IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13–73647

ROBERT GLEN JONES, JR.,

PETITIONER,

V.

CHARLES L. RYAN, ET AL.,

RESPONDENTS.

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

(CAPITAL CASE)

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

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Less than 1 week before his scheduled execution date of October 23, 2013,[1] Petitioner Robert Glen Jones, Jr., asks this Court for leave to file a second or successive ("SOS") habeas petition, raising a freestanding actual-innocence claim and a claim based on *Brady v. Maryland*, 373 U.S. 83 (1963). (Dkt. # 1.) *See* 28 U.S.C. § 2244(b)(3)(A) (requiring prisoner to obtain leave of court of appeals before filing second or successive habeas petition in district court); *accord* Rule 9, Rules Governing § 2254 Cases. This Court "may authorize the filing of a second or successive application *only* if it determines that the application makes a prima facie showing that the application satisfies [AEDPA's] requirements" for filing an SOS petition. 28 U.S.C. § 2244(b)(3)(B), (C) (emphasis added). As set forth below, Jones has made no such showing, and this Court should deny his application.

A. *Factual and procedural overview.*

In the summer of 1996, Jones, along with co-defendant Scott Nordstrom, murdered six people while robbing two Tucson businesses: the Moon Smoke Shop ("Smoke Shop") and the Firefighters' Union Hall ("Union Hall"). *State v. Jones*, 4 P.3d 345, 352–53, ¶¶ 1–11 (Ariz. 2000) ("*Jones I*"). Jones was sentenced to death for each murder. *Id.* at 351, ¶ 1. David Nordstrom was the getaway driver for the Smoke Shop crimes and, pursuant to a testimonial agreement with the State,

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[1] Jones does not ask this Court to stay his execution.

described at trial how Jones and David's brother Scott Nordstrom committed those offenses. *Id.* at 352, ¶¶ 2–4. David Nordstrom also testified that, on the night of the Union Hall murders, Jones had appeared at his residence and had admitted that he and Scott Nordstrom had killed the victims. *Id.* at 353, ¶ 10. At the time, David Nordstrom was on parole and supervised by an electronic monitor worn on his ankle. *Id.* The monitor's records confirmed that David Nordstrom did not leave his residence the night of the Union Hall crimes. *Id.*[2]

Following this Court's August 2012 Opinion affirming the district court's order denying relief, *see Jones II*, 691 F.3d at 1095–1108, Jones filed a certiorari petition in the United States Supreme Court. In April 2013, while the petition was pending, Jones' prior counsel withdrew from representation and this Court appointed present counsel. *See* Ninth Cir. No. 10–99006, Dkt. # 57. The United States Supreme Court denied certiorari in June 2013, *see Jones v. Ryan*, 133 S.Ct. 2831 (2013), and the Arizona Supreme Court issued an execution warrant shortly thereafter. Following the warrant's issuance, Jones filed a motion for relief from judgment in district court—based largely on the same factual predicate as the claim he seeks to raise in his proposed SOS petition—and the district court denied that

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[2] For a full description of the facts underlying Jones' convictions, Respondents respectfully refer this Court to the Arizona Supreme Court's decision in *Jones I*, 4 P.3d at 352–53, ¶¶ 1–11, and to this Court's decision in *Jones v. Ryan*, 691 F.3d 1093, 1096–99 (9th Cir. 2012) ("*Jones II*").

motion. *See Jones v. Ryan*, 2013 WL 5348249 (D. Ariz. Sept. 24, 2013). Jones' appeal from that ruling is pending before this Court. *See* Ninth Cir. No. 13–16928.

B. *This Court should deny Jones' application for leave to file an SOS petition.*

In his proposed SOS petition, Jones argues that, prior to trial, the State falsely represented that only personnel from the Arizona Department of Corrections ("ADC") supervised David Nordstrom's electronic-monitoring system, the records of which formed his alibi for the Union Hall crimes. (Dkt. # 1.) According to Jones, newly-obtained information from ADC reveals that Behavioral Intervention, Inc. ("BI"), which manufactured the type of monitor Nordstrom wore, supervised Nordstrom electronically. (*Id.*) Relying on information gleaned from newspaper articles, government documents, and other public records, Jones contends that BI had a "history of problems" relating to the reliability of its manufacturing systems. (*Id.*) Jones speculates that, *if* this information had been disclosed and *if* it had led to evidence that Nordstrom's monitor was unreliable, he *could* have impeached Nordstrom's alibi for the Union Hall murders and been found not guilty. (*Id.*)

"Permitting a state prisoner to file a second or successive federal habeas corpus petition is not the general rule, it is the exception, and an exception that may be invoked only when the demanding standard set by Congress is met." *Bible v. Schriro*, 651 F.3d 1060, 1063 (9th Cir. 2011); *see also Tyler v. Cain*, 533 U.S. 656, 661 (2001) (AEDPA significantly "restricts the power of federal courts to award

relief to state prisoners who file second or successive habeas corpus applications"). AEDPA "*requires* dismissal of a second or successive habeas corpus application unless" a petitioner meets the requirements of 28 U.S.C. § 2244(b)(2). *Bible*, 651 F.3d at 1063–64 (emphasis added). Specifically, an application relating to claims not previously presented "shall be dismissed unless":

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; *and*
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a 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) (emphasis added).[3]

Therefore, before this Court may grant his application, Jones "must make a prima facie showing his claim (1) is based on newly discovered evidence and (2) establishes that he is actually innocent of the crimes alleged." *Bible*, 651 F.3d at 1064. "'A prima facie showing is a sufficient showing of possible merit to warrant

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[3] Because Jones does not contend that his claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. § 2244(b)(2)(A) is inapplicable and not addressed here.

a fuller exploration by the district court," and this Court "'will grant an application for an SOS petition if it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition.'" *Id.* at 1064 n.1 (quoting *Landrigan v. Trujillo*, 623 F.3d 1253, 1257 n.6 (9th Cir. 2010)). This Court's decision on Jones' application is not "appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Jones has not made a prima facie showing under 28 U.S.C. § 2244(b)(2)(B). First, Jones failed to diligently develop his claims. *See* 2244(b)(2)(B)(i). Jones offers no reason that he could not, at some earlier point in the 17 years since his crimes, have discovered the information upon which his claim rests. Jones argues that he could not have discovered his claim's factual predicate previously because "there was no cause for the defense to seek the [BI] records after the [State] gave the false discovery response that no one else besides ADC personnel monitored David Nordstrom." (Dkt. # 1, at 13.) But Jones' present counsel had no more "cause" to seek the records than did previous counsel, yet they sought the records nonetheless. Prior counsel could have done the same, either at trial, on appeal, during state post-conviction proceedings, or during habeas proceedings.

Nor has Jones shown that the information he now possesses was not available earlier. Jones learned of the monitor's purported unreliability from public

records that existed during trial and post-conviction proceedings. He offers no reason that he could not, during those prior proceedings, have researched BI, made the same discovery request of ADC that his present counsel have made, and discovered the factual basis for the claim he now seeks to present. Having foregone this opportunity, Jones should not be permitted to raise his claim now, on the eve of his execution.

Second, Jones has not shown that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole," would be sufficient to show his innocence by clear and convincing evidence. 28 U.S.C. § 2244(b)(2)(B)(ii). Most critically, Jones has been unable to obtain records from BI that he suspects will support his claim that Nordstrom's monitoring system may have malfunctioned. As a result, he candidly admits that he "cannot yet prove *Brady* materiality" and that "[i]t may be that [he] will not prevail once discovery is obtained and [a] hearing is held." (Dkt. # 1, at 10–11.)

But if Jones cannot show materiality under *Brady*, he cannot meet his higher burden of making a *prima facie* case that he is innocent by clear and convincing evidence. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). *See United States v. Bagley*, 473 U.S. 667, 682 (1985) ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to

undermine confidence in the outcome."). And Jones cannot state a *prima facie* claim of innocence by speculating that *if* discovery is granted he *might* be able to show a *Brady* violation. Speculation cannot amount to clear and convincing evidence, and this Court "should not allow [a] prisoner[] to use federal discovery for fishing expeditions to investigate mere speculation." *Calderon v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 98 F.3d 1102, 1106 (9th Cir.1996); *accord Kemp v. Ryan*, 638 F.3d 1245, 1260 (9th Cir. 2011).

Further, even if BI's records support Jones' suspicion that Nordstrom's system may have malfunctioned, that fact would not show Jones' innocence in light of the evidence as a whole. *See* 28 U.S.C. § 2254(b)(2)(B)(ii). In addition to David Nordstrom's testimony implicating Jones, Lana Irwin testified that she overheard Jones describe details of the Union Hall and Smoke Shop murders that were not publically released. *Jones II*, 691 F.3d at 1098–99. She also helped Jones change his appearance after the murders, and recalled that he told her that he was hiding from someone. *Id.* David Evans heard Jones twice respond, when asked whether he was involved in the robberies, "If I told you, I'd have to kill you." *Id.* at 1099. Jones also told Evans that "you don't leave witnesses." *Id.* And a Smoke Shop survivor's physical description of one of the robbers generally matched Jones. *See Jones I*, 4 P.3d at 352, ¶ 5.

Finally, if Jones had successfully challenged Nordstrom's alibi for the Union Hall crimes, that fact would not have proved Jones' innocence—in fact, it would more likely have shown that *both* Jones and Nordstrom were involved. This is particularly true in light of the testimony described above from Irwin and Evans. And evidence impeaching Nordstrom's alibi for the Union Hall crimes would have had no bearing on the jury's finding that Jones committed the Smoke Shop crimes, as Nordstrom conceded that he was present for and participated in those events. Furthermore, Jones' counsel "attacked [Nordstrom's] credibility on every basis" at trial and persuasively highlighted his motive to fabricate. *Jones I*, 4 P.3d at 355, ¶ 18. It is therefore unlikely that additional information calling into question the monitoring system's reliability would have changed the jury's assessment of his veracity. This Court should reject Jones' arguments and deny his application for leave to file an SOS petition.

C. *Alternatively, Jones has not satisfied Schlup's standard.*

Relying on *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004), Jones suggests that he need not meet AEDPA's demanding standards for filing an SOS petition because his proposed petition presents a freestanding actual-innocence

claim, in addition to a *Brady* claim.[4] (Dkt. # 1, at 11.) Under such circumstances, Jones argues, the law is unclear "whether the actual innocence test of *Schlup [v Delo*, 513 U.S. 298 (1995)] or … AEDPA's more restrictive test" for filing an SOS petition applies. (*Id.*) *See Cooper*, 358 F.3d at 1119–20 (declining to resolve whether AEDPA or *Schlup* applies when a prisoner seeks leave to file an SOS petition containing a freestanding actual innocence claim).

Even assuming that Jones need only meet *Schlup*'s standard, he has failed to carry his burden. As previously stated, Jones *concedes* he cannot prove materiality under *Brady*, which is the same type of reasonable-probability standard as *Schlup*. *Compare Bagley*, 473 U.S. at 682 (requiring showing of reasonable probability of a different result had evidence been disclosed); *with, e.g., Cooper*, 358 F.3d at 1119 ("*Schlup* requires only that an applicant show that it is 'more likely than not' that no reasonable fact-finder would have found him guilty."). And in light of the additional evidence of Jones' guilt set forth above, in the form of testimony from Irwin and Evans, Jones has failed to show a reasonable probability that the jury

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[4] Whether a freestanding actual-innocence claim is cognizable on habeas review remains an open question. *See McQuiggin v. Perkins*, __ U.S. __, 133 S.Ct. 1924, 1931 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."); *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 71–72 (2009) (assuming without deciding that freestanding actual-innocence claim is cognizable).

would have found him not guilty had he impeached Nordstrom's alibi. This Court should deny Jones' application.

Respectfully submitted this 18th day of October, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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