No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT GLEN JONES, JR.,

Applicant,

v.

CHARLES L. RYAN, et al.,

Respondents.

An appeal is pending in *Jones v. Ryan*, Ninth Cir. No. 13-16928.

APPLICATION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

Capital Case

Execution scheduled for October 23, 2013

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
tim_gabrielsen@fd.org

Counsel for Applicant

Robert Glen Jones, Jr., through counsel, applies to this Court pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995), 28 U.S.C. § 2244(b)(3)(A) and Ninth Circuit Rule 22-3 for authorization to file a second or successive petition for writ of habeas corpus in the United States District Court for the District of Arizona in order to prosecute a freestanding claim of actual innocence and a claim that his right to due process was violated by the withholding of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The *Brady* claim alleged here constitutes a ground for relief distinct from the one Appellant argues in the pending appeal in *Jones v. Ryan*, Ninth Cir. No. 13-16928. That claim alleges a violation of Appellees' continuing duty to disclose exculpatory evidence while the case was in § 2254 proceeding and constitutes an extraordinary circumstance under Fed. R. Civ. P. 60(b)(6).

The claim here alleges a violation on the part of the Pima County Attorney that occurred prior to trial when the prosecution disclosed in response to a defense discovery request only that two Arizona Department of Corrections ("ADC") personnel, Fritz Ebenal and Rebecca Matthews, monitored the curfew of suspect and former co-defendant David Nordstrom, who was placed on an electronic home monitoring system ("EMS") as part of his parole after his release from ADC on an unrelated conviction. That discovery response was false or, at a minimum, misleading. In July 2013, ADC informed Jones' counsel that the manufacturer of the EMS unit used on Nordstrom actually provided electronic monitoring of his curfew.

Consistent with Ninth Circuit Rule 22-3, Jones attaches to this Application the proposed Second or Successive Petition that he would file in the district court should the Court grant him authorization to do so. Jones omits the state and federal court orders because all are contained in the ERs in the pending appeal, *Jones v. Ryan*, Ninth Cir. No. 13-16928.

The successive petition is supported by the attached Memorandum in Support, the new evidence that is contained in the Excerpts of Record in Ninth Cir. No. 13-16928, and all pleadings filed in the proceedings in the district court and this Court. The proposed successive petition contains the freestanding claim of innocence, the *Brady* claim, and a request for evidentiary development under Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts.

Respectfully submitted this 17th day of October, 2013

Jon M. Sands
Federal Public Defender
Timothy M. Gabrielsen

By s/Timothy M. Gabrielsen
TIMOTHY M. GABRIELSEN
Counsel for Applicant

MEMORANDUM IN SUPPORT

I. INTRODUCTION.

Robert Jones and David and Scott Nordstrom were indicted on six counts of first degree murder and related offenses for events that occurred at the Moon Smoke Shop ("Moon") and at the Fire Fighters Union Hall ("Fire Fighters") in 1996. At Jones' trial, David Nordstrom ("David") testified he was indicted for six Tucson murders, two at the Moon on May 30, 1996, and four at the Fire Fighters on June 13, 1996. ER 742 (Excerpts of Record filed with Appellant's Opening Brief in Ninth Cir. No. 13-16928, Dkt. 3). David cut a deal in which he pleaded guilty to armed robbery and agreed to testify against Jones and Scott Nordstrom ("Scott") at their separate trials in exchange for the dismissal of two first degree murder counts for events that occurred at the Moon. ER 743. David was charged with the four murders at the Fire Fighters, but those charges were dismissed. He testified against Jones and Scott at their separate trials. Jones and Scott were convicted of all six homicides and sentenced to death. *See State v. Jones*, 197 Ariz. 290, 297, 4 P.3d 345, 352 (2000) (ER102); *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 171 (2002).[1] David served less than four years in prison.

II. Trial testimony of David Nordstrom, Fritz Ebenal, and Rebecca Matthews.

There was no physical evidence to connect Robert Jones to the homicides at either the Moon or Fire Fighters. The cases against Jones for first degree murder at both the Moon and Fire Fighters turned largely on the testimony of David Nordstrom, who the Arizona Supreme Court characterized as the state's "key

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

witness." *State v. Jones*, 4 P.2d 345, 351 (Ariz. 2000). David testified to having prior convictions for other acts of dishonesty, including for giving false information to a police officer, two convictions in Pima County for theft, and convictions in Texas for burglary and forgery. ER 743, 759.

David testified he was on a curfew as part of his parole after his release from Douglas Prison on January 25, 1996, where he had served a prison sentence for a conviction for the offense of theft by control. ER 671. His curfew was monitored by the parole division of the Arizona Department of Corrections ("ADC") through the use of an electronic monitoring system ("EMS"). ER 671. He stayed at his father's residence upon his release. *Id*. His compliance with curfew while on EMS was checked by Fritz Ebenal, a parole officer with the ADC. ER 672.

The prosecution relied heavily on Nordstrom's electronic alibi to bolster the impeachment of him, which included having six murder charges dismissed; his multiple curfew violations that went undetected and unprosecuted, including for methamphetamine and alcohol use; his multiple convictions for felonies of dishonesty, and his prior inconsistent statements to law enforcement. ER 704-05, 741. His step-mother testified that he was a "liar." ER 806.

At Jones' trial, David testified to a narrative that included riding in the middle seat of Jones' pick-up truck, between Jones and Scott. ER 687. According to David, Jones suggested they rob the Moon after they had broken into a car at a Tucson hospital and obtained a 9 mm. handgun. ER 689, 697. David had already obtained a .380 handgun from a friend, and the .380 was already in the truck. ER 682, 694. Jones drove to a location behind the Moon, where he and Scott exited to commit the robbery and instructed David to drive the truck. ER 698.

Three witnesses who survived the Moon shooting testified to the shootings of one customer and one employee, but could not identify the shooters, except to say that one of them wore a long-sleeved shirt, dark sunglasses and a dark cowboy hat. ER 121. David testified that Jones' clothing matched that description that

day, including a black cowboy hat. ER 700. On cross-examination, David admitted that he owned a cowboy hat. ER 765. One survivor saw one of the gunmen move to the back room and yell, "Get the fuck out of there." The bodies of a store patron and employee were found near the front door and in a back room, respectively. David testified that he heard shots, then Jones and Scott returned to the truck and said, "Let's go." ER 699. According to David, Jones claimed to have shot two victims while Scott said he shot one. ER121. David claimed to have received some of the proceeds from the robbery. Noel Engles, one of the Moon survivors, saw a light colored pick-up truck in the alley after the shooting but he saw only two persons in the truck. ER 121. David drove in the direction of Interstate 10, entered the expressway, and drove home. ER 701.

David testified that he drove on separate occasions with Scott and Jones to ponds south of Tucson, where they disposed of the weapons. ER 712-14. David testified that on January 16, 1997, he took law enforcement to those locations, and obtained $5,000 in reward money, but they were unable to find the weapons and he was arrested upon their return to Tucson. ER 740. He immediately returned the money. ER 786. The 9 mm. and .380 were never found, and no physical evidence connected Jones to either the Moon or Fire Fighters.

David testified that he returned home a half hour before curfew on June 13, 1996, after working that day and being driven home by Scott. ER 707. He testified he was awakened by Jones late that night, and Jones indicated that he and Scott had robbed the Fire Fighters and killed four people. ER 617.

Ebenal testified that he was David's parole officer. ER 286. He described the EMS unit used to monitor David as a transmitter on a rubber ankle bracelet. ER 286-87. It had a particular serial number. ER 290. When David would go home and plug in the Field Monitoring Device ("FMD"), "the transmitter is automatically picked up by the FMD, and the phone line calls us and tells us he's there and it's hooked up and whether or not it's a good connection or not." *Id.*

Ebenal testified that a violation would cause a page to be sent to him, and, after hours, the message goes to Central Communications, which would pass the message on to Ebenal. ER 291-92. Ebenal testified that data went to his computer and identified computer printouts that purported to show his monitoring of David's compliance with his curfew for dates during his parole, as well as violations. ER 293. Ebenal testified that records showed David was not in violation of curfew on either May 30 or June 13, 1996. ER 307.

Rebecca Matthews testified she was a supervisor in ADC's parole division. ER 624. Matthews testified she conducted a test in 1997, the year after the homicides, on an FMD and ankle bracelet *of the same type* used to monitor Nordstrom, but she conceded she did not know whether the ankle bracelet she tested was actually the one worn by Nordstrom. ER 628-29, 643. She testified that the test she ran on a unit with Detective Brenda Woolridge was not run on the same telephone line that had been operative in the Nordstrom residence when David was on the EMS system. ER 631. She mentioned that data was transmitted to Phoenix, but did not identify BI and did not testify that BI had any role in the electronic monitoring or that data was transmitted to Colorado. ER 626, 634.

III. The *Brady* claim.

A. Request for *Brady* information and response.

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

> 15. All electronic monitor officers responsible for monitoring David Nordstrom.
>
> 16. The electronic monitor records of June 13, 1996, regarding David Nordstrom.

ER 846.

The prosecution tendered the following response:

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

16. E-M Records for 6/13/96: See Response to Number 2.

ER 852. Response Number 2 stated, "S. Nordstrom's Statement: Previously disclosed. Will re-disclose." *Id*.[2]

After this Court allowed the substitution of prior counsel, Daniel D. Maynard, undersigned counsel informally sought records regarding the electronic monitoring of David Nordstrom, including from the Pima County Attorney, the ADC, and the manufacturer of the electronic monitor used on David Nordstrom, Behavioral Intervention, Inc. ("BI"), of Boulder, Colorado. Specifically, Jones sought maintenance and repair records on the BI Model 9000 used on Nordstrom and on all similar units sold to ADC. The ADC responded in pertinent part:

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

ER 235.

[2] The only statements of Scott Nordstrom in the disclosure made by the Pima County Attorney include: 1) a report by Pima County Attorney Investigator Steve Merrick, who wrote a report dated May 27, 1996, in which he stated he learned the name of Scott's probation officer, Debbie Hegedus, but included nothing about the identity of BI or anyone else monitoring David Nordstrom's curfew. Hegedus wrote a "Field Supervision Face Sheet" on April 29, 1996, in which she included information Scott reported to her, to wit, his height and weight; and, 2) a statement by Scott upon his arrest on January 26, 1997, in which he was told police had David in custody. Scott simply requested counsel, and interrogation ceased. At a clemency hearing on October 16, 2013, Kellie Johnson, the head of the Criminal Division at the Pima County Attorney, stated she supposed the reference in discovery response #2 simply meant that the EMS records later identified by Ebenal at trial were disclosed. Jones does not object to that characterization of Response #2, as the EMS records failed to identify BI as well.

By naming only Ebenal and Matthews and Scott Nordstrom's parole officer as possessors of data generated by David Nordstrom's EMS unit, the Pima County prosecutor violated the duty to disclose under *Brady*.[3] Based on the foregoing, Jones makes out a *prima facie* violation of *Brady* and respectfully request the offices of this Court to compel the production of evidence from BI upon which the claim rises or falls.

The Pima County Attorney's discovery response was, at a minimum, misleading. ADC was not the sole entity to possess records relevant to the functioning of David Nordstrom's EMS unit. BI possessed and likely still possesses the information required by Jones to prove the materiality prong of the test in *Strickler*. BI has refused to produce the information requested by Jones. Yet, around the time of Jones' trial, there were clear implications BI had experienced significant problems with its EMS units.

B. History of problems with BI.

In November 1996, a 14-year-old girl was run over by her 16-year-old boyfriend as she walked down a road in Jupiter Farms, Florida. ER 245. Her boyfriend, who was charged with second degree murder, was monitored by a BI EMS system. BI was quoted as saying its EMS system functioned properly when it reported no violation for the offender that evening. *Id*. Yet, two jail inmates reported the offender confessed he killed the girl, and an acquaintance of the offender said he, too, was able to "leave his residence and go out of range [of the EMS] undetected for short periods of time." *Id*. When questioned by

[3] The test requires proof that evidence exists that is favorable to the accused, that the prosecution suppressed the evidence intentionally or inadvertently, and the evidence is material, that is, that there is "a reasonable probability that the suppressed evidence would have produced a difference in the verdict." *See Strickler v. Green*, 527 U.S. 263 (1999). The test also imposes a duty under *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), "to learn of any favorable evidence known to others acting on the government's behalf in the case."

investigators, BI acknowledged that there was a "default feature" in the system that allowed for offenders to be out of range for a period of time it would not specify. ER 246. A Florida DOC spokesperson stated that the DOC was not even aware that BI built a reporting delay into the system until the inmates reported the confession. ER 248.

On June 6, 1998, BI moved, successfully, to seal the portions of trial where testimony would be given how offenders could slip out of the BI EMS ankle bracelets. ER 252. That did not prevent the prosecutor from telling jurors in opening statement on July 10, 1998, that all the offender needed to do to slip out of the BI ankle bracelet was step into a bucket of water, use a dinner spoon to snap off the monitor, and the water would block the signal from going to house-arrest supervisors. ER 254. "The monitor, which is fooled into 'thinking' it is still connected to the bracelet, stays at home while the offender can stray as far and as long as he wishes." *Id*. She also stated that an offender could leave his residence for up to seven minutes before a signal was transmitted. *Id*.

In a Security and Exchange Commission ("SEC") filing, BI reported that in April 1995, a lawsuit was filed in Cook County, Illinois, against BI, the county sheriff, the county corrections department, and parolee Gerald Hodges alleging wrongful death based on malfunction of a BI EMS system used to monitor Hodges. ER 259. The case involved the murder of Seke Willis by Hodges in a gang-related incident. *See* Brief of Defendant-Appellant, *People v. Hodges*, No. 1-95-1093, 1996 WL 33651749 (Ill. App. 1st Dist. Jan. 25, 1996). The BI violation report showed Hodges was out of compliance with his curfew at 10:32 p.m., shortly before the shooting. *Id*. However, a prosecution witness testified that the offender was actually present at a party near the murder scene even prior to that time, although no violation report was generated. *Id*. at *13 n. 8. SEC documents fail to specify whether the civil case against BI was settled or dismissed. ER 259.

In August of 1996, an intoxicated offender subject to BI electronic monitoring by the Missouri Department of Corrections drove his vehicle across the center line, striking the oncoming vehicle of Gary Trout, killing both the offender and Mr. Trout. *Trout v. Gen. Sec. Servs. Corp.*, 8 S.W.3d 126, 130-31 (Mo. Ct. App. 1999). The offender was out past his curfew pursuant to the home arrest system. *Id*. On May 6, 1997, suit was brought against several entities, including BI for faulty manufacturing. ER 265. At trial, it was determined that the system correctly registered the violation of curfew but testimony of a parole officer indicated other problems with the system, notably the existence of signals that incorrectly noted the offender's absence depending on the placement of the equipment within the offender's residence. *Trout*, 8 S.W.3d at 130-31. BI was no longer a party to the litigation when the matter was appealed. *Id*. at 129.

In October 1996, a Pennsylvania teen sued the Allegheny County Monitoring Program, its supervisor and the unnamed EMS manufacturer after the EMS system falsely reported him to be in violation, which resulted in a detention that caused him to miss 24 days of high school. ER 276. The manufacturer later tested the unit and acknowledged it malfunctioned. *Id*. SEC filings indicate that BI was the manufacturer. ER 265. On January 29, 1998, BI settled the suit. ER 268.

During the pendency of Mr. Jones' PCR proceedings, a 1999 Florida newspaper article reported that during a trial for the a rape and murder of a 19-year-old woman, an installer of BI EMS units in Charlotte County, Florida, described a type of pliers that could be bought at a hardware store that could be used to remove an ankle bracelet without it transmitting a violation. ER 278.

Based on the foregoing, Jones acknowledges he cannot yet prove *Brady* materiality. However, he has shown enough that the matter should be remanded to the district court for evidentiary development, including discovery, an evidentiary hearing, and for the court to make factual findings. *See Cooper v. Woodford*, 358

F.3d 1117 (9th Cir. 2004) (*en banc*). It may be that Jones will not prevail once the discovery is obtained and the hearing is held, as was true when Cooper returned from the district court. *See Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2009). However, it is clear that Pima County Attorney's discovery response was false or misleading, and an accurate response would have alerted Jones counsel that records should have been elicited from BI with respect to units used on Nordstrom and similar units sold to the ADC. The records now need to be examined.

IV. Jones requests authorization to file a second or successive petition.

A. The *Cooper* standard.

This Court noted in *Cooper* that where a petitioner brings a claim of actual innocence and a claim of constitutional violation, he is necessarily "making a 'gateway' claim under *Schlup v. Delo*, 513 U.S. 298 (1995)," to allow consideration in a second or successive petition claims that were not brought in a first § 2254 petition. The *Cooper* Court noted that it was still an open question whether the actual innocence test of *Schlup* or the AEDPA's more restrictive test for filing a second or successive petition under 28 U.S.C. § 2244(b)(2)(B) applies. 358 F.3d at 1119. That question remains open. *See Goodwin v. Busby*, No. CV-11-2262 IEG (JMA), 2012 WL 2190896 (S.D. Cal. June 13, 2012), at *10. Cooper requires a petitioner to make a *prima* facie showing he would be entitled to relief if the matter were returned to the district court.

The evidence in BI's possession could render him actually innocent of the offense of premeditated first degree murder under *Herrera v. Collins*, 506 U.S. 390 (1993), *House v. Bell*, 547 U.S. 518 (2006), and *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997). Jones makes this claim based on his theory held from the time of trial that he was mistaken for David Nordstrom. As the Court is aware from the Rule 60(b) appeal, Jones has pleaded he has no vehicle with which to obtain

records from BI with which to prove a claim of innocence, whether it is to prove the freestanding claim or employ it in support of the *Schlup* "gateway" claim.

In *In re Davis*, ___ U.S. ___, 130 S.Ct. 1 (2009), the Supreme Court, in an original jurisdiction habeas corpus action that was filed after the Eleventh Circuit denied a request for authorization to file a successive petition under 28 U.S.C. § 2244(b), remanded a Georgia death penalty case on a freestanding claim of actual innocence. The order stated:

> The petition for writ of habeas corpus is transferred to the United States District Court for the Southern District of Georgia for hearing and determination. The District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence.

Id. at 1. In *Cooper*, this Court remanded to the district court for evidentiary development and hearing where testing of physical evidence would be dispositive of the claim. The *en banc* majority and concurring judges disagreed as to whether to grant the application under the test of either *Schlup* or § 2244(b), or stay the proceeding entirely pending the outcome of the testing on remand. 358 F.3d at 1119-20, 1125. In short, though, the majority ruled that matter must be remanded to the district court, under either theory, for factual development. Jones makes the same request here because he is otherwise powerless to obtain the records being withheld by BI.

As the *Cooper* Court noted, to make a successful *Schlup* claim, Jones must show that in light of all the evidence, including his new evidence, that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt in order to be returned to the district court to litigate the *Brady* claim. 358 F.3d at 1119. The records in BI's possession could serve to prove David Nordstrom's complicity in the six homicides, which would undermine his credibility with respect to his testimony that he only drove the getaway car at the Moon and failed to participate at all at the Fire Fighters. His guilt would place

him in Jones' stead, i.e., it would inculpate David and exculpate Jones, thus meeting the *Schlup* standard where only two perpetrators entered the Moon and one witness there saw only two persons in the apparent getaway vehicle behind the Moon.

The same result would obtain under the AEDPA, even with its more restrictive provisions. Jones is required to prove:

> B(i) the factual predicate for the claim could not have been discovered through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in the light of the evidence as whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B)(i) & (ii).

B. Jones was diligent.

The BI records could not have been discovered through the exercise of due diligence because there was no cause for the defense to seek the records after the Pima County Attorney gave the false discovery response that no one else besides ADC personnel monitored David Nordstrom. The case is similar to *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 diligence did not require that defense counsel perform a courthouse search of public records in the off chance he may discover something that impeaches a venirman's voir dire testimony. *Id*. Here, the defense was led into believing that only ADC had information relevant to the performance of the EMS unit used on Nordstrom.

Possessed of evidence showing that David Nordstrom's EMS unit malfunctioned, or that similar units sold to ADC and monitored and maintained by BI failed to record curfew violations for which parolees had not received approval would clearly and convincingly cause a reasonable juror not to convict but for the *Brady* violation described above.

Finally, remand for discovery from BI and an evidentiary hearing is required to allow Jones to meet the "extraordinarily high" burden of making a "truly persuasive demonstration of 'actual innocence'" that might relieve him of his conviction and death sentence. *See Herrera*, 506 U.S. at 417; *House*, 547 U.S. at 555. Jones has demonstrated good cause for discovery under Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts.

For these reasons, Applicant Robert Jones request that the matter be remanded to the district court for evidentiary development whether the Court grants the SOS application under the *Schlup* "gateway" to consideration of the *Brady* and actual innocence claims or under 28 U.S.C. § 224(b)(2)(b)(i) & (ii).

Respectfully submitted this 17th 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 Applicant

Certificate of Service

I hereby certify that on this 17th day of October, 2013, I electronically transmitted the attached document to the Clerk's office of the United States Court of Appeals for the Ninth Circuit using the CM/ECF System for filing and transmitted a Notice of Electronic Filing to the following registrants:

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

s/Teresa Ardrey
Teresa Ardrey
Legal Secretary
Capital Habeas Unit

Jon M. Sands
Federal Public Defender
Timothy M. Gabrielsen (Nevada Bar No. 8076)
407 W. Congress, Suite 501
Tucson, AZ 85701
Telephone: (520) 879-7614
tim_gabrielsen@fd.org

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Robert Glen Jones, Jr., Petitioner, vs. Charles L. Ryan, et al., Respondents.	No. **SECOND OR SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254** DEATH PENALTY CASE - EXECUTION SET FOR OCTOBER 23, 2013

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I. INTRODUCTION.

Robert Jones and David and Scott Nordstrom were indicted on six counts of first degree murder and related offenses for events that occurred at the Moon Smoke Shop ("Moon") and at the Fire Fighters Union Hall ("Fire Fighters") in 1996. At Jones' trial, David Nordstrom ("David") testified he was indicted for six Tucson murders, two at the Moon on May 30, 1996, and four at the Fire Fighters on June 13, 1996. Dist. Ct. Dkt. 110 p. 153. David cut a deal in which he pleaded guilty to armed robbery and agreed to testify against Jones and Scott Nordstrom ("Scott") at their separate trials in exchange for the dismissal of two first degree murder counts for events that occurred at the Moon. Dkt. 110 p. 154. David was charged with the four murders at the Fire Fighters, but those charges were dismissed. He testified against Jones and Scott at their separate trials. Jones and Scott were convicted of all six homicides and sentenced to death. *See State v. Jones*, 197 Ariz. 290, 297, 4 P.3d 345, 352 (2000) (ER102); *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 171 (2002).[1] David served less than four years in prison.

II. PROCEDURAL HISTORY.

On September 19, 2003, Jones filed in this Court a petition for writ of habeas corpus. Dist. Ct. Dkt. 1. An amended petition was filed on March 29, 2004. Dkt. 27. On January 29, 2010, this Court filed a Memorandum of Decision and Order in which it denied merits relief on various claims and further ruled that Jones procedurally defaulted five claims of prosecutorial misconduct. Dkt. 79. This

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

Court granted a certificate of appealability as to whether Jones established "cause" to excuse one claim of prosecutorial misconduct. Dkt. 79.

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

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

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

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

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

On August 19, 2013, in this Court, Jones filed an oversized Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b). Dist. Ct. Dkt. 104. On August

21, 2013, this Court ordered the motion filed. Dkt. 105. After the parties completed briefing, this Court dismissed the motion for relief from judgment on September 24, 2013. Dkt. 116.

Jones filed a notice of appeal on September 24, 2013. Dkt. 117. That appeal is pending in the Ninth Circuit.

III. JURISDICTION.

The Ninth Circuit, pursuant to 28 U.S.C. § 2244(b), has authorized Petitioner to file this Second or Successive Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254.

IV. FACTS.

Trial testimony of David Nordstrom, Fritz Ebenal, and Rebecca Matthews.

There was no physical evidence to connect Robert Jones to the homicides at either the Moon or Fire Fighters. The cases against Jones for first degree murder at both the Moon and Fire Fighters turned largely on the testimony of David Nordstrom, who the Arizona Supreme Court characterized as the state's "key witness." *State v. Jones*, 4 P.2d 345, 351 (Ariz. 2000). David testified to having prior convictions for other acts of dishonesty, including for giving false information to a police officer, two convictions in Pima County for theft, and convictions in Texas for burglary and forgery. Dkt. 110, Ex. B at 155, 171.

David testified he was on a curfew as part of his parole after his release from Douglas Prison on January 25, 1996. Dkt. 110, Ex. B at 83. He had served a prison sentence for a conviction for the offense of theft by control. *Id*. His curfew was monitored by the parole division of the Arizona Department of Corrections ("ADC") through the use of an electronic monitoring system ("EMS"). *Id*. at 84.

He stayed at his father's residence upon his release. *Id*. at 82. His compliance with curfew while on EMS was checked by Fritz Ebenal, a parole officer with the ADC. Dkt. 110, Ex. B at 84.

The prosecution relied heavily on Nordstrom's electronic alibi to bolster the impeachment of him, which included having six murder charges dismissed; his multiple curfew violations that went undetected and unprosecuted, including for methamphetamine and alcohol use; his multiple convictions for felonies of dishonesty, and his prior inconsistent statements to law enforcement. Dkt. 110, Ex. B at 116-117, 153. His step-mother testified that he was a "liar." Dkt. 110, Ex. C at 55.

At Jones' trial, David testified to a narrative that included riding in the middle seat of Jones' pick-up truck, between Jones and Scott. Dkt. 110, Ex. B at 99. According to David, Jones suggested they rob the Moon after they had broken into a car at a Tucson hospital and obtained a 9 mm. handgun. *Id*. at 101, 109. David had already obtained a .380 handgun from a friend, and the .380 was already in the truck. *Id*. 94, 106. Jones drove to a location behind the Moon, where he and Scott exited to commit the robbery and instructed David to drive the truck. *Id*. at 110.

Three witnesses who survived the Moon shooting testified to the shootings of one customer and one employee, but could not identify the shooters, except to say that one of them wore a long-sleeved shirt, dark sunglasses and a dark cowboy hat. 4 P.3d at 353. David testified that Jones' clothing matched that description that day, including a black cowboy hat. Dkt. 110, Ex. B at 112. On cross-examination, David admitted that he owned a cowboy hat. *Id*. at 177. One survivor saw one of the gunmen move to the back room and yell, "Get the fuck out of there." The bodies of a store patron and employee were found near the front door and in a back

room, respectively. David testified that he heard shots, then Jones and Scott returned to the truck and said, "Let's go." Dkt. 110, Ex. B at 111. According to David, Jones claimed to have shot two victims while Scott said he shot one. 4 P.3d at 353. David claimed to have received some of the proceeds from the robbery. Noel Engles, one of the Moon survivors, saw a light colored pick-up truck in the alley after the shooting but he saw only two persons in the truck. *Id*. at 353. David drove in the direction of Interstate 10, entered the expressway, and drove home. Dkt. 110, Ex. B at 113.

David testified that he drove on separate occasions with Scott and Jones to ponds south of Tucson, where they disposed of the weapons. Dkt. 110, Ex. B at 124-26. David testified that on January 16, 1997, he took law enforcement to those locations, and obtained $5,000 in reward money, but they were unable to find the weapons and he was arrested upon their return to Tucson. *Id*. at 152. He immediately returned the money. *Id*. at 198. The 9 mm. and .380 were never found, and no physical evidence connected Jones to either the Moon or Fire Fighters.

David testified that he returned home a half hour before curfew on June 13, 1996, after working that day and being driven home by Scott. Dkt. 110, Ex. B at 119. He testified he was awakened by Jones late that night, and Jones indicated that he and Scott had robbed the Fire Fighters and killed four people. *Id*. at 122.

Ebenal testified that he was David's parole officer. Dkt. 106, Ex. 14 at 241. He described the EMS unit used to monitor David as a transmitter on a rubber ankle bracelet. *Id*. at 241-42. It had a particular serial number. *Id*. at 245. When David would go home and plug in the Field Monitoring Device ("FMD"), "the transmitter is automatically picked up by the FMD, and the phone line calls us and tells us he's there and it's hooked up and whether or not it's a good connection or not." *Id*.

Ebenal testified that a violation would cause a page to be sent to him, and, after hours, the message goes to Central Communications, which would pass the message on to Ebenal. Dkt. 106, Ex. 14 at 246-47. Ebenal testified that data went to his computer and identified computer printouts that purported to show his monitoring of David's compliance with his curfew for dates during his parole, as well as violations. *Id*. at 248. Ebenal testified that records showed David was not in violation of curfew on either May 30 or June 13, 1996. *Id*. at 262.

Rebecca Matthews testified she was a supervisor in ADC's parole division. Dkt. 110, Ex. A at 29. Matthews testified she conducted a test in 1997, the year after the homicides, on an FMD and ankle bracelet *of the same type* used to monitor Nordstrom, but she conceded she did not know whether the ankle bracelet she tested was actually the one worn by Nordstrom. *Id*. at 33-34, 48. She testified that the test she ran on a unit with Detective Brenda Woolridge was not run on the same telephone line that had been operative in the Nordstrom residence when David was on the EMS system. Dkt. 110, Ex. A at 36. She mentioned that data was transmitted to Phoenix, but did not identify BI and did not testify that BI had any role in the electronic monitoring or that data was transmitted to Colorado. *Id*. at 32, 39.

V. THE *BRADY* CLAIM.

A. Request for *Brady* information and response.

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

> 15. All electronic monitor officers responsible for monitoring David Nordstrom.
>
> 16. The electronic monitor records of June 13, 1996, regarding David Nordstrom.

Dkt. 114, Ex. 1 at 2.

The prosecution tendered the following response:

> 15. E-M officers for D. Nordstrom: Fritz Evenal (sic), Rebecca Matthews, of the Department of Corrections.
>
> 16. E-M Records for 6/13/96: See Response to Number 2.

Dkt. 114, Ex. 2 at 3. Response Number 2 only directed the defense to a statement given by Scott Nordstrom. *Id*.[2]

After this Court allowed the substitution of prior counsel, Daniel D. Maynard, undersigned counsel informally sought records regarding the electronic monitoring of David Nordstrom, including from the Pima County Attorney, the ADC, and the manufacturer of the electronic monitor used on David Nordstrom, Behavioral Intervention, Inc. ("BI"), of Boulder, Colorado. Specifically, Jones sought maintenance and repair records on the BI Model 9000 used on Nordstrom and on all similar units sold to ADC. The ADC responded in pertinent part:

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2 The only statements of Scott Nordstrom in the disclosure made by the Pima County Attorney include: 1) a report by Pima County Attorney Investigator Steve Merrick, who wrote a report dated May 27, 1996, in which he stated he learned the name of Scott's probation officer, Debbie Hegedus, but included nothing about the identity of BI or anyone else monitoring David Nordstrom's curfew. Hegedus wrote a "Field Supervision Face Sheet" on April 29, 1996, in which she included information Scott reported to her, to wit, his height and weight; and, 2) a statement by Scott upon his arrest on January 26, 1997, in which he was told police had David in custody. Scott simply requested counsel, and interrogation ceased. At a clemency hearing on October 16, 2013, Kellie Johnson, the head of the Criminal Division at the Pima County Attorney, stated she supposed the reference in discovery response #2 simply meant that the EMS records later identified by Ebenal at trial were disclosed. Jones does not object to that characterization of Response #2, as the EMS records failed to identify BI as well.

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

Dkt. 106, Ex. 5.

By naming only Ebenal and Matthews and Scott Nordstrom's parole officer as possessors of data generated by David Nordstrom's EMS unit, the Pima County prosecutor violated the duty to disclose under *Brady*.[3] Based on the foregoing, Jones makes out a *prima facie* violation of *Brady* and respectfully request the offices of this Court to compel the production of evidence from BI upon which the claim rises or falls.

The Pima County Attorney's discovery response was, at a minimum, misleading. ADC was not the sole entity to possess records relevant to the functioning of David Nordstrom's EMS unit. BI possessed and likely still possesses the information required by Jones to prove the materiality prong of the test in *Strickler*. BI has refused to produce the information requested by Jones. Yet, around the time of Jones' trial, there were clear implications BI had experienced significant problems with its EMS units.

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3 The test requires proof that evidence exists that is favorable to the accused, that the prosecution suppressed the evidence intentionally or inadvertently, and the evidence is material, that is, that there is "a reasonable probability that the suppressed evidence would have produced a difference in the verdict." *See Strickler v. Green*, 527 U.S. 263 (1999). The test also imposes a duty under *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), "to learn of any favorable evidence known to others acting on the government's behalf in the case."

B. History of problems with BI.

In November 1996, a 14-year-old girl was run over by her 16-year-old boyfriend as she walked down a road in Jupiter Farms, Florida. Dkt. 106, Ex. 6. Her boyfriend, who was charged with second degree murder, was monitored by a BI EMS system. BI was quoted as saying its EMS system functioned properly when it reported no violation for the offender that evening. *Id*. Yet, two jail inmates reported the offender confessed he killed the girl, and an acquaintance of the offender said he, too, was able to "leave his residence and go out of range [of the EMS] undetected for short periods of time." *Id*. When questioned by investigators, BI acknowledged that there was a "default feature" in the system that allowed for offenders to be out of range for a period of time it would not specify. Dkt. 106, Ex. 6. A Florida DOC spokesperson stated that the DOC was not even aware that BI built a reporting delay into the system until the inmates reported the confession. Dkt. 106, Ex. 7.

On June 6, 1998, BI moved, successfully, to seal the portions of trial where testimony would be given how offenders could slip out of the BI EMS ankle bracelets. Dkt. 106, Ex. 8 at 2. That did not prevent the prosecutor from telling jurors in opening statement on July 10, 1998, that all the offender needed to do to slip out of the BI ankle bracelet was step into a bucket of water, use a dinner spoon to snap off the monitor, and the water would block the signal from going to house-arrest supervisors. Dkt. 106, Ex. 9 at 2. "The monitor, which is fooled into 'thinking' it is still connected to the bracelet, stays at home while the offender can stray as far and as long as he wishes." *Id*. She also stated that an offender could leave his residence for up to seven minutes before a signal was transmitted. *Id*.

In a Security and Exchange Commission ("SEC") filing, BI reported that in April 1995, a lawsuit was filed in Cook County, Illinois, against BI, the county sheriff, the county corrections department, and parolee Gerald Hodges alleging wrongful death based on malfunction of a BI EMS system used to monitor Hodges. Dkt. 106, Ex. 10 at 3. The case involved the murder of Seke Willis by Hodges in a gang-related incident. *See* Brief of Defendant-Appellant, *People v. Hodges,* No. 1-95-1093, 1996 WL 33651749 (Ill. App. 1st Dist. Jan. 25, 1996). The BI violation report showed Hodges was out of compliance with his curfew at 10:32 p.m., shortly before the shooting. *Id*. However, a prosecution witness testified that the offender was actually present at a party near the murder scene even prior to that time, although no violation report was generated. *Id*. at *13 n. 8. SEC documents fail to specify whether the civil case against BI was settled or dismissed. Dkt. 106, Ex. 10 at 3.

In August of 1996, an intoxicated offender subject to BI electronic monitoring by the Missouri Department of Corrections drove his vehicle across the center line, striking the oncoming vehicle of Gary Trout, killing both the offender and Mr. Trout. *Trout v. Gen. Sec. Servs. Corp.*, 8 S.W.3d 126, 130-31 (Mo. Ct. App. 1999). The offender was out past his curfew pursuant to the home arrest system. *Id*. On May 6, 1997, suit was brought against several entities, including BI for faulty manufacturing. Dkt. 106, Ex. 10 at 9. At trial, it was determined that the system correctly registered the violation of curfew but testimony of a parole officer indicated other problems with the system, notably the existence of signals that incorrectly noted the offender's absence depending on the placement of the equipment within the offender's residence. *Trout,* 8 S.W.3d at 130-31. BI was no longer a party to the litigation when the matter was appealed. *Id*. at 129.

In October 1996, a Pennsylvania teen sued the Allegheny County Monitoring Program, its supervisor and the unnamed EMS manufacturer after the EMS system falsely reported him to be in violation, which resulted in a detention that caused him to miss 24 days of high school. Dkt. 106, Ex. 11. The manufacturer later tested the unit and acknowledged it malfunctioned. *Id*. SEC filings indicate that BI was the manufacturer. Dkt. 106, Ex. 10 at 9. On January 29, 1998, BI settled the suit. Dkt. 106, Ex. 10 at 12.

During the pendency of Mr. Jones' PCR proceedings, a 1999 Florida newspaper article reported that during a trial for the a rape and murder of a 19-year-old woman, an installer of BI EMS units in Charlotte County, Florida, described a type of pliers that could be bought at a hardware store that could be used to remove an ankle bracelet without it transmitting a violation. Dkt. 106, Ex. 12 at 1.

Based on the foregoing, Jones acknowledges he cannot yet prove *Brady* materiality. However, he has good cause under Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts for this Court to order discovery. *See Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004) (en banc). It may be that Jones will not prevail once the discovery is obtained and the hearing is held, as was true when Cooper returned from the district court. *See Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2009). However, it is clear that Pima County Attorney's discovery response was false or misleading, and an accurate response would have alerted Jones counsel that records should have been elicited from BI with respect to units used on Nordstrom and similar units sold to the ADC. The records now need to be examined.

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VI. FREESTANDING INNOCENCE AND *BRADY* CLAIMS.

A. The *Cooper* standard.

The Ninth Circuit noted in *Cooper* that where a petitioner brings a claim of actual innocence and a claim of constitutional violation, he is necessarily "making a 'gateway' claim under *Schlup v. Delo*, 513 U.S. 298 (1995)," to allow consideration in a second or successive petition claims that were not brought in a first § 2254 petition. The *Cooper* Court noted that it was still an open question whether the actual innocence test of *Schlup* or the AEDPA's more restrictive test for filing a second or successive petition under 28 U.S.C. § 2244(b)(2)(B) applies. 358 F.3d at 1119. Cooper requires a petitioner to make a *prima* facie showing he would be entitled to relief if the matter were returned to the district court.

The evidence in BI's possession could render him actually innocent of the offense of premeditated first degree murder under *Herrera v. Collins*, 506 U.S. 390 (1993), *House v. Bell*, 547 U.S. 518 (2006), and *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997). Jones makes this claim based on his theory held from the time of trial that he was mistaken for David Nordstrom.

In *In re Davis*, ___ U.S. ___, 130 S.Ct. 1 (2009), the Supreme Court, in an original jurisdiction habeas corpus action that was filed after the Eleventh Circuit denied a request for authorization to file a successive petition under 28 U.S.C. § 2244(b), remanded a Georgia death penalty case on a freestanding claim of actual innocence. The order stated:

> The petition for writ of habeas corpus is transferred to the United States District Court for the Southern District of Georgia for hearing and determination. The District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence.

Id. at 1. In *Cooper*, the Ninth Circuit remanded to the district court for evidentiary development and hearing where testing of physical evidence would be dispositive of the claim. The *en banc* majority and concurring judges disagreed as to whether to grant the application under the test of either *Schlup* or § 2244(b), or stay the proceeding entirely pending the outcome of the testing on remand. 358 F.3d at 1119-20, 1125. In short, though, the majority ruled that matter must be remanded to the district court, under either theory, for factual development. Jones makes the same request here because he is otherwise powerless to obtain the records being withheld by BI.

As the *Cooper* Court noted, to make a successful *Schlup* claim, Jones must show that in light of all the evidence, including his new evidence, that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt in order to be returned to the district court to litigate the *Brady* claim. 358 F.3d at 1119. The records in BI's possession could serve to prove David Nordstrom's complicity in the six homicides, which would undermine his credibility with respect to his testimony that he only drove the getaway car at the Moon and failed to participate at all at the Fire Fighters. His guilt would place him in Jones' stead, i.e., it would inculpate David Nordstrom and exculpate Jones, thus meeting the *Schlup* standard where only two perpetrators entered the Moon and one witness there saw only two persons in the apparent getaway vehicle behind the Moon.

The same result would obtain under the AEDPA, even with its more restrictive provisions. Jones is required to prove:

> B(i) the factual predicate for the claim could not have been discovered through the exercise of due diligence; and

> (ii) the facts underlying the claim, if proven and viewed in the light of the evidence as whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B)(i) & (ii).

B. Jones was diligent.

The BI records could not have been discovered through the exercise of due diligence because there was no cause for the defense to seek the records after the Pima County Attorney gave the false discovery response that no one else besides ADC personnel monitored David Nordstrom. The case is similar to *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 diligence did not require that defense counsel perform a courthouse search of public records in the off chance he may discover something that impeaches a venirman's voir dire testimony. *Id*. Here, the defense was led into believing that only ADC had information relevant to the performance of the EMS unit used on Nordstrom.

Possessed of evidence showing that David Nordstrom's EMS unit malfunctioned, or that similar units sold to ADC and monitored and maintained by BI failed to record curfew violations for which parolees had not received approval would clearly and convincingly cause a reasonable juror not to convict but for the *Brady* violation described above.

Finally, after obtaining discovery from BI, an evidentiary hearing is required to allow Jones to meet the "extraordinarily high" burden of making a "truly persuasive demonstration of 'actual innocence'" that might relieve him of his

conviction and death sentence. *See Herrera*, 506 U.S. at 417; *House*, 547 U.S. at 555. Jones has demonstrated good cause for discovery under Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts.

VI. TECHNICAL INFORMATION.

Petitioner has been represented by the following attorneys:

a) At trial by Eric Larsen;

b) On direct appeal to the Arizona Supreme Court and on petition for certiorari to the United States Supreme Court by S. Jonathan Young;

c) On petition for post-conviction relief pursuant to Arizona Rule of Criminal Procedure 32 and on petition for review of the denial to the Arizona Supreme Court by Daniel D. Maynard and Jennifer A. Sparks;

d) On petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by Daniel D. Maynard and Jennifer A. Sparks; and,

e) On appeal from the denial of habeas corpus relief by Daniel D. Maynard. Mr. Maynard filed a petition for writ of certiorari, then was permitted to withdraw by the Ninth Circuit. Undersigned counsel was appointed and also represents Jones in the appeal of the denial of relief from judgment under Fed. R. Civ. P. 60(b).

VII. PRAYER FOR RELIEF.

WHEREFORE, Robert Glen Jones, Jr. respectfully prays this Court order discovery and conduct an evidentiary hearing where he might prove his freestanding claim of innocence and that his innocence serves as cause to excuse the procedural default of the *Brady* claim. Finally, he seeks that writ issue with respect to the *Brady* claim.

Respectfully submitted this 17th 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

Certificate of Service

I hereby certify that on this 17th day of October, 2013, I electronically transmitted the attached document to the Clerk's office of the United States Court of Appeals for the Ninth Circuit using the CM/ECF System for filing and transmitted a Notice of Electronic Filing to the following registrants:

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

s/Teresa Ardrey
Teresa Ardrey
Legal Secretary
Capital Habeas Unit