at 336. The causal nexus claim alleged here is virtually on all fours with *Williams* (*Aryon*) *v. Ryan*, 623 F.3d 1258, 1271 (9th Cir. 2010), and *Styers v. Schriro*, 547 F.3d 1026, 1034-36 (9th Cir. 2008) (*per curiam*), Arizona capital habeas corpus cases in which this Court ordered that the writ issue. In those cases, as was true here, the state sentencing court or state supreme court described the defendant's proffered

mitigation but then stated either it would not consider it because it bore no causal nexus to the crime or it was not mitigating. *Tennard v. Dretke*, 542 U.S. 274 (2004), holds that mitigating evidence such as that proffered in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), need not bear any causal nexus to the crime to be mitigating. The non-statutory mitigation described above *was* mitigating and it *was* proven. *Eddings*, 455 U.S. 104, required that it be considered in the weighing process. Jones meets the test set forth in *Martinez* and *Miller-El*.

Appellees rely heavily on the Ninth Circuit's decision in *Poyson v. Ryan*, 711 F.3d 1087 (9th Cir. 2013), in which a split panel denied Poyson, another Arizona capital habeas petitioner, causal nexus relief. Ans. Br. at 30. What Appellees omit is the fact that *Poyson* is pending rehearing, with suggestion for rehearing *en banc*, based on the tension between *Poyson* and *Styers*. *See* Petition for Panel Rehearing and Petition for Rehearing En Banc, *Poyson v. Ryan*, Ninth Cir. No. 10-99005, Dkt. 69-1, April 12, 2013. Rehearing has been pending for almost five months, doubtless owing to Judge Thomas' compelling and exceptionally well-reasoned dissent on this claim. *See Poyson*, 711 F.3d at 1104-09 (Thomas, J., dissenting in part).

As was true in the district court and remains true here, Appellees offer the Court no analysis to distinguish *Jones* from *Styers* or *Williams.* With respect to those two cases, Appellees make only the conclusory statement that those cases are "readily distinguishable" from *Jones*. Ans. Br. at 32. They are not, and reasonable jurists would have trouble distinguishing them from *Williams* and *Styers*. Jones has presented a substantial claim.

E. The *Phelps* factors strongly favor relief from judgment.

This is another important issue the district court omitted from its consideration. Appellees again answer with the arguments contained in their

Response to Motion for Relief from judgment. *See* ER 597 *et seq*. Jones responds largely with the arguments posited in his Reply. ER 824 *et seq*. For the reasons that follow, the balance of the *Phelps* factors strongly favors allowing relief from the judgment.

1. Change in the law.

Significantly, this Court considered the change in the law of *Martinez* in another Arizona capital habeas corpus appeal and determined under the *Phelps* analysis that the factor tipped in the petitioner's favor as it balanced the equities in the case. *See Lopez*, 678 F.3d at 1136. As Jones notes above, this was not a circumstance like *Gonzlez* that the Supreme Court's resolution of a circuit split was not an extraordinary event. This was a sea change in the Supreme Court's procedural jurisprudence that requires relief from judgment in this capital habeas corpus case. Appellees fail to acknowledge the Court's rendering of that equity in *Lopez*.

Instead, Appellees argue that *Martinez* did not give rise to a *per se* conflict on the part of Jones' § 2254 counsel that would allow Jones to raise claims here that were not included in the § 2254. Ans. Br. at 34. Appellees argue that there were no procedurally defaulted claims to which *Martinez* could be applied.

The three claims alleged in the Rule 60(b) should be considered procedurally defaulted under the technically exhausted/procedurally defaulted jurisprudence recognized by the Supreme Court in *Coleman*, 501 U.S. 522, this Court's cases and the standing orders of the Arizona District Court. *See* Op. Br. at 26-27. In addition, as noted at 5-7, *supra*, *Martinez* was decided on the facts before the Court, and this Court can fill interstices in the decisional law by reasonably applying *Martinez* to a case like this one where the Court, since *Coleman* ruled that IAC of PCR counsel does not serve as cause to excuse a procedural default. *See*

Smith v. Baldwin, 510 F.3d 1127, 1146-47 (9th Cir. 2007); *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9th Cir. 1996). It would have been futile for § 2254 counsel to raise defaulted claims in the petition and it would have served no practical purpose. Doctrinally, and given the equity that *Martinez* confers, the absence of procedurally defaulted claims should not be fatal to consideration of cause and prejudice under *Martinez*.

Contrary to Appellees' assertion, the *per se* conflict on the part of Jones' § 2254 counsel to which *Martinez* gave rise is distinguishable from the two attorney negligence cases cited by Appellees. In *Towery v. Ryan*, 673 F.3d 933, 941(9th Cir. 2012), Towery asked that judgment be re-opened because counsel abandoned him, citing *Holland*, 130 S.Ct. 2549, and *Maples*, 132 S.Ct. 912, which required that the federal courts reach his causal nexus claim. This Court ruled, as a matter of fact, that counsel had not abandoned Towery and that the mere failure to raise a claim constitutes negligence but not abandonment. *Id*. In *Harris v. United States*, 367 F.3d 74, 77 (2nd Cir. 2004), the court ruled that the failure of a first § 2255 counsel to raise direct appellate counsel's ineffectiveness constituted mere negligence and not abandonment that would allow for relief from judgment under Rule 60(b).

2. Diligence/Delay.

Appellees argue that undersigned counsel filed the Rule 60(b) motion within four months of their appointment but that the motion was still filed 17 months after the decision in *Martinez*. Ans. Br. at 35-36. As noted above, Maynard's *per se* conflict excuses the failure of Jones to have filed any sooner.

The *Phelps* Court found motions for reconsideration in the Eleventh Ninth Circuits in *Ritter* and *Phelps* filed nine months and four months, respectively, after an initial adverse judgment, to constitute short delays that cut in favor of

petitioners seeking relief from judgment. *Id*. Here, newly-appointed, non-conflicted counsel has filed this Rule 60(b) Motion three and one-half months after appointment. Counsel has done so after entering appearances in the Ninth Circuit and Supreme Court, reading the entire trial transcript and reviewing the entire state and federal court records, and filing a reply to Appellees' Brief in Opposition to the Petition for Writ of Certiorari in the Supreme Court. In addition, the courts continue to define the contours of *Martinez*. *See e.g. Trevino v. Thaler*, ___ U.S. ___, 133 S.Ct. 1911 (2013), and the Ninth Circuit in various panel opinions and orders, and its *en banc* consideration of *Dickens, supra*. Jones' delay has not been unreasonable.

Appellees' parenthetical purporting to explain why the Ninth Circuit's ruling in *Lopez*, 678 F.3d at 1136, militates in favor of a finding that Jones lacked diligence in bringing his claims pursuant to *Martinez* is misleading. Ans. Br. at 34. While Lopez may have waited until *Martinez* was decided to ask for the stay and remand to raise PCR counsel's ineffectiveness as cause, the Ninth Circuit made abundantly clear that Lopez did so only after he was unsuccessful in arguing that counsel originally argued for merits consideration of his claims on the basis that Respondents "waived all procedural bars." *Id*.

Jones, on the other hand, has not previously posited any (unsuccessful) alternative theories here for why the Court should grant the Rule 60(b) motion and reach the merits. He only argues that *Martinez* confers an equitable right to establish ineffective assistance of PCR counsel as cause and that § 2254 counsel had a duty after *Martinez* to consider whether he could gain merits consideration of claims *he* defaulted in state court, based on the new procedural rule of *Martinez*. *United States v. Del Muro*, 87 F.3d 1078, 1080 (9th Cir. 1996), and *Abbamonte v. United States*, 160 F.3d 922, 925 (2d Cir. 1998), speak powerfully to the

disincentive Maynard had to re-examine the record and claims he brought earlier in the PCR proceedings, claims that were merely coextensive with claims that were already rejected in the state PCR proceedings.

3. Reliance on the judgment.

Appellees comingle this factor, which refers to whether the judgment has been executed or remains prospective, with Arizona's interest in finality. Ans. Br. at 35. However, Appellees have not changed their legal position to any significant degree in reliance on the Court's judgment. *See Phelps*, 569 F.3d at 1137-38; *Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987). Appelees are unable to execute the effects of judgment which, in this case is Jones' execution, until all state and federal legal proceedings have ceased. There is no such thing as a partial execution. This is not a case, to use the example in *Phelps*, where property was already transferred in reliance on the district court's judgment when the change of law occurred. *Id*. at 1137. The factor favors re-opening the judgment.

4. The degree of connection.

Appellees renew the argument made with respect to the change-in-the-law factor above that Jones' claims are not procedurally defaulted and there can be no connection to *Martinez*. Ans. Br. at 36. Jones' claims are technically exhausted but procedurally defaulted for the reasons described above. In addition, § 2254 counsel's *per se* conflict restores Jones to the *status quo ante* and requires that his claims be considered as if pleaded in the § 2254 petition. *Martinez* confers an equitable remedy to excuse such defaults where the petitioner can establish the IAC of PCR counsel for failing to exhaust such claims. The connectedness favors re-opening the judgment.

5. Comity.

In defense of Jones' conflicted § 2254 counsel, Appellees cite *Lopez* for the proposition that because Jones brought "several challenges to trial counsel's ineffectiveness" in over a decade in federal court, comity cuts against Mr. Jones. Ans. Br. at 36-37. In *Detrich v. Ryan*, No. 08-99001, 2013 WL 4712729, at *8 (9th Cir. Sept. 3, 2013) (*en banc*), a plurality of this Court observed:

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

Appellees further posit that the conflict of § 2254 counsel does not explain his failure to raise the new claims in the federal petition. Ans. Br. at 36. In fact, it *does* explain those omissions. Jones cites in the section entitled "Diligence" *supra* Ninth and Second Circuit cases that speak to the disincentive of conflicted counsel ever to reconsider his earlier actions or to review the record to determine whether he failed adequately to represent his client. Reasonably competent counsel would have made the objections required to bar the admission of the EMS records that supported suspect David Nordstrom's alibi, would have interviewed the other party to the alleged admissions of Mr. Jones to which prosecution witness Lana Irwin testified, and would have objected to the sentencing court's reliance on an impermissible causal nexus test. Reasonably competent PCR and § 2254 counsel would have raised those meritable claims in the collateral proceedings. As the

Detrich plurality noted, "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him." *Id*. at *8.

Finally, Arizona's interest in finality is blunted, as the *Gonzalez* Court noted, by the existence of legal vehicles available under Rule 60 whose express purposes are to re-open judgments. *Gonzalez*, 545 U.S. at 529 ("The mere recitation of these provisions shows why we give little weight to respondent's appeal to the virtues of finality."). This Court also found this factor to tip in a petitioner's favor because in Rule 60(b), the petitioner is not asking for relief on the merits of a decided issue, but rather he asks for a first judgment on a claim that was earlier barred from merits consideration. *See Phelps*, 569 F.3d at 1139.

6. Death penalty.

As this Court noted in *Phelps*, neither *Gonzalez* nor the Eleventh Circuit's decision in *Ritter*, 811 F.2d 1398, which was cited favorably by *Gonzalez*, "impose a rigid or exhaustive checklist" on the equitable factors to be considered. 569 F.3d at 1135. One factor that cuts compellingly in Jones' favor is that he stands to suffer death if the Court does not grant relief from judgment. "[D]eath is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida*, 430 U.S. 349, 357 (1977). Although the courts have not generally created distinct rules that apply to capital habeas proceedings, they have noted that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), as well as a heightened scrutiny in reviewing such a decision, *see Cartwright v. Maynard*, 822 F.2d 1477, 1483 (10th Cir.1987) (*reh'g en banc*), *aff'd*, 486 U.S. 356 (1988). The Court's review of Mr.

Jones' additional, substantial claims would enhance the reliability of the process employed to sentence Mr. Jones to death.

The *Phelps* factors strongly favor re-opening the district court's judgment.

II. BRADY CONSTITUTES AN EXTRAORDINARY CIRCUMSTANCE REQUIRING RELIEF FROM JUDGMENT UNDER RULE 60(B).

A. Clarification of claim.

As Jones noted in his Opening Brief, prior to trial, the defense 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.

ER 846. On July 29, 2013, in response to an informal records request in which Jones sought information about the electronic monitoring unit Behavioral Intervention, Inc. ("BI"), sold to the ADC, including the one used on David Nordstrom, the ADC sent a letter that stated that "the inmate was monitored by BI and the monitoring system was maintained electronically by BI." ER 235.

It is Jones' position that the above pretrial exchanges and the ADC's July 2013 response constitutes a *Brady* violation because it is apparent that Ebenal and Matthews were *not* the only ones to monitor David Nordstrom's parole. It is Jones' claim in the Rule 60(b) litigation that evidence the BI Model 9000 malfunctioned, if the production of BI's records he seeks here so demonstrates, would have provided Jones evidence with which to prove the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 694 (1984), with respect to two exhausted

habeas claims, that trial counsel should have more effectively challenged Ebenal and Matthew's testimony and should have called additional witnesses that showed Nordstrom was out past curfew without his violation being detected. Op. Br. at 6-7, 17-187, 28-30.

The district court properly understood the claim, having found first, that 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"; and, second, that "Respondents were under no duty to disclose the allegedly exculpatory material during these federal habeas proceedings." ER 8-9 (*citing Dist. Attorney's Office for the Third Judicial Dist. V. Osborne*, 557 U.S. 52, 68-69 (2009)).

Thus, the defect in the integrity of the § 2254 proceeding Jones claims would be corrected in the Rule 60(b) motion, were the Court to find that a *Brady* violation occurred i*n the § 2254 proceeding*, is the district court's determination that Jones did not prove *Strickland* prejudice on two exhausted claims for which the PCR court and the district court found no deficient performance to prove the IAC claim. Jones makes the above point to clarify his claim, which Appellees understood to be that the *Brady* information would support only the new, *unexhausted* EMS claim. Ans. Br. at 37.

Consistent with Appellees assertion (at 38), Jones does seek discovery under Rule 6 to prove the new EMS claim outlined in the *Martinez* discussion above, but the Argument II claim is intended solely to be that the suppressed evidence would support two exhausted claims. As Jones notes in the Opening Brief (at 17), evidence that BI's Model 9000 units sold to ADC to monitor Arizona parolees malfunctioned, including the one used on David Nordstrom, would also prove the

prejudice for Jones' exhausted prosecutorial misconduct claims for which relief was denied in the PCR court and district court on the basis that Nordstrom and Lana Irwin's testimony rendered the errors insufficiently prejudice to require that relief be granted.

B. Application of *Brady* to federal habeas corpus.

Appellees cite *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), for the proposition that the prosecution's duty under *Brady* does not persist into federal habeas corpus. Ans. Br. at 39. Yet, that case is distinguishable and, under the facts of this case, would permit Appellees to suppress potentially exculpatory evidence long enough to defeat Jones' entitlement to it.

Appellees quote the same language from *Osborne* upon which Jones focused in arguing in the Opening Brief (at 30-31) which distinguishes *Osborne* from *Jones*, to wit, that Osborne otherwise received a fair trial and only brought his *Brady* claim after the advent of DNA testing. Jones alleges his trial was unfair, in part because of the two distinct *Brady* claims that mar his conviction: the one complained of here with respect to the false discovery response as to who monitored his EMS for parole and the Fire Fighters victim's relative who confronted Prosecutor White prior to trial to ask why Nordstrom was not being pursued on account of his electronic alibi, where she evaded detection for parole curfew violations in the same county, and she was monitored by BI.

As Jones noted above with respect to the application of the common law to fill interstices, this Court should now act to recognize the distinction Jones advocates as to why *Osborne* does not apply here and hold that prosecutors may not simply run out the clock on a *Brady* violation by suppressing the evidence until a capital case enters federal habeas corpus proceedings.

C. *Brady* was violated here.

From trial, the prosecution understood Jones' defense to be that he was mistaken for David Nordstrom in the commission of the six homicides. To prove it was Nordstrom, Jones needed evidence to prove what the district court labeled Nordstrom's "unrecorded curfew violations." ER 48. The PCR court and the district court understood those violations would prove the prejudice prong of the exhausted IAC claim that other witnesses could have impeached Nordstrom's alibi. ER 48, 156.

A previous counsel for Appellees entered an appearance in the PCR proceeding. The state court record reflects that the State was represented by Assistant Attorney General Ferg, in *State v. Jones*, Pima Co. No. CR-57526, 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. Counsel knew or should have known that the other *Brady* claim had occurred, as the information about the Fire Fighters relative was date-stamped as produced to Jones in those same proceedings on June 14, 2002. ER 582.

Appellees argue, Ans. Br. at 40-41, and Jones concedes, he cannot yet prove *Brady* materiality because BI has not responded to Jones' request for the relevant records. ER 227, 233 at ¶ 6. Jones again respectfully renews his request for discovery pursuant to Rule 6.

Finally, Appellees argue that there was no *Brady* violation because Jones obtained in 2013 news articles that were published from 1996 to 1999 that showed problems with BI's EMS units, and because he therefore had "the same access to public information as the state, "there was no *Brady* violation. Ans. Br. at 43. Jones did not have the same access, as Appellees had a contractual relationship

with BI and all leverage necessary to obtain documents and compel testimony from BI's representatives, just as had occurred in a Florida murder case where a BI unit malfunctioned. ER 245-56.

Of course, it is not the news articles and SEC filings that prove *Brady* materiality. It is solely BI's records that potentially serve to do that. To say Jones should have reviewed SEC filings and searched foreign news archives in 1996 for evidence he did not know existed, in part because the Pima County Attorney failed to disclose BI's involvement in monitoring Nordstrom, is as tenuous an argument as the one rejected by the Supreme Court in *Williams* (*Michael*) *v. Taylor*, 529 U.S. 420, 440-43 (2000). There, a venireman gave sworn testimony that she was not related to any witness in the case, including a deputy sheriff to whom she had been married, and the prosecutor, who served as their divorce attorney, failed to correct the misleading testimony. The Court ruled that defense counsel was not required to perform a courthouse search of public records in the off chance he may discover something that impeaches a venirman's voir dire testimony. *Id*.

The potential *Brady* claim identified here is such an extraordinary circumstance as to justify relief from judgment. The evidence of malfunctioning BI units and the report of a woman that her BI unit malfunctioned in Pima County prior to Jones' trial provides "good cause" for the discovery he seeks.

Conclusion

For the reasons stated in the opening brief and above, Jones requests that the Court vacate the order of the district court in which it dismissed his Motion for Relief from Judgment, order the judgment re-opened as to the claims in Arguments I and II, and remand for the district court's consideration of those claims.

In the alterative Jones request that the Court vacate the district court's judgment and remand for the district court to properly apply the test of *Phelps* to determine whether the judgment should be re-opened as to Claims I and II.

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, and the *per se* conflict of interest to which it gave rise, constitute sufficiently extraordinary circumstances that require re-opening the judgment. Jones further requests that the Court remand with instructions to allow evidentiary development with respect to the two guilt phase claims outlined in Argument I and the *Brady* claim outlined in Argument II. He further requests the Court should re-open the judgment and order that the writ issue based on the IAC of trial counsel for not objecting to the sentencing court's invocation of the impermissible causal nexus test to screen from its consideration non-statutory mitigating evidence of Jones longstanding drug abuse history, exposure to physical abuse of him and his mother, and his diagnosed personality disorder.

Respectfully submitted this 10th day of October, 2013.

Jon M. Sands
Federal Public Defender
Timothy M. Gabrielsen
Assistant Federal Public Defender
By s/Timothy M. Gabrielsen
TIMOTHY M. GABRIELSEN
Counsel for Petitioner-Appellant

Certification of Compliance with the Type-Volume Limitation

This Reply Brief complies with the type-volume limitation of Ninth Circuit Rule 32-4(1), because this brief contains 8,888 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: October 10, 2013

s/Timothy M. Gabrielsen
Counsel for Petitioner-Appellant

Certificate of Service

I hereby certify that on this 10th 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/Tamelyn McNeill
Tamelyn McNeill
Legal Secretary
Capital Habeas Unit

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.

SUPPLEMENTAL EXCERPTS OF RECORD

SERs 874 to 920

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

Petitioner's Supplemental
Excerpts of Record

Index

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

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

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

APPEARANCES:

FOR THE STATE: DAVID WHITE
Deputy County Attorney

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

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL -- DAY THREE -- A.M. Session

June 19, 1998

REPORTED BY:

TONI HENSON
Official Court Reporter
Division Ten
Pima County Superior Court

DEFENSE

LANA IRWIN,

having been first duly sworn to state the truth, was examined and testified as follows:

THE COURT: Please have a seat, ma'am.

MR. WHITE: I'm sorry, Judge. Can we approach for a moment?

(Whereupon, the following proceedings were held at the bench, out of the hearing of the jury:)

MR. WHITE: I would ask that the news media be ordered not to show the witness' face. That is her request. She is terrified of retribution from the defendant's friends.

THE COURT: I am reluctant to do that. I don't see the efficacy of it in the first place. I mean, he knows who she is.

I don't know that I have the authority, other than if it interferes with the progress of the trial. So I decline to do that.

(End of bench conference.)

MR. WHITE: May I proceed, Your Honor?

THE COURT: Yes, you may.

DIRECT EXAMINATION

BY MR. WHITE:

Q. Ma'am, would you please state your name and spell your last name for the court reporter.

A. Certainly. Lana Irwin, I-r-w-i-n.

Q. Up until a month or so ago, where did you live?

A. In the Phoenix area.

Q. How long did you live in the Phoenix area?

A. About 11 years.

Q. Up until a month ago or so, had you lived in Tucson at all?

A. I had never been here.

Q. Now, do you have a daughter?

A. Yes, I do.

Q. What is your daughter's name?

A. Brittany Irwin.

Q. How old is your daughter?

A. Eighteen.

Q. I'd like to call your attention or take you back to the summer of 1996, two years ago, okay?

A. Okay.

Q. Where specifically were you living in Phoenix two years ago?

A. 17602 North Cave Creek, Phoenix, Arizona.

It was Apartment 209. Zip code, 85732.

Q. Who did you live there with?

A. My daughter Brittany.

Q. Now, in the summer of '96, did you meet a person who later became known to you as "Red" or Robert Jones?

A. Yes, I did.

Q. Do you see that person in the courtroom?

A. Yes, I do. (Pointing.)

Q. Would you tell us what that person is wearing so we know who you are talking about.

A. A gray jacket with a purple shirt.

MR. WHITE: May the record reflect the witness has identified the defendant?

THE COURT: The record will reflect that the witness has indicated the defendant.

Q. Where was it that you met the defendant?

A. In my apartment, in my dining room.

Q. Did he come there with -- well, let me back up for a second.

When you met him, was there another man at the apartment?

A. Yes, there was.

Q. Was that man a friend of yours?

A. A recent acquaintance.

Q. Was that Mr. Coates?
A. Steven Coates.
Q. Now, when Mr. Jones, the defendant, came to your apartment, were you able to tell whether Mr. Jones and Mr. Coates knew each other?
A. Yes, they were friends.
Q. And for that reason did the defendant come to your apartment a number of times?
A. Yes.
Q. Did he stay there overnight sometimes?
A. Yes.
Q. Now, let's try to get a time period, if we could.
A. Okay.
Q. Do you remember a time when you received an injury -- may I approach the witness, Your Honor?
THE COURT: Yes.
Q. -- that caused you to wear a cervical collar?
A. Yes, I did.
Q. Did somebody take a picture of you with that collar on?
A. Yes, they did.
Q. Is that the picture?
A. Yes, it was.

Q. And see the date, the camera puts that in the corner of the picture?

A. August 10th.

Q. Had you met the defendant near the time to when this picture was taken?

A. Prior to.

Q. How long prior to?

A. About approximately three months.

Q. Now, when you met the defendant, did he at some point early on in your meeting him, did he talk about some friends down in Tucson who had been stabbed?

A. Yes, he did.

Q. Do you recall how he described those people?

A. One of them was in the hospital in serious condition. He had to get back right away to visit.

Q. Okay. And was this conversation about his friends being stabbed, was that early on when you met him?

A. The first day, the very first time.

Q. Okay. So if we can figure out when the stabbing was, then we'll be able to place when you first met him within some range; is that correct?

A. Correct.

Q. And we'll figure that out through somebody.

A. Thank you.
Q. How many times would you say the defendant was at your apartment, if you can remember, approximately?
A. Three.
Q. When you first met him, what color was his hair?
A. Red.
Q. Similar to what it is now?
A. Exactly.
Q. Did his hair color ever change?
A. Yes.
Q. How did it change?
A. I colored it brown.
Q. How about the length of the hair?
A. My friend cut it. She's a cosmetologist.
Q. And why did you color his hair?
A. He said he was hiding from someone.
Q. And he wanted to change his appearance?
A. His appearances, correct.
Q. Now, any of these times that he's at your apartment, do you ever hear him talking to Mr. Coates?
A. Yes.
Q. I'd like to talk about those conversations, okay?

A. Okay.
Q. Did you ever hear him talk about, first of all, having a truck?
A. Yes.
Q. When he came to your apartment, did you notice what kind of vehicle he had?
A. A motorcycle. It was like a Japanese or, I don't know, Chinese or Oriental motorcycle, the fast one.
Q. Okay. So he didn't have a truck then?
A. No.
Q. What did he say about his truck? And this is the same time period we're talking about?
A. Yes. He was worried about it and he had to get it back.
Q. Did he say why he was worried about it?
A. Because it had been seen somewhere.
Q. Seen somewhere?
A. Um-hum.
Q. Did he say seen in relation to anything in particular?
A. Something had happened and he -- it had been seen doing something. I'm not real sure what.
Q. Okay. And he was concerned about getting it back?

A. Very.
Q. Did he say who had this truck?
A. Someone named David.
Q. Now, did you ever meet this David person?
A. No.
Q. Did you hear him talk about anything that he had done in Tucson?
A. Yes.
Q. And specifically, did you hear him talk about acts of violence in Tucson?
A. Yes.
Q. We're talking about hearing this on one conversation or a number of conversations?
A. Many conversations.
Q. Did you ever hear him talking with Mr. Coates about killing people in Tucson?
A. Yes.
Q. Now, did you have conversations with him about this or you just listened to him?
A. I mostly listened.
Q. Okay. I'm going to ask you some specific questions about those conversations, then, all right?
A. All right.
Q. Do you remember him saying to Mr. Coates how many people -- well, did he say that he killed

someone in Tucson?

A. Yes.

Q. Do you remember him saying how many people he killed?

A. A man by the door --

Q. Okay. I'm not asking about specifics. I just want a number right now.

A. Okay. Four. Perhaps five. Definitely four, perhaps five.

Q. All right. Now, when he was talking about this, was he talking about doing this by himself or --

A. No.

Q. No?

A. No.

Q. Other people were involved?

A. Yes.

Q. How did he refer to those other people?

A. His partner.

Q. He killed four. Did he say how many his partner killed?

A. Two.

Q. Did you hear him say how these people were killed? Were they --

A. Shot.

Q. Shot. Okay. All of them?

A. Yes.
Q. Do you remember hearing him say where they were shot? I don't mean --
A. In the head.
Q. Do you remember -- you started to say something about a door. Do you remember hearing any conversation about doors?
A. One door was open and one had to be kicked in.
Q. I'm sorry. One had to be kicked in?
A. Yes. One was kicked, one was open.
Q. And you said something about somebody shot by a door. Was that --
A. Someone was standing by a door and was shot.
Q. Do you remember him saying anything about people in a back room or somebody going to a back room?
A. They ran to the back room. His partner chased them and they were shot.
Q. We talked about partners just a second ago. Did he say he had one partner or more than one?
A. Two.
Q. What did he say about the two partners? What made you think there was a second partner total?
A. Brothers. One was in the truck.

Q. Tell me about that, the best you can remember.

A. One was in the truck and one was inside and he was mad about the one that was in the truck.

Q. Did he say what he was mad about?

A. No, not that I heard.

Q. These people that were killed, did he indicate whether or not there were any women killed?

A. Yes, he did.

Q. I want to talk about the women who were killed. Did you overhear any conversation about the place where the women were killed?

A. A bar or maybe a restaurant. I don't know.

Q. One or the other of those two?

A. Yes.

Q. Did you overhear him describe what this bar or restaurant looked like?

A. I only heard him say a red room, everything was red, was like red.

Q. Did he talk about -- well, what did he say about the women? Did he --

A. That they just weren't supposed to be there so they had to be shut up so they didn't run their necks.

Q. That was kind of a long answer. Let's

break it down. That they just weren't supposed to be there?

A. Right.

Q. Referring to the women?

A. Right.

Q. And the other thing you said?

A. So they didn't run their necks.

Q. Run their necks?

A. Say anything.

Q. Oh. Did you ever hear him tell Mr. Coates how many women he was talking about?

A. Three.

Q. Did he ever describe -- and was there a man or some men involved also who were shot?

A. One by the door and one with his head back.

Q. When you talk about the one with his head back, can you describe the age of that person?

A. Older.

Q. An older man?

A. Yes.

Q. With his head back?

A. His head -- his head, I can't put my head in that position because of my neck, but he said his head was back, but I can't do the same thing.

Q. Was this person standing or sitting?

A. Sitting in a chair.
Q. Sitting in a chair with his head back?
A. Yes.
Q. Did he say what place -- did he give a description of the place where the man was sitting in the chair with his head back?
A. I don't remember.
Q. Was that in that same red room?
A. That was -- I think it was in the same red room.
Q. His partner -- I think I may have asked you this. Did he say anything about his partners getting hurt?
A. Yes, stabbed. One of them was in the hospital and one of them wasn't.
Q. Did he say why these people got killed? I mean, what was going on that these people got killed? Was there money involved?
A. Yes, but there wasn't enough money.
Q. You said, yes, there was money involved. What do you mean by that? What did you hear them say about money?
A. He didn't get enough money.
Q. Now, Ms. Irwin, you recognize the two detectives here, right?

A. Yes.
Q. And they came to talk to you in Phoenix?
A. Yeah.
Q. Did you want to talk to them?
A. No.
Q. And did you initially talk to them and tell them the details you've told us?
A. No.
Q. At one point did you say something about a dream?
A. Yes.
Q. What did you tell them?
A. I told them that I had a dream about a red room where people were killed because I wanted them to know that what had happened had happened, but I didn't want to tell them. I was afraid that I would get killed myself in jail.
Q. Okay. You were in jail at that time?
A. Yes.
Q. What were you in jail for?
A. Possession of a half a joint.
Q. Of marijuana?
A. Yes.
Q. Did you get out of jail?
A. I bailed myself out.

Q. You did that on your own?
A. Yes.
Q. Did the detectives or any prosecutors give you money to bail yourself out?
A. No. I contacted them immediately afterwards, though.
Q. The detectives?
A. Yes.
Q. You were worried about the people in jail hurting you, is that it?
A. Well, yes.
Q. Now, let's tell the jury about the place you're living now. Is the State of Arizona, Pima County providing you a place to live right now?
A. Yes.
Q. Renting you a place?
A. Yes.
Q. And we have promised to relocate you?
A. Yes.
Q. Is that something that we offered or did you ask for that?
A. I asked for it.
Q. And why was that?
A. I'm scared.
Q. Why are you scared?

A. I don't want to be killed and I don't want my children to be hurt.

Q. Are you testifying because of those promises?

A. No.

Q. Why are you testifying?

A. Because people that kill people don't belong on the street.

Q. The charges, the possession of marijuana charges, what's your understanding of what's going to happen with those?

A. I would get six weeks in the Task program. I wouldn't get any jail time.

Q. Since you're testifying, you're going to get out from under those charges?

A. They are going to dismiss it.

Q. Are you testifying to get out from under those charges?

A. No.

Q. Why not?

A. It's not anything to worry about. It would be a misdemeanor at the end of it.

MR. WHITE: Thank you, ma'am. That's all I have.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. LARSEN:

Q. Ms. Irwin, it's my understanding that when you first met Robert Jones you were living at the Americana Apartments over on Cave Creek?

A. Correct.

Q. And that would have occurred in May of 1996?

A. Correct.

Q. It would have been toward the end of May, correct?

A. Correct.

Q. And you know that because a friend of yours was released from prison in April of 1996, correct?

A. An acquaintance.

Q. Would that be Shannon?

A. Shannon was not my friend. I knew him for four days.

Q. Was that the person who had gotten arrested in April of '96?

A. Yes.

Q. And that's how you know you met Robert Jones in May of '96?

A. No. I met Robert Jones through Shannon's brother, Foot.

Q. Okay. And that occurred in May of '96?
A. Yes.
Q. And I gather that first meeting lasted a couple of hours, correct?
A. Yes.
Q. And then Mr. Jones left?
A. Yes.
Q. And he showed up again at your apartment, correct?
A. Yes.
Q. And that was within a few days, correct?
A. Yes.
Q. Certainly no more than 10 days, possibly only a week, correct?
A. Correct.
Q. And so it was probably still in May?
A. Probably.
Q. I gather that he returned riding a motorcycle?
A. Yes.
Q. And you indicated it was one of the Japanese models, a Suzuki or something like that?
A. Yes.
Q. And it's the second time that you overheard this conversation between Mr. Jones and Mr. Coates,

correct?

A. Yes.

Q. And as I understand it, when Mr. Jones came up after the second time, he stayed about a month with you?

A. Yes.

Q. And that was at the Americana Apartments?

A. Yes.

Q. Now, regarding the statements that you've testified about today, would it be fair to say that you've got some mental health problems?

A. Yes.

Q. Can you give the jury some idea of the diagnosis that you've received?

A. I'm manic depressive.

Q. How long have you been manic depressive?

A. I was probably born manic depressive.

Q. Have you been treated psychiatrically for it?

A. Yes.

Q. Have you been given medications for it?

A. Yes.

Q. Will you tell the jury what medications you're on.

A. I take Depakote, Doxipin (phonetic) and

Diazapan.

Q. And those medications are to assist you in keeping your emotions on a fairly even keel, correct?

A. Yes.

Q. Are there times when you don't medicate yourself?

A. No.

Q. So you are consistent all the time using your medications?

A. Yes, pretty much so.

Q. Does that mean that there are times when you don't use the medication?

A. I guess there are times everybody forgets something, but not necessarily -- not very often.

Q. Is it my further understanding that you have suffered head injuries in the past that have required brain surgery?

A. Yes. There is no repercussions from that, however.

Q. And the fact that you were in for some charges of possession of marijuana and drug paraphernalia, would that indicate that perhaps you have used illegal drugs in the past?

MR. WHITE: Excuse me, Judge, I'm going to object.

THE COURT: Sustained, without a time frame.

Q. Approximately around the time of 1996, early summer to the end of summer, were you using illegal drugs?

A. May I ask you to rephrase that? Would that be the time I met these people at my house?

Q. Correct.

A. Yes.

Q. And you tell us what drugs you were using?

A. Yes. I used marijuana and I used crystal.

Q. Since that time have you continued to use drugs?

A. No.

Q. It is my understanding that you have signed an agreement with the State of Arizona through the Maricopa County Attorney's Office that they will dismiss the possession of drug paraphernalia and possession of marijuana charges in CR-9805158.

A. Correct.

Q. And that's if you give testimony in this case as well as in a case involving Steven Coates, correct?

A. I will give testimony in this case.

MR. LARSEN: May I approach, Judge?

THE COURT: You may.

THE WITNESS: I don't know anything about Steven Coates --

MR. LARSEN: There is no question before you, ma'am.

Q. I am showing you what has been marked as Defendant's Exhibit A. Does this look like a copy of an agreement?

A. Yes, it does.

Q. So this agreement --

A. It was not signed.

Q. You have not signed it?

A. No.

Q. So you don't feel it's in force and effect?

A. No.

Q. Okay. So although the Maricopa County Attorney's Office has agreed to dismiss the charges, have you not agreed to that?

A. I've agreed to testify in Pima County.

Q. You would agree that that agreement signed by the Deputy County Attorney wants you to testify up in Phoenix, too, right?

A. I know nothing about Phoenix.

Q. I didn't ask that, ma'am. I just asked, does the agreement ask that you testify up in Phoenix?

A. I'm not sure I understand.

MR. LARSEN: May I approach, Judge?

THE COURT: Yes.

Q. I'm going to ask you to read to yourself the second paragraph, beginning with the word "also." That might shorten it a little bit.

A. Also may.

Q. Just go ahead and read that.

A. (Witness complies.)

Q. And that is the Deputy County Attorney's signature; is that correct?

A. Yes.

Q. And that does refer to Maricopa County, correct? I understand that you're maintaining you haven't signed it. I'm just asking whether the one signed by the Maricopa County Deputy County Attorney indicates that they are looking for you to testify in Maricopa County. Is that what it says?

A. It says "may."

Q. It says they may wish to use you in a case pending in Maricopa County, correct? I'm just asking whether it says Maricopa County.

A. Right.

Q. You also, I gather, made a deal with the State of Arizona down here in Pima County, correct?

A. Correct.

Q. Mr. White went through some of the terms of it with you, correct?

A. Correct.

Q. You have received a place to stay?

A. Correct.

Q. You are going to receive relocation and transportation expenses?

A. Correct.

Q. You are going to receive at least one month's rent paid?

A. Correct.

Q. You are presently being housed and fed by the Pima County Attorney's Office?

A. Housed.

Q. Okay. You have asked that they assist you in getting your Social Security check transferred?

A. Yes.

Q. And it's your understanding that you will also get your marijuana and drug paraphernalia charges dismissed, correct?

A. Correct.

Q. Do you realize that Mr. White works for the Pima County Attorney's Office and not the Maricopa County Attorney's Office?

A. Correct.

Q. But I guess Mr. White has agreed to recommend to the Maricopa County Attorney's Office to dismiss it up there?

A. Correct. May I ask a question?

Q. No, you don't get to.

THE COURT: Just respond to the attorney's questions. Mr. White will have the opportunity to ask you questions later.

THE WITNESS: Okay.

Q. Ma'am, do you believe you've got a pretty good memory of the events in question?

A. I have an extremely good memory, photographic.

Q. You never get pieces mixed up?

A. No, I don't get things mixed up.

Q. Do you recall telling Detective Salgado and Mr. White along with Brenda Woolridge that you do get things mixed up?

A. Not mixed up, no.

Q. You don't recall that, ma'am?

MR. WHITE: May she be allowed to answer the question?

THE COURT: Yes. Had you completed your answer, ma'am?

THE WITNESS: Yes.

THE COURT: If at any time you wish to give a further answer and you get cut off, let me know and I'll give you the opportunity to make a full response to the question.

THE WITNESS: Okay.

THE COURT: You may proceed.

MR. LARSEN: Thank you, Judge. May I approach?

THE COURT: Yes.

BY MR. LARSEN:

Q. Ma'am, I'm showing you what has been marked as Defendant's Exhibit B. Have you ever seen a copy of that?

A. I don't know.

Q. Does that look to be a transcript of the interview you did with Mr. White, Detective Salgado and Detective Woolridge on May 5th?

A. Probably.

Q. Would you turn to Page 9, please.

A. (Witness complies.)

Q. And if you'll look down towards Line 39, there's a highlighted section there next to where the answer is. Does that say: I get pieces mixed up. You understand, I hope.

And Mr. White says: Sure, of course.

MR. WHITE: Your Honor, I'm going to ask that counsel read the entire answer, please.

THE COURT: Very well. Counsel.

MR. LARSEN: I'm getting it situated at this point, Judge.

THE COURT: Before your examination concludes, you will read the entire answer.

MR. LARSEN: Absolutely.

THE COURT: Very well.

BY MR. LARSEN:

Q. Do you see where I am referring to?

A. Yes.

Q. Okay. And this is a series of questions and answers between yourself and Mr. White, correct?

A. Yes.

Q. And at this point Mr. White is doing the questioning, correct?

A. Yes.

Q. And he's talking to you about the events in question, correct?

A. Yes.

Q. Now, Mr. White's question is: Okay, you've got to say it aloud, whatever the answer is, okay? Anything else you said that you can recall on that

occasion?

Your answer: So much was happening, I get pieces mixed up. You'll understand, I hope.

And Mr. White responds with: Sure, of course.

Did I read that accurately?

A. Yes.

Q. Were you telling Mr. White the truth the best as you could?

A. Yes. They didn't go into details. They talked about many things all at once.

MR. LARSEN: Move as non-responsive after the word "yes," Judge.

THE COURT: Overruled.

Q. Would you agree that your memory comes and goes?

A. No.

Q. Would you agree that you told Mr. White and the two detectives that are sitting to my left that your memory comes and goes?

A. Would you rephrase that?

Q. Would you agree that on May 5, 1998, you told Mr. White and the two detectives that your memory comes and goes?

A. At the time that the --

Q. I'm just asking whether you told the detectives and Mr. White that your memory comes and goes. Do you recall that?

A. (No audible response.)

Q. Do you recall --

THE COURT: Allow the witness to answer the question, please.

THE WITNESS: The memory of maybe the exact words at an exact time come and go, but the memory of the words stay very clearly.

Q. Did you tell Mr. White in response to the question: Okay, that's fine. That's fine. Your answer: Memories, they come and go like nightmares, you know.

Do you recall saying that?

A. It's not they are like nightmares.

Q. Do you recall saying the words that I just read?

A. Yes.

Q. And just like in a dream, they're kind of jumbled up, correct?

A. Yes.

Q. And you initially started your conversation with the detectives that this was in fact a dream, correct?

A. Like a nightmare.

Q. Did you use the words to the detective that this was like a dream, you wanted to tell them about a dream?

A. I don't want to tell them about a dream. I want to tell them about it seemed like a dream.

Q. Did you phrase it that way or did you phrase it: I had a dream, I'm going to tell you about a dream I had.

A. I didn't have a dream. I had a very bad incident of reality.

Q. I understand, ma'am. I'm just asking you, did you tell the detectives when you first brought this up that you had a dream about this?

A. Oh, the day that I met with them, yes.

Q. Okay. You told the detectives some of the details about what had happened, correct?

A. Yes.

Q. One of the things that you told them that you overheard was that persons were shot right between the eyes, correct?

A. I said that the person was shot in the head.

Q. Do you recall telling the detectives that the persons were shot right between the eyes?

MR. WHITE: What page?

MR. LARSEN: 9.

THE WITNESS: It came out between the eyes.

Q. Do you recall the following question and answer on Page 9, Line 11 through 14:

Question by Mr. White: Okay. Anything else on that occasion that you --

Answer: There were three bitches that shouldn't have been there and they -- he shot them in the head, and, wow, what a good aim, it went right between the eyes and their head exploded like a pumpkin.

Do you recall that answer to --

A. I said that, their heads exploded like a pumpkin.

Q. Do you recall that question and answer?

A. Yes.

Q. You also told the detectives that you overhead Mr. Jones' conversation about raping the women, correct?

A. No, not Mr. Jones. I overheard a conversation about women being raped, but I don't believe that I stated from Mr. Jones.

Q. Do you recall talking to the detectives on April 29th when they went up to Phoenix, the first time

they taped you?

A. After I called them up here? Yes.

Q. So the first time that they taped you, okay? On Page 4, Lines 22 through 24. I'm going to ask whether you remember this question and this answer:

Question by the detective: Do you remember what he said about the three women or what he said about the bar in Tucson where he killed these three women? Did he say anything else about the women?

Answer: He raped them.

Do you recall that question and answer to these two detectives sitting to my right?

A. I recall talking about hearing that he had raped somebody.

Q. Okay. Do you recall that question and that answer when you spoke with the detectives on April 29th?

A. Did I state Robert Jones, that he raped them?

Q. Ma'am, what I'm asking is --

A. No, I don't recall stating Robert Jones, that he raped anybody.

Q. Do you recall the words that I just read on April 29th, telling the detectives on April 29th those words?

A. No. Yes, I guess so, if I said them.

THE COURT: Ma'am, the question is not whether you said them or not.

The question is simply: Do you remember having said them? That's all he's asking.

THE WITNESS: Yeah.

BY MR. LARSEN:

Q. You also remember telling the detectives that he cut them up?

A. I think that was talking about someone in Phoenix.

Q. Beginning on Line 19: Did he say anything more about the gunshot wound?

Answer: Not that I remember.

Question: Okay. Now, apparently he was -- did he tell you that's why?

Answer: I think he cut somebody else, too.

Question: I see.

Answer: Like sliced them or shanked them or something.

Do you remember those questions and your answers on April 29th?

A. I think.

Q. You think you remember those?

A. No, I think he did it. I think I heard

him. I did not say for sure he did. I think.

Q. Did I read your answers accurately?

A. Yes.

Q. The State has also given you immunity for any crimes that you have committed other than murder, correct?

MR. WHITE: I'm going to object to that. That misstates the terms.

THE COURT: Unless there's a factual basis that counsel is prepared to make.

MR. LARSEN: Sure.

THE COURT: Then you may proceed.

Q. Page 1 of your May 10 statement, statement by Mr. White:

Okay. Let me finish and then you can say whatever you need to say. And in addition to the conditions on that page, and Detectives Salgado and Woolridge broke them down so we'll have a copy, I've also agreed that anything you say in this interview regarding drug use or any other crimes short of murder -- I assume you never, you didn't commit any murders or do anything, right?

Heaven's no, was your answer.

Question by Mr. White: Okay. So any crimes that you talk about that you were involved in,

in your statement, will not be used against you in any way, do you understand that?

Your answer: Okay.

Did you understand that to mean that anything you said about other crimes wouldn't be used against you?

A. Yes.

MR. LARSEN: I have nothing further of this witness. Thank you, Your Honor.

THE COURT: You may redirect.

MR. WHITE: Actually, Judge, I guess I need to reopen my direct briefly.

THE COURT: The Court will allow you to do so.

MR. WHITE: Thank you.

REDIRECT EXAMINATION

BY MR. WHITE:

Q. When you were overhearing the defendant talk about the old man, you described an older man?

A. Yes.

Q. Do you remember hearing him say anything about that person getting hit?

A. It sounded like a baseball swing. He hit him in the head with a gun. He made the sound of a

baseball swing when he was hit in the head with a gun. Pistol whipped.

Q. Pistol whipped?

A. Yeah. I didn't know what that meant yet.

Q. Is that your word or his word?

A. His word.

Q. And he described the sound that it made?

A. Like a baseball swing.

Q. I asked about whether you had lived in Tucson and you told us you lived in Phoenix.

A. Correct.

Q. When you were living in Phoenix, did you read anything or hear anything on the news about the murders in Tucson at a place called the Smoke Shop or the Fire Fighter's Hall?

MR. LARSEN: I'm going to object. Is this redirect? I'm not sure if we are still in redirect or in reopen.

MR. WHITE: This is reopen.

THE COURT: Counsel has asked permission and the Court has granted to reopen and the Court will give the defense an opportunity to cross on this new matter.

MR. LARSEN: Thank you.

THE WITNESS: No, I hadn't.

BY MR. WHITE:

Q. Do you read the newspaper a lot?

A. No.

Q. You were told -- now I'm going to redirect, Your Honor.

THE COURT: Thank you.

Q. You were told that you were going to be given immunity for any crimes that you committed.

A. Yes.

Q. And did you commit some crimes?

MR. LARSEN: Object. Self-serving.

THE COURT: Overruled.

Q. Did you commit some crimes when you were hanging out with Mr. Coates and the defendant?

A. You mean like using drugs?

Q. Any crimes.

A. Yes.

Q. What crimes?

A. I used drugs.

Q. And that's what you've told us about here on cross-examination?

A. Yes.

Q. Okay. Mr. Larsen started off asking you questions about when you first met the defendant.

A. Yes.

Q. And you were talking about in May.
A. Yes. May or the first of June.
Q. Is that an estimate that you're giving us?
A. Yes.
Q. Did you write it in a diary or something somewhere?
A. I had some notes of every description and everything that went on. However, I can't find them.
Q. Okay. Is there a way that we can determine when you first met the defendant in terms of the things you talked about?
A. Yes, that would be the day that Foot was released.
Q. Now, let me stop you there. He's not going to be a witness here.
A. Right, but once I find that the date that Foot was released, it was approximately seven to ten days after that.
Q. Okay. My question is: The things that the detectives talked to you about, for instance, the stabbing, did he tell you that his friend got stabbed?
A. Right.
Q. When did he tell you about his friends getting stabbed?
A. The day -- two days before he got there.

Q. Okay. So his friend got stabbed two days before he got there?

A. Yeah.

Q. So if we can determine when the friend was stabbed --

A. Right.

Q. Now, you said that you have been diagnosed as manic depressive.

A. Correct.

Q. Describe what that is like, so that we know.

A. I have problems controlling my emotions. I don't have a problem with my intellect.

Q. Okay. When you say you have problems controlling your emotions, what do you mean?

A. My emotions get high, they get low. As long as I take my medication, they are in control.

Q. They get high and sometimes they get --

A. Sometimes I get very elated and sometimes I get very depressed. But I'm not stupid.

Q. Mr. Larsen asked you about the brain surgery. When did you have brain surgery?

A. December 31, 1985, it began. It ended January 1, 1986. At St. Mark's Hospital in Salt Lake City. It was performed by Dr. Rick Hood and the

neurologist was Dr. Stone.

Q. Okay.

A. It was three days after the birth of my son Charles.

Q. Have you had any problems since then?

A. No. I had a complete recovery.

Q. Okay. Mr. Larsen asked you about this agreement with the Maricopa County Attorney's Office.

Did you have that marked, Mr. Larsen?

MR. LARSEN: Yes, it is over there.

Q. Showing you Defendant's A, is that a copy of the agreement?

A. I elected not to sign it because I don't want to see Steven Coates ever.

Q. Would that be an accurate copy?

A. Yes.

MR. WHITE: I move for the admission of Defendant's A.

MR. LARSEN: I have an objection. May I make a record at the bench?

(Whereupon, the following proceedings were held at the bench, out of the hearing of the jury:)

MR. LARSEN: State of Arizona versus Coats and Jones, Maricopa County.

We have done quite an admirable job of

keeping that out.

MR. WHITE: We will redact that.

THE COURT: Well, just take out the caption of the case. It seems to me that would take care of it.

MR. LARSEN: It's not going to take a genius to know it's been redacted. Jones is a short name.

MR. WHITE: Well, Judge, defense counsel is the one that raised it.

MR. LARSEN: There's no question about what is in that agreement.

THE COURT: I have a hard time understanding what the relevance is. In the first place, she didn't sign it. She is not bound by it.

MR. WHITE: It is relevant for my purposes now because Mr. Larsen cross-examined her about it. I think the jury has got some questions.

THE COURT: Well, I don't think there is any prejudice to the defendant if we do that redaction. We'll call it 1-A.

(End of bench conference.)

THE COURT: Pursuant to the side bar discussion, the Court will admit Defense Exhibit A-1.

You may proceed, Mr. White.

BY MR. WHITE:

Q. Let's talk about that agreement briefly, Ms. Irwin.

A. Okay.

Q. There's a case against Mr. Coates up in Phoenix; is that right?

A. Yes.

Q. And apparently the prosecutor up in Phoenix had some interest in that agreement and you testifying against Mr. Coates; is that right?

A. Yes.

Q. And you don't want to do that.

A. I don't know anything. He was out of my house before they ever had a case against him.

Q. So you don't want to -- you don't know anything about Mr. Coates up in Phoenix that the Maricopa prosecutor is involved in.

A. No.

Q. Okay. Ms. Irwin, I was going to ask you about whether the Pima County Attorney's Office, my office, had agreed to help you get your Social Security checks. Why do you need some help getting your Social Security checks?

A. I wanted to change my Social Security Number so these people couldn't find me. I'm very

afraid of them. Not my checks, my number.

Q. And that's the assistance you requested?

A. Yes. They've hurt me enough.

Q. Pardon me?

A. They've hurt me enough. I don't want to be hurt by these people anymore.

Q. Now, Mr. Larsen was asking you questions about you telling the detectives about people getting cut up and people getting raped. When you overheard the defendant talking to Mr. Coates, were they talking about lots of things?

A. So many, I tried to understand but I didn't understand where everything went together. There was so much, I couldn't even believe I was hearing it. I didn't believe what I heard half the time.

Q. So you heard about somebody getting cut up?

A. Yes.

Q. You don't know whether that occurred down here in Tucson or someplace else?

A. It have occurred anywhere.

Q. Same thing for the rapes?

A. Yes.

Q. Are you saying that you overheard the defendant say he raped these women in this red room in Tucson?

A. No.

MR. WHITE: Thank you, Ms. Irwin. That's all I have.

THE WITNESS: Thank you.

THE COURT: You may cross-examine as to the new matters opened.

MR. LARSEN: Nothing further.

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

MR. WHITE: No, sir.

THE COURT: Go ahead and write out your question. The jury has one question.

(Whereupon, the following proceedings were held at the bench, out of the hearing of the jury:)

MR. LARSEN: I think it's a legitimate question.

MR. WHITE: I do, too.

THE COURT: To be clear, we are talking about the time that she's talking about in her testimony, only that period of time.

Any objection to the Court asking the questions?

MR. LARSEN: No.

MR. WHITE: No.

(End of bench conference.)

THE COURT: Ms. Irwin, the jury has asked me to ask you these questions.

THE WITNESS: Okay.

THE COURT: Were you on your prescription medication at the time you were using the drugs that you indicated that you were using during the time that you related in your testimony?

THE WITNESS: Yes.

THE COURT: You were taking your prescriptions?

THE WITNESS: Yes.

THE COURT: Were you using alcohol during that period of time as well?

THE WITNESS: No. I've never drank.

THE COURT: All right. Any other reason why this witness should not be excused?

MR. WHITE: I do have a follow-up based on the jury question.

THE COURT: I will allow either of you or both of you to ask a follow-up question.

BY MR. WHITE:

Q. If you're taking those prescription drugs and you take marijuana or crystal meth, is there some kind of drug reaction there because of the combination?

A. Generally, they react with Ibuprofen, and

that's the only action I'm aware of. And I don't take Ibuprofen.

Q. So generally, the reaction is if you're taking the illegal stuff with the Ibuprofen; is that what you're saying?

A. No. If I take my prescription medications with Ibuprofen, that can put me in like a coma, but I'm not aware of any other, you know, interaction.

Q. So when you take your prescription medications and then smoke marijuana, what would happen to you?

A. Nothing different. I guess it would be the same as someone who didn't have manic depression that smoked marijuana.

MR. WHITE: Okay. Thank you.

THE COURT: Mr. Larsen?

MR. LARSEN: No.

THE COURT: Anyone else?

Thank you, ma'am. You are dismissed.

Ladies and gentlemen, at this time we will take the noon recess. We will ask you to return back to this court at 1:30.

During the recess I remind you once again not to discuss the case with each other. Keep an open mind. See you back at 1:30.