No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2013

ROBERT GLEN JONES, *Petitioner*,

vs.

CHARLES L. RYAN, *Respondent.*

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EXECUTION DATE: OCTOBER 23, 2013

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Appendix A

Opinion, *State v. Jones*, 4 P.2d 345 (Ariz. 2000)

Supreme Court of Arizona,
En Banc.
STATE of Arizona, Appellee.
v.
Robert Glen JONES, Jr., Appellant.

No. CR–98–0537–AP.
June 15, 2000.

Defendant was convicted in the Superior Court of Pima County, No. CR–57526,John S. Leonardo, J., of, six counts of first-degree murder, for which he received death sentences, first degree attempted murder, aggravated assault, armed robbery, and first-degree burglary. On direct, automatic appeal, the Supreme Court, McGregor, J., held that: (1) erroneous admission of evidence under the hearsay exception for prior consistent statements was harmless; (2) prosecutor did not engage in misconduct; (3) trial court adequately life-and death-certified the jury; (4) witness' relatively vague references to other unproven crimes and incarcerations of defendant did not require a mistrial; (5) any error in prosecutor's reference to noted serial killers in his closing argument could not have affected the outcome of trial; (6) defendant was not entitled to a change of venue on the ground of pretrial publicity; (7) admission of police artist's composite sketch was not an abuse of discretion; (8) counsel's waiver of defendant's presence at bench conference did not violate defendant's Sixth Amendment right to be present; and (9) death penalty was warranted.

Affirmed.

West Headnotes

[1] Witnesses 410 ⚿414(2)

410 Witnesses
410IV Credibility and Impeachment
410IV(F) Corroboration
410k414 Competency of Corroborative Evidence
410k414(2) k. Former statements corresponding with testimony. Most Cited Cases

Hearsay exception for prior consistent statements offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive requires the statement to have been made before the motive to fabricate arose, regardless whether the declarant is accused of recent fabrication, bad motive, or improper influence. 17A A.R.S. Rules of Evid., Rule 801(d)(1)(B) .

[2] Witnesses 410 ⚿414(2)

410 Witnesses
410IV Credibility and Impeachment
410IV(F) Corroboration
410k414 Competency of Corroborative Evidence
410k414(2) k. Former statements corresponding with testimony. Most Cited Cases

To determine admissibility under the hearsay exception for prior consistent statements offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, the court must decide (1) whose credibility the statement bolsters, and (2) when that particular declarant's motive to be untruthful arose. 17A A.R.S. Rules of Evid., Rule 801(d)(1)(B).

[3] Witnesses 410 ⚿414(2)

410 Witnesses
410IV Credibility and Impeachment
410IV(F) Corroboration
410k414 Competency of Corroborative Evidence
410k414(2) k. Former statements corresponding with testimony. Most Cited Cases

Declarant's statement to police that defendant had admitted needing to leave town because he had killed some people was admissible in capital murder case under the hearsay exception for prior

consistent statements, as declarant was not offered a deal to testify until later, and thus, had no motive to fabricate the original statement. 17A A.R.S. Rules of Evid., Rule 801(d)(1)(B).

[4] Witnesses 410 ⚿414(2)

410 Witnesses
410IV Credibility and Impeachment
410IV(F) Corroboration
410k414 Competency of Corroborative Evidence
410k414(2) k. Former statements corresponding with testimony. Most Cited Cases

Declarant's statement to detectives about a "dream" in which the victims were killed exactly as defendant had described it, introduced to bolster her testimony in capital murder case that she overheard defendant say he had murdered four people, was admissible under the hearsay exception for prior consistent statements, as declarant had been offered no deal prior to the statement, and thus, the statement was made prior to the time her motive to fabricate arose. 17A A.R.S. Rules of Evid., Rule 801(d)(1)(B).

[5] Witnesses 410 ⚿414(2)

410 Witnesses
410IV Credibility and Impeachment
410IV(F) Corroboration
410k414 Competency of Corroborative Evidence
410k414(2) k. Former statements corresponding with testimony. Most Cited Cases

Declarant's statements as to what defendant had said and done were not admissible in capital murder case under the hearsay exception for prior consistent statements, as the declarant's alleged motive to fabricate arose at the time the murders occurred, which was prior to the time of the statements; defendant's theory was that, at the time of the statements, the declarant was already plotting to lie about defendant's involvement in the case, and if the declarant had actually participated in all of the killings, his decision to shift the blame to the defendant presumably formed immediately upon the deaths. 17A A.R.S. Rules of Evid., Rule 801(d)(1)(B).

[6] Criminal Law 110 ⚿1170.5(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170.5 Witnesses
110k1170.5(1) k. In general. Most Cited Cases

Error in admitting, under the hearsay exception for prior consistent statements, evidence of declarant's statements as to what defendant had said and done was harmless in capital murder case; even in light of the defense's extensive attempts to impeach the declarant and the multiple attacks on his veracity, the jury chose to convict defendant on six counts of murder, the declarant's credibility did not hinge on the prior consistent statements, and even if testimony as to the statements had been excluded, all of the declarant's own testimony about defendant's involvement and admissions would still have been admissible. 17A A.R.S. Rules of Evid., Rule 801(d)(1)(B).

[7] Criminal Law 110 ⚿2020

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)4 Nonproduction of Witness or Rendering Witness Unavailable
110k2020 k. In general. Most Cited Cases
(Formerly 110k700(10))

Prosecutor did not impermissibly threaten to prosecute defense witness for perjury when he explained to the trial court that a witness might choose to invoke his Fifth Amendment rights because he might be liable for perjury regardless of how he testified; prosecution's statements did not constitute a threat, but were made to explain the witness' somewhat confusing decision to invoke the

Fifth Amendment. U.S.C.A. Const.Amend. 5.

[8] Criminal Law 110 ⚿1152.19(7)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.19 Counsel
110k1152.19(7) k. Arguments and statements by counsel. Most Cited Cases
(Formerly 110k1154)

Supreme Court will disturb the trial court's decision not to grant a mistrial for prosecutorial misconduct only for an abuse of discretion.

[9] Criminal Law 110 ⚿2020

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)4 Nonproduction of Witness or Rendering Witness Unavailable
110k2020 k. In general. Most Cited Cases
(Formerly 110k700(10))

There is no per se prosecutorial misconduct when the prosecutor merely informs the witness of the possible effects of his testimony.

[10] Criminal Law 110 ⚿2020

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)4 Nonproduction of Witness or Rendering Witness Unavailable
110k2020 k. In general. Most Cited Cases
(Formerly 110k700(10))

Absent some substantial governmental action preventing a witness from testifying, the witness's decision to invoke the Fifth Amendment does not suggest prosecutorial misconduct. U.S.C.A. Const.Amend. 5.

[11] Criminal Law 110 ⚿1036.2

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.2 k. Competency, examination, and impeachment of witnesses. Most Cited Cases

Defendant waived the argument that the trial court should have sua sponte granted a witness immunity by failing to make any objection or motion to that effect at trial.

[12] Criminal Law 110 ⚿1158.17

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.17 k. Jury selection. Most Cited Cases
(Formerly 110k1158(3))

Trial judge has the power to decide whether a venire person's death penalty views would actually impair his ability to apply the law, and thus, deference must be paid to the trial judge who sees and hears the juror.

[13] Jury 230 ⚿108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases

Trial judge has discretion in applying the test for whether a venire person's death penalty views would actually impair his ability to apply the law; the inquiry itself is more important than the rigid application of any particular language.

[14] Criminal Law 110 ⚿1166.22(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.22 Remarks and Conduct of Judge
110k1166.22(2) k. Nature of remarks in general. Most Cited Cases

Although trial judge incorrectly stated that the *Witherspoon/Wainwright* standard for death-qualification of the jury did not apply because juries did not sentence defendants, the judge's approach complied with the constraints of *Witherspoon/Wainwright*, and thus, the erroneous statement was harmless; questionnaire asked whether venire persons could "disregard the possible punishment and decide this case based on the evidence produced in court," some jurors were dismissed, and judge subsequently asked venire persons if they felt strongly about the death penalty, to which three persons responded that they supported its imposition.

[15] Jury 230 ⚿33(2.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2.15) k. View of capital punishment. Most Cited Cases

Jury 230 ⚿131(8)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(8) k. Personal opinions and conscientious scruples. Most Cited Cases

Trial court satisfied the constraints of the *Morgan* test for life-qualification of the jury in a capital case; defense counsel never submitted questions to the trial court asking whether any juror would automatically impose the death penalty once guilt was found, regardless of the law, the trial court specifically asked if any of the jurors had strong feelings about the death penalty, either way, the three people who responded that they favored its application were removed by the defense with peremptory strikes, and the defense did not request any additional questions.

[16] Jury 230 ⚿131(8)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(8) k. Personal opinions and conscientious scruples. Most Cited Cases

Defendants have a right to know whether a potential juror will automatically impose the death penalty once guilt is found, regardless of the law, and thus, defendants are entitled to address this issue during voir dire.

[17] Jury 230 ⚿33(2.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2.15) k. View of capital punishment. Most Cited Cases

Jury 230 ⚿131(8)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(8) k. Personal opinions and

conscientious scruples. Most Cited Cases

Trial court is not required to life-qualify the jury in the absence of the defendant's request; trial court is under no obligation to question venire persons endlessly concerning other topics, even if those questions might indicate an affinity for the death penalty.

[18] Criminal Law 110 ⚿373.4

110 Criminal Law
110XVII Evidence
110XVII(F) Other Misconduct by Accused
110XVII(F)12 Nature and Circumstances of Other Misconduct Affecting Admissibility
110k373.3 Conduct Not Amounting to Crime, or Evidence Merely Suggestive of Crime
110k373.4 k. In general. Most Cited Cases
(Formerly 110k374)

Witnesses 410 ⚿249

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k249 k. Remarks by witness. Most Cited Cases
(Formerly 110k374)

Witness' unsolicited testimony about murder defendant's status as a paroled felon, that following the murders, defendant borrowed duct tape to use in a subsequent robbery, and that defendant was subsequently incarcerated, did not create undue prejudice or require a mistrial; the testimony made relatively vague references to other unproven crimes and incarcerations, the judge gave an appropriate limiting instruction, without drawing additional attention to the evidence, and the prosecution played no part in soliciting the information.

[19] Criminal Law 110 ⚿867.14(4)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k867 Discharge of Jury Without Verdict; Mistrial
110k867.14 Witnesses
110k867.14(4) k. Unresponsive, unsolicited, and unexpected testimony. Most Cited Cases
(Formerly 110k867)

When unsolicited prejudicial testimony has been admitted, the trial court must decide whether the remarks call attention to information that the jurors would not be justified in considering for their verdict, and whether the jurors in a particular case were influenced by the remarks.

[20] Criminal Law 110 ⚿867.14(4)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k867 Discharge of Jury Without Verdict; Mistrial
110k867.14 Witnesses
110k867.14(4) k. Unresponsive, unsolicited, and unexpected testimony. Most Cited Cases
(Formerly 110k867)

When a witness unexpectedly volunteers information, the trial court must decide whether a remedy short of mistrial will cure the error.

[21] Criminal Law 110 ⚿1155

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1155 k. Issues related to jury trial. Most Cited Cases

Absent an abuse of discretion, Supreme Court will not overturn the trial court's denial of a motion for mistrial; trial judge's discretion is broad, because he is in the best position to determine whether the evidence will actually affect the outcome of the trial.

[22] Criminal Law 110 ⚿1169.11

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.11 k. Evidence of other offenses and misconduct. Most Cited Cases
Testimony about prior bad acts does not necessarily provide grounds for reversal.

[23] Criminal Law 110 ⚿1171.1(2.1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(2.1) k. In general. Most Cited Cases
Misconduct by the prosecutor during closing arguments may be grounds for reversal because he is a public servant whose primary interest is the pursuit of justice.

[24] Criminal Law 110 ⚿2077

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2076 Statements as to Facts and Arguments
110k2077 k. In general. Most Cited Cases
(Formerly 110k713)
To determine whether a prosecutor's remarks are improper, trial court should consider (1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks.

[25] Criminal Law 110 ⚿1171.1(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(1) k. Conduct of counsel in general. Most Cited Cases
Prosecutorial misconduct alone will not mandate that a defendant be awarded a new trial; such an award is only required when the defendant has been denied a fair trial as a result of the actions of counsel.

[26] Criminal Law 110 ⚿1152.19(7)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.19 Counsel
110k1152.19(7) k. Arguments and statements by counsel. Most Cited Cases
(Formerly 110k1154)

Criminal Law 110 ⚿2192

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2191 Action of Court in Response to Comments or Conduct
110k2192 k. In general. Most Cited Cases
(Formerly 110k730(1))
Trial court is in the best position to determine whether an attorney's remarks require a mistrial, and its decision will not be disturbed absent a plain abuse of discretion.

[27] Criminal Law 110 ⚿2073

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by

Counsel
110k2071 Scope of and Effect of Summing Up
110k2073 k. For prosecution. Most Cited Cases
(Formerly 110k713)

Criminal Law 110 ⚿2089

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2088 Matters Not Sustained by Evidence
110k2089 k. In general. Most Cited Cases
(Formerly 110k719(1))

Prosecutors have wide latitude in presenting their closing arguments to the jury; excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury.

[28] Criminal Law 110 ⚿2160

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2158 Guilt Phase Arguments as to Potential Sentence or Punishment
110k2160 k. In particular prosecutions. Most Cited Cases
(Formerly 110k723(1))

Prosecution's single reference to the death penalty in closing argument, during his explanation of reasonable doubt, did not rise to the level of misconduct in capital murder case; reference to the death penalty did not call attention to a fact that the jurors would not be justified in considering during their deliberations, and the probability that the statement improperly influenced the jurors was very low.

[29] Criminal Law 110 ⚿2089

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2088 Matters Not Sustained by Evidence
110k2089 k. In general. Most Cited Cases
(Formerly 110k719(1))

Any error in prosecutor's reference to noted serial killers in his closing argument in capital murder case could not have affected the outcome of the trial; prosecutor did not introduce evidence completely outside the realm of the trial, but rather, drew an analogy between defendant's attitude at trial and that of well-known murderers.

[30] Criminal Law 110 ⚿2150

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2145 Appeals to Sympathy or Prejudice
110k2150 k. Comments on frequency of offenses, and appeals for law enforcement. Most Cited Cases
(Formerly 110k723(3))

Prosecution's plea, during closing argument, for a guilty verdict on behalf of murder victims and their families did not rise to the level of misconduct in capital murder case; prosecutor did not attempt to inflame the jury or make an emotional plea to ease the suffering of the poor families.

[31] Criminal Law 110 ⚿126(2)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k123 Grounds for Change
110k126 Local Prejudice
110k126(2) k. Particular offenses.

Most Cited Cases

Capital murder defendant was not entitled to a change of venue on the ground of prejudicial pretrial publicity; only a few of more than 850 print or television articles mentioned defendant directly, the majority of the statements concerned largely factual contentions, the trial judge took the precautionary steps necessary to choose an impartial jury, almost all of the jurors who did have exposure to the publicity stated that their exposure was negligible, and every juror who admitted he could not set aside his feelings concerning the media coverage eventually was excused.

[32] Criminal Law 110 ⚿126(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k123 Grounds for Change
110k126 Local Prejudice
110k126(1) k. In general. Most Cited Cases

For venue issues, appellate court is concerned with the prejudicial effect of pretrial publicity, rather than merely the amount of publicity.

[33] Criminal Law 110 ⚿126(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k123 Grounds for Change
110k126 Local Prejudice
110k126(1) k. In general. Most Cited Cases

There is a two-step inquiry to determine the effect of pretrial publicity: whether the publicity created a presumption of prejudice, and whether the defendant has shown actual prejudice.

[34] Criminal Law 110 ⚿134(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k129 Application
110k134 Affidavits and Other Proofs
110k134(1) k. In general. Most Cited Cases

If a defendant can show pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality, prejudice will be presumed without examining the publicity's actual influence on the jury.

[35] Criminal Law 110 ⚿134(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k129 Application
110k134 Affidavits and Other Proofs
110k134(1) k. In general. Most Cited Cases

Defendant's burden of proof on motion for change of venue due to prejudicial pretrial publicity is extremely heavy, and juror exposure to information concerning the trial does not raise a presumption that the defendant was denied a fair trial.

[36] Criminal Law 110 ⚿1134.39

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.39 k. Jurisdiction and venue. Most Cited Cases
(Formerly 110k1134(3))

Supreme Court evaluates the totality of the circumstances from the entire record to determine if pretrial publicity was so great as to result in an unfair trial.

[37] Criminal Law 110 ⚿444.17

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k444 Authentication and Foundation
110k444.17 k. Sketches, diagrams,

drawings. Most Cited Cases
(Formerly 110k444)
Admission of police artist's composite sketch under the evidentiary rule allowing a witness to authenticate a document if the witness has knowledge and testifies that a matter is what it is claimed to be was not an abuse of discretion where an eyewitness testified that it was an accurate depiction of what he observed; testimony of artist was not necessary to provide the proper foundation, since the eyewitness gave the artist the original description, and was in the best position to determine whether the drawing represented that description. 17A A.R.S. Rules of Evid., Rule 901(b)(1).

[38] Criminal Law 110 ⚿1153.1

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.1 k. In general. Most Cited Cases
(Formerly 110k1153(1))
Evidentiary rulings are subject to the trial court's determination and will not be disturbed, absent an abuse of discretion.

[39] Criminal Law 110 ⚿636(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k636 Presence of Accused
110k636(3) k. During preliminary proceedings and on hearing of motions. Most Cited Cases
Counsel's waiver of defendant's presence at a bench conference during which the defense released two witnesses from trial did not violate defendant's Sixth Amendment right to be present; the proceeding did not involved any actual confrontation, the jury was not present, and the trial judge did not make any determination concerning defendant himself, but rather, counsel made a strategy decision only. U.S.C.A. Const.Amend. 6.

[40] Criminal Law 110 ⚿636(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k636 Presence of Accused
110k636(1) k. In general. Most Cited Cases
Defendant's right to be present during trial stems from the Confrontation Clause of the Sixth Amendment. U.S.C.A. Const.Amend. 6.

[41] Criminal Law 110 ⚿636(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k636 Presence of Accused
110k636(1) k. In general. Most Cited Cases
Right to be present at all critical stages of a criminal trial is a fundamental right. U.S.C.A. Const.Amend. 6.

[42] Criminal Law 110 ⚿636(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k636 Presence of Accused
110k636(1) k. In general. Most Cited Cases
Although a defendant has the right to be present at trial, his right extends only to those situations in which his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. U.S.C.A. Const.Amend. 6.

[43] Attorney and Client 45 ⚿92

45 Attorney and Client
45II Retainer and Authority
45k87 Commencement and Conduct of Litigation
45k92 k. Conduct of trial. Most Cited
Counsel, acting alone, may make decisions of strategy pertaining to the conduct of the trial, and defendants are often bound by counsel's strategy decisions. U.S.C.A. Const.Amend. 6.

[44] Sentencing and Punishment 350H ⚿1673

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1673 k. Personal or pecuniary gain. Most Cited Cases
Not all robberies suffice to invoke the pecuniary gain aggravating sentencing factor in a capital case; rather, robbery must be a motive or cause of the murder, not just the result. A.R.S. § 13–703, subd. F, par. 5.

[45] Sentencing and Punishment 350H ⚿1618

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1613 Requirements for Imposition
350Hk1618 k. Narrowing class of eligible offenders. Most Cited Cases
To pass constitutional muster, sentencing schemes must narrow the class of persons to those for whom the death sentence is justified.

[46] Sentencing and Punishment 350H ⚿1673

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1673 k. Personal or pecuniary gain. Most Cited Cases
Pecuniary gain aggravating sentencing factor applied in a capital murder case in which it was clear that defendant and his co-defendant intended to rob and murder their victims. A.R.S. § 13–703, subd. F, par. 5.

[47] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
In the absence of contravention, testimony from capital murder defendant's parole officer that defendant was on parole at the time of the murders was sufficient to establish beyond a reasonable doubt the aggravating sentencing factor that defendant committed the offenses "while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail." A.R.S. § 13–703, subd. F, par. 7.

[48] Sentencing and Punishment 350H ⚿1705

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1703 Other Offenses, Charges, Misconduct
350Hk1705 k. Nature, degree, or seriousness of other offense. Most Cited Cases
Aggravating sentencing factor that defendant was convicted of another offense for which life imprisonment or death was imposable applied in capital murder case, where murders of multiple victims occurred at two different locations, despite claim that the factor did not apply because all six of the murders occurred in a single incident; defendant was convicted for all six murders prior to sentencing, and each set of murders provided a sufficient basis for finding the factor as to the other set of murders. A.R.S. § 13–703, subd. F, par. 1.

[49] Sentencing and Punishment 350H ⚿1705

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1703 Other Offenses, Charges, Misconduct
350Hk1705 k. Nature, degree, or seriousness of other offense. Most Cited Cases

Each of defendant's convictions on three counts of aggravated assault, three counts of armed robbery, and two counts of first-degree burglary, all of which convictions occurred before the sentencing phase, provided sufficient grounds for satisfying the aggravating capital sentencing factor of prior conviction of a serious offense. A.R.S. § 13–703, subd. F, par. 2.

[50] Sentencing and Punishment 350H ⚷1660

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1660 k. Dual use of evidence or aggravating factor. Most Cited Cases

Finding that both of the murders at one location established the aggravating capital sentencing factor of another homicide conviction for the other murder, and that each of the murders at a second location provided a sufficient basis for finding that factor for each other, essentially counted the same murders previously counted in an analysis of the aggravating factor that defendant was convicted of another offense for which life imprisonment or death was imposable, and was thus erroneous; it was mathematically possible to satisfy both aggravators, without counting a single murder twice, but it was unclear whether trial court did so. A.R.S. § 13–703, subd. F, pars. 1, 8.

[51] Sentencing and Punishment 350H ⚷ 1788(10)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(10) k. Harmless and reversible error. Most Cited Cases

Any double-counting of murders in finding the aggravating capital sentencing factor of another homicide conviction and the aggravating factor that defendant was convicted of another offense for which life imprisonment or death was imposable was harmless; it was possible to mathematically apply the murders to satisfy both factors without double counting any single murder, and either factor, once combined with other aggravating factors, outweighed the mitigating factors for sentencing, regardless of whether the other was applied. A.R.S. § 13–703, subd. F, pars. 1, 8.

[52] Sentencing and Punishment 350H ⚷1771

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1771 k. Degree of proof. Most Cited Cases

Capital murder defendant must prove the statutory mitigating factors by a preponderance of the evidence. A.R.S. § 13–703.

[53] Sentencing and Punishment 350H ⚷1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental illness or disorder. Most Cited Cases

Although a defendant must prove that his ability to conform to the law was significantly impaired to establish the sentencing mitigation factor that he lacked the capacity to appreciate the wrongfulness of his conduct, the impairment need not have been so severe as to constitute a complete defense to the crime. A.R.S. § 13–703, subd. G, par. 1.

[54] Sentencing and Punishment 350H ⚷1772

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases

Capital murder defendant's continual drug use did not establish the mitigating sentencing factor that he lacked the capacity to appreciate the wrongfulness of his conduct; while evidence showed that he had used drugs since he was introduced to them in his early teens, and a neuropsychologist found that defendant had an amphetamine dependence, defendant drank only a small amount of beer on the night of one set of murders, and nothing at all on the night of a second set of murders. A.R.S. § 13–703, subd. G, par. 1.

[55] Sentencing and Punishment 350H ⚿1712

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1712 k. Intoxication or drug impairment at time of offense. Most Cited Cases

Voluntary intoxication may be considered a mitigating sentencing factor in a capital murder case if it impairs the defendant's ability to comprehend the nature of his crimes. A.R.S. § 13–703, subd. G, par. 1.

[56] Sentencing and Punishment 350H ⚿1712

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1712 k. Intoxication or drug impairment at time of offense. Most Cited Cases

Voluntary intoxication may be a mitigating sentencing factor in a capital murder case when the defendant has a long history of substance abuse. A.R.S. § 13–703, subd. G, par. 1.

[57] Sentencing and Punishment 350H ⚿1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental illness or disorder. Most Cited Cases

Capital murder defendant's antisocial personality disorder did not establish the mitigating sentencing factor that he lacked the capacity to appreciate the wrongfulness of his conduct; defendant made no showing that his condition significantly impaired his ability to understand the crimes. A.R.S. § 13–703, subd. G, par. 1.

[58] Sentencing and Punishment 350H ⚿1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental illness or disorder. Most Cited Cases

Antisocial personality disorder, combined with other factors, may be a mitigating sentencing factor in a capital murder case. A.R.S. § 13–703, subd. G, par. 1.

[59] Sentencing and Punishment 350H ⚿1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental illness or disorder. Most Cited Cases

Character or personality disorders alone are not sufficient to constitute significant impairment establishing the mitigating sentencing factor that defendant lacked the capacity to appreciate the wrongfulness of his conduct; defendant must also show that he was substantially impaired. A.R.S. § 13–703, subd. G, par. 1.

[60] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases

Capital murder defendant failed to establish the mitigating sentencing factor of relatively minor participation; testimony from surviving witnesses indicated that both of the two suspects were shooting at different times in different places. A.R.S. § 13–703, subd. G, par. 3.

[61] Sentencing and Punishment 350H ⚿1771

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1771 k. Degree of proof. Most Cited Cases

Sentencing and Punishment 350H ⚿1789(8)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(8) k. Verdict and findings. Most Cited Cases

Supreme Court independently re-weighs the trial court's findings concerning non-statutory mitigation factors in a capital murder case, which must be proven by a preponderance of the evidence.

[62] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases

Testimony concerning good character is not a mitigating sentencing factor in a capital murder case when contradicted by evidence that the defendant has been involved in other crimes.

[63] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases

Defendant's dysfunctional family history was not a mitigating sentencing factor in a capital murder case; while defendant claimed that his treatment during childhood led him to spend most of his life under the influence of drugs, no evidence showed that he was intoxicated at the time of the murders.

[64] Sentencing and Punishment 350H ⚿1716

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1716 k. Childhood or familial background. Most Cited Cases

Dysfunctional family history may be a mitigating sentencing factor in a capital murder case if it has a relationship to or affects the defendant's behavior at the time of the crime.

[65] Sentencing and Punishment 350H ⚿1716

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1716 k. Childhood or familial background. Most Cited Cases

Family history is not a mitigating sentencing factor in a capital murder case absent a nexus between that history and defendant's violent behavior.

[66] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases

Defendant failed to prove a history of good deeds sufficient to establish a mitigating sentencing factor in a capital murder case; the only evidence that he presented was that once he grew big enough, he protected his sister and mother from beatings by his mother's boyfriend, and that his actions convinced his mother that she could leave the boyfriend and fend for herself.

[67] Sentencing and Punishment 350H ⚿1721

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1721 k. Other matters related to offender. Most Cited Cases

Great number of good deeds may be a mitigating circumstance in a capital murder case.

[68] Sentencing and Punishment 350H ⚿1716

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1716 k. Childhood or familial background. Most Cited Cases

While capital murder defendant established family support, it was only slightly mitigating; while in his mother's custody during parole, defendant continued to engage in criminal activity.

[69] Sentencing and Punishment 350H ⚿1717

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1717 k. Existing social ties and responsibilities. Most Cited Cases

Although close family ties may be mitigating in a capital murder case, general statements of support carry little weight.

[70] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases

Capital murder defendant failed to prove the mitigating circumstance of good behavior during the course of the trial; neuropsychologist observed that defendant tended to minimize his involvement in activities and tried to make himself look good, and trial court noted that the trial would be the ideal place to bring out defendant's best behavior.

[71] Sentencing and Punishment 350H ⚿1721

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1721 k. Other matters related to offender. Most Cited Cases

Although good behavior during the course of the trial has rarely been considered mitigating in a capital murder prosecution, it may be assigned some value.

[72] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases

Capital murder defendant failed to prove that his potential for rehabilitation was a mitigating circumstance; neuropsychologist's report indicated that defendant was marked with psychopathology and an inability to live in accordance with societal rules, and defendant had a history of criminal behavior.

[73] Sentencing and Punishment 350H ⚿1718

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1718 k. Remorse and actual or potential rehabilitation. Most Cited Cases

If a capital murder defendant has potential to be rehabilitated, the court may consider the fact mitigating.

[74] Sentencing and Punishment 350H ⚿1717

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1717 k. Existing social ties and responsibilities. Most Cited Cases

Family devotion may be a mitigating factor in a capital murder case where the family would suffer considerably from the defendant's loss.

[75] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases

Capital murder defendant failed to prove the mitigating circumstance of residual doubt, despite claim that three State witness were all paid informants who received something of value for their testimony; jury of twelve persons found defendant guilty despite his attacks on the witnesses' credibility.

****351 *296** Janet A. Napolitano, The Attorney General by Paul J. McMurdie, Chief Counsel, Criminal Appeals Section, Phoenix, and Bruce M. Ferg, Assistant Attorney General, Tucson, for the State.

S. Jonathan Young, Tucson, for Jones.

****352 *297** O P I N I O N.

McGREGOR, Justice.

¶ 1 Appellant Robert Jones appeals his convictions and death sentences for six counts of first-degree murder, and his convictions and sentences for one count of first-degree attempted murder, three counts of aggravated assault, three counts of armed robbery, and two counts of first-degree burglary. [FN1] We review this case on direct, automatic appeal pursuant to article VI, section 5.3 of the Arizona Constitution, Arizona Rules of Criminal Procedure 26.15 and 31.2.b, and Arizona Revised Statutes Annotated (A.R.S.) section 13–4031. For the following reasons, we affirm the appellant's convictions and sentences.

FN1. Jones filed a notice of appeal from the non-capital convictions, but did not brief these issues on appeal. We, therefore, affirm these convictions and sentences. *See State v. Greene,* 192 Ariz. 431, 444 n. 2, 967 P.2d 106, 119 n. 2 (1998); ARIZ. R.CRIM. P. 31.2.b.

I.

¶ 2 David Nordstrom (David), the state's key witness, was released from prison in January 1996, after serving his sentence for a theft conviction. At that time, he took up residence in his father's home in Tucson, where he was under "home arrest" status and monitored by an ankle monitor. The home arrest was related to his prior theft conviction, and as a term of the arrest, he had to be inside his father's home by a certain time every evening. During this period of home arrest, he reestablished his friendship with the defendant, Robert Jones (Jones). Scott Nordstrom (Scott), David's brother, also returned to Tucson and spent time with David and Jones.

¶ 3 Sometime before April 1996, David obtained a .380 semiautomatic pistol from a friend, which he gave to Jones after Jones requested it for protection. On May 30, 1996, Scott and Jones picked up David in Jones's truck, an old white Ford pickup. Jones was wearing his usual attire: a long-sleeved western shirt, Levi's, boots, sunglasses, and a black cowboy hat. In a parking lot near the Tucson Medical Center, Jones spotted a car that he thought he could steal. Although he failed to start the car, Jones found a 9mm pistol under the seat and left with it, stating, "I've got my gun now." (R.T. 6/23/98, at 103–04.)

¶ 4 As the three continued driving, they began discussing the possibility of a robbery, and Jones gave Scott the .380 pistol. Jones then suggested that they rob the Moon Smoke Shop. He parked behind the store, telling David he and Scott would go in, rob it, and be right out. David then heard gunfire from inside, after which, Jones and Scott left the shop and jumped into the truck. David drove up the alley, exited onto the surface street, and headed toward the freeway. Jones stated, "I shot two people," and Scott stated, "I shot one." (*Id.* at 113.) Jones then split the money from the robbery with David and Scott.

¶ 5 The survivors from the robbery testified that four employees were in the store at the time of the robbery: Noel Engles, Tom Hardman, Steve Vetter, and Mark Naiman, a new employee on the job for the first time. Just before the robbery, Engles was standing behind the counter, and Vetter and Naiman were kneeling behind it. Hardman was sitting behind another counter, and no customers were in the store. Jones and Scott followed a customer, Chip O'Dell, into the store and immediately shot him in the head. As the door buzzer indicated someone had entered the store, Engles, Vetter, and Naiman all heard the gunshot. Because all three were concentrating on the stock behind the counter, however, none of them saw the robbers or O'Dell enter. Engles looked up to see a robber in a long-sleeved shirt, dark sunglasses, and a dark cowboy hat wave a gun at him and yell to get down. Naiman recognized the gun as a 9mm.

¶ 6 Engles noticed a second robber move toward the back room and heard someone shout, "Get the fuck out of there!" (R.T. 6/18/98, at 47.) Engles dropped to his knees and pushed an alarm button. The gunman at the counter nudged Naiman in the head with his pistol and demanded that he open the register. After he did so, the gunman reached over the counter and began firing at the others on the floor. Thinking the others ****353 *298** were dead, Naiman ran out of the store and called 911 at a payphone. On the floor behind the counter, Engles heard shots from the back room and, realizing the gunmen had left the store, ran out the back door. While running up the alley to get help, he saw a light-colored pickup truck carrying two people, which turned sharply onto the surface street, despite heavy traffic. All survivors agreed that no one had offered any resistance to the gunmen, and that the shootings were completely unprovoked.

¶ 7 Naiman and Engles survived, as did Vetter, despite the shots to his arm and face. Chip O'Dell died from a bullet through his head, which had been fired from close range. Hardman, who had fled to the back room when the gunmen entered, had been shot fatally in the head from above as he lay on the floor. Three 9mm shell casings were found in the store, one beside Mr. O'Dell and two near the cash register. Two .380 shells were found near Hardman's body. Two weeks after the robbery, Naiman met with a police sketch artist who used his description of one of the gunmen to create a composite drawing.

¶ 8 Two weeks after the Moon Smoke Shop robbery, the Fire Fighters Union Hall was robbed. The Union Hall was a club owned by the firefighters and their guests, which contained a bar, bingo hall, and snack bar. Members entered using key cards, and the bartender buzzed in guests. When member Nathan Alicata arrived at 9:20 p.m., he discovered the bodies of member Maribeth Munn, the bartender, Carol Lynn Noel, and a couple, Judy and Arthur "Taco" Bell.

¶ 9 During the ensuing investigation, the police found three 9mm shell casings, two live 9mm shells, and two .380 shell casings. Approximately $1300 had been taken from the open cash register. The coroner, who investigated the bodies at the scene, concluded that the bartender, Carol, had been shot twice, and that the other three victims were shot through the head at close range as their heads lay on the bar. Carol also suffered blunt force trauma which caused a bleeding laceration to the side of her mouth, and Arthur had a contusion on the right side of his head in a shape consistent with

a pistol.

¶ 10 David Nordstrom testified at trial that on the day of the Union Hall murders, his brother Scott gave him a ride home, where he remained the rest of the evening. David's parole officer produced records at trial verifying that David's ankle-monitoring unit indicated he had not left his father's home on the night of the murders. Late that evening, Jones entered David's father's house and began telling David what had happened. Jones admitted to David that he and Scott had robbed the Union Hall. He stated that because the bartender could not open the safe, Scott kicked her and shot her. Jones said he then shot the three other witnesses in the back of the head. Jones, Scott, and David disposed of the guns by throwing them into a pond south of Tucson, and Scott and David burned one of the victim's wallets at another location.

¶ 11 David kept the secret until he saw an appeal on the television for information. At that time, he told his girlfriend, Toni Hurley, what he knew. Hurley eventually made an anonymous 88–CRIME call, which led to David's contact with the police, and an ultimate release of the information.

II.

¶ 12 Jones appeals his convictions and sentences on eleven grounds. For the reasons discussed below, we uphold the convictions and sentences.

A.

¶ 13 Jones's first point of error concerns the use of prior consistent statements to rebut recent charges of fabrication. Jones argues that in each instance, the witness's statement was actually made *after* that witness had motive to fabricate. Specifically, Jones objected to the following testimony: (1) David Nordstrom's out-of-court statements to Toni Hurley and the police, introduced at trial through Hurley's testimony, (2) David Evans's out-of-court statements to detectives, introduced at trial through Detective Edward Salgado's testimony, and (3) Lana Irwin's out-of-court statements to the police, introduced at trial by Detective Brenda Woolridge.

[1][2] ***299 **354** ¶ 14 Arizona Rule of Evidence 801(d)(1)(B) provides that an out-of-court statement is not hearsay if the declarant testifies at trial, is available for cross-examination, and the statement is " consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." This rule requires the statement to have been made *before* the motive to fabricate arose:

> The only way to be certain that a prior consistent statement in fact controverts a charge of "recent fabrication or improper influence or motive" is to require that the statement be made at a time when the possibility that the statement was made for the express purpose of corroborating or bolstering other testimony is minimized.

State v. Martin, 135 Ariz. 552, 554, 663 P.2d 236, 238 (1983). The timing requirement applies, regardless whether the witness is accused of recent fabrication, bad motive, or improper influence. *See id.* Thus, to determine admissibility, the court must decide (1) whose credibility the statement bolsters, and (2) when that particular witness's motive to be untruthful arose. In this case, because both David Evans's and Lana Irwin's prior statements were used to bolster their own testimony and were made before their motives to fabricate arose, they were properly admitted under Rule 801. David Nordstrom made his prior statements, however, after his motive to fabricate arose. Therefore, the trial court erred in admitting them.

[3] ¶ 15 First, Evans testified at trial that he had a conversation with Jones, in which Jones stated the police were on to him and knew that he had committed the murders. Evans also admitted he was receiving a plea bargain in two cases in exchange for his testimony. To rebut this motive to fabricate, the state questioned Detective Salgado concerning Evans's consistent statements to the police. Salgado testified that not only did Evans not ask for anything when he voluntarily contacted the police with the information, but that at the time of

his original statements, he had not been arrested for any crime. During that original conversation with the police, Evans stated that Jones had admitted he needed to leave town because he had killed some people. Evans was not, however, offered a deal to testify until later. Thus, he had no motive to fabricate this original statement, and it was admissible under Rule 801. When the defense objected at trial, the trial court determined the prior consistent statements were admissible because they aided the jury in determining Evans's credibility. Because the defense called Evans's credibility into question through its cross-examination, the prior consistent statements were made before his motive to fabricate arose, and the statements were used to bolster Evans's credibility, the trial court did not abuse its discretion in admitting them.

[4] ¶ 16 Second, Jones argues that the trial court improperly admitted Lana Irwin's prior consistent statements to the police, despite the fact that her motive to fabricate had already arisen at the time of her statement. Irwin testified at trial that she overheard Jones say he had murdered four people in Tucson. Because she feared Jones's retaliation, however, she originally told the detectives about a "dream" she had. In the dream, the victims were killed exactly as Jones had described it. To bolster Irwin's credibility, Detective Brenda Woolridge later testified that when she and another detective originally went to the Maricopa County Jail to question Irwin, they offered her absolutely no deal. In fact, Irwin initially refused to speak with them. It was only when they began to leave that Irwin stated she had the "dream." The defense objected to the detective's testimony concerning Irwin's "dream" as hearsay. The trial judge, however, admitted her statements to the police, relying on Rule 801. This admission was proper. Based on the evidence, Irwin did not have a motive to fabricate at the time of her original statements. She had been offered no deal prior to the statements, and the deal that she eventually received was negligible.[FN2] Because ****355 *300** the statements were made by Irwin prior to her motive to fabricate and introduced to bolster Irwin's testimony, the trial court did not err in admitting them under Rule 801.

> FN2. Irwin's charge of possession of marijuana was dropped in exchange for her testimony. Yet, she only possessed half a marijuana cigarette and was able to bail herself out of jail. Had she been convicted, she could have resolved the issue by spending six weeks in a rehabilitation center. Thus, the dismissal of the charges probably was not a great inducement to fabricate her testimony.

[5] ¶ 17 Third, Jones claims that David Nordstrom's statements to both the police and Toni Hurley were erroneously admitted under Rule 801 because they were actually made after his motive to fabricate arose. At trial, the state offered Toni Hurley's testimony that David had made prior consistent statements to her concerning the murders for the purpose of bolstering David's testimony. The court admitted these statements under Rule 801. The defense's primary trial theory was that David actually perpetrated the murders, and because he happened to resemble Jones, decided to blame Jones as soon as they happened. Thus, when David told Hurley and the police what Jones had said and done, he was already plotting to lie about Jones's involvement in the case, even though David was not yet considered a suspect. Assuming Jones's theory was true, David's motive to fabricate necessarily arose at the time of the murders. *See State v. Jeffers,* 135 Ariz. 404, 424, 661 P.2d 1105, 1125 (1983). If David actually participated in all of the killings, his decision to shift the blame to Jones presumably formed immediately upon the deaths. It would have been in David's best interest to plant the seeds of this deception before he became a suspect, by telling Hurley and the police that Jones was the true murderer. Thus, because David's motive to fabricate arose at the time the murders occurred, rather than at the time of his arrest, the trial court improperly admitted his prior statements under Rule 801. We find, however, that admitting this testimony

was harmless error.

[6] ¶ 18 The defense's primary theory at trial was that David himself was the murderer and was merely blaming his bad deeds on the innocent defendant. To support this theory, the defense attacked David's credibility on every basis. It pointed out that David was a convicted felon, habitually used drugs and alcohol, violated the terms of his probation, did not obtain steady employment, possessed illegal firearms, violated his curfew, falsified his employment records, and lied to the police. On the stand, the defense impeached him numerous times with his prior inconsistent statements to the police. The defense argued that David was receiving virtually no punishment for his participation in the Moon Smoke Shop murders in exchange for his testimony. Finally, it argued in both opening and closing statements its theory that David was the true murderer. Yet, even in light of the defense's extensive attempts to impeach David and the multiple attacks on his veracity, the jury chose to convict Jones on every count of murder. We do not believe that had Toni Hurley's testimony concerning David Nordstrom's prior statements been excluded, the jury would have suddenly regarded David as a liar. David's credibility as a witness did not hinge on these prior consistent statements. Moreover, even if Hurley's testimony had been excluded, all of David's testimony about Jones's involvement and admissions would still have been admissible. Therefore, although the statements were erroneously admitted under Rule 801, we find no reversible error.

B.

[7] ¶ 19 Jones next argues that the prosecutor's threat to prosecute defense witness Zachary Jones [FN3] (Zachary) for perjury, regardless of how Zachary testified, violated the defendant's right to a fair trial, due process right to present a defense, and compulsory process rights under U.S. Constitution Amendments V, VI, VIII, and XIV, and Arizona Constitution article II, sections 4 and 24, because it prevented the defense from rebutting the testimony of the prosecution's primary witness. According to a defense interview with Zachary, while David Nordstrom, the state's star witness, was in jail following his arrest for his participation in the murders, Zachary overheard David tell another inmate, "Yeah, there's someone out there who's almost my twin brother who I **356 *301 can lay all my bad deeds on, so I have a second chance at life." (R.O.A. at 323.) The defense made an offer of proof of Zachary's testimony at a pre-trial hearing on June 17, 1998. Defense counsel told the court that he had spoken with Zachary's attorney, who said Zachary might invoke the Fifth Amendment. As a result, defense counsel was not certain whether Zachary would testify. During this discussion, the prosecutor volunteered to the court why Zachary might invoke the Fifth Amendment:

> FN3. Zachary Jones is not related to the defendant.

> [Prosecutor]
>
> I am putting this on the record so that the Court understands the context of why Mr. Zachary Jones may have a valid Fifth Amendment claim here.
>
> The Court has heard Mr. Larsen's [defense counsel] recitation of what Mr. Zachary Jones has previously said.
>
> It is the State's belief, and I believe we have a witness who will testify if need be, that there was a conspiracy in the Pima County Jail on the part of Mr. Robert Jones and other inmates to solicit inmates to fabricate accounts about David Nordstrom bragging that he had pulled the wool over the State's eyes and he had really been personally responsible for these killings.
>
> ....
>
> If he comes into court and says and sticks with the account that Mr. Larsen has given and I can prove that this is false, he is committing perjury.

> If he comes into court and says, and I think there is some possibility that, okay, you know, I didn't ever have this conversation with David Nordstrom, he is admitting to participating in a conspiracy to commit perjury because he will have to admit that he agreed with Robert Jones to falsify the story....

(R.T. 6/17/98, at 7–8.) The prosecutor neither contacted Zachary directly, nor spoke to Zachary's attorney. Instead, he explained to the court his analysis of the reasons Zachary might choose to invoke his Fifth Amendment rights. Six days into trial, when the defense attempted to call Zachary as a witness, Zachary's counsel informed the court that he might be liable for perjury, regardless of how he testified, and the prosecutor again confirmed the possibility in open court. Zachary consulted with his attorney and asserted his Fifth Amendment rights. These facts do not amount to prosecutorial misconduct.

[8] ¶ 20 We will disturb the trial court's decision not to grant a mistrial for prosecutorial misconduct only for an abuse of discretion. *See State v. Lee,* 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997). Jones cites to *United States v. Vavages,* 151 F.3d 1185 (9th Cir.1998), for the proposition that a prosecutor's threat of a perjury prosecution to a defense witness constitutes witness intimidation and is improper. The facts of the present case, however, are distinguishable. In *Vavages,* the court agreed that "there ... [was] no question that the prosecutor was justified in contacting ... [the defense witness's] counsel, cautioning him against his client's testifying falsely, and informing him of the possible consequences of perjurious testimony." *Id.* at 1190. The court was concerned, however, with three aspects of the prosecutor's behavior: (1) his articulation to the witness of his belief that the testimony would be false, (2) his threat to withdraw the witness's plea agreement in an unrelated case, and (3) the use of the absence of the testimony to refute the defense's alibi during closing argument. *See id.* at 1190–91; *see also Webb v. Texas,* 409 U.S. 95, 97–98, 93 S.Ct. 351, 353, 34 L.Ed.2d 330 (1972) (finding that the judge's threatening remarks to the sole defense witness drove him off the stand).

[9][10] ¶ 21 Here, however, the prosecution's statements did not constitute a threat. In fact, according to the record, as relied upon in Jones's own brief, the prosecutor's remarks were made to the court to explain Zachary's somewhat confusing decision to invoke the Fifth Amendment. Nothing in the record indicates that the prosecutor contacted Zachary directly, or made any personal threats to Zachary concerning his testimony. Nor did the prosecutor ever actually say that he would pursue a conviction, regardless of how Zachary testified. He simply stated his understanding of the reasons Zachary might refuse to testify. There is no *per se* prosecutorial misconduct when the prosecutor merely****357 *302** informs the witness of the possible effects of his testimony. *See State v. Dumaine,* 162 Ariz. 392, 400, 783 P.2d 1184, 1192 (1989). In addition, counsel represented Zachary and advised him as to whether he should testify. Thus, Zachary's decision followed consultation with and advice from his own attorney. Absent some substantial governmental action preventing the witness from testifying, a witness's decision to invoke the Fifth Amendment does not suggest prosecutorial misconduct.

[11] ¶ 22 Finally, Jones argues that the trial court erred by failing to *sua sponte* grant immunity to Zachary in exchange for his testimony. Jones failed, however, to make any objection or motion to this effect at trial. No court has held that the constitutional burden to meet the Sixth Amendment's Confrontation Clause shifts to the trial court in the absence of the defense counsel's motion or request to grant such immunity. At the very least, Jones waived the argument that the court should have granted him immunity by failing to pursue the remedy at trial. For these reasons, we reject the defendant's second point of error.

C.

[12][13] ¶ 23 Jones's third point of error con-

cerns the life-and death-qualification of the jury. Jones argues that once the trial court denied his motion to prohibit death-qualification, the only standard that could be applied was that defined in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). He further argues that when the court allowed the prosecution the opportunity to death-qualify, the defendant should have been entitled to life-qualify under *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). Although the court denied the defendant's request to apply *Witherspoon* and *Morgan* on improper grounds, the court effectively met the constraints of both tests during its voir dire questioning. Therefore, the trial court's denial constituted harmless error.

¶ 24 We have recognized that death-qualification is appropriate in Arizona, even though juries do not sentence: "[W]e have previously rejected the argument that, because the judge determines the defendant's sentence, the jury should not be death qualified. We have also repeatedly reaffirmed our agreement with *Witherspoon v. Illinois* and *Adams v. Texas.* " *State v. Van Adams,* 194 Ariz. 408, 417, 984 P.2d 16, 25 (1999) (citations omitted). Even more importantly, however, this Court has applied and adopted the more liberal *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1955), test. *See State v. Anderson,* 325 Ariz. Adv. Rep. 3, 197 Ariz. 314, 4 P.3d 369 (2000). In *Wainwright,* the Supreme Court took a step back from the rigid test articulated in *Witherspoon,* which required the prospective juror to unequivocally state that he could not set aside his feelings on the death penalty and impose a verdict based only on the facts and the law, and held that a juror was properly excused from service if the juror's views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright,* 469 U.S. at 424, 105 S.Ct. at 852 (quoting *Adams v. Texas,* 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)). The trial judge has the power to decide whether a venire person's views would actually impair his ability to apply the law. For this reason, "deference must be paid to the trial judge who sees and hears the juror." *Id.* at 426, 105 S.Ct. at 853. Thus, we recognize that the trial judge has discretion in applying the test; the inquiry itself is more important than the rigid application of any particular language.

[14] ¶ 25 Although the trial judge incorrectly stated that the *Witherspoon/Wainwright* standard did not apply because Arizona juries do not sentence defendants, in fact his approach complied with the constraints of *Witherspoon/Wainwright.* The trial court, in agreement with both parties, submitted written juror questionnaires at the outset of voir dire. These questionnaires were available to the parties after the venire persons completed them. The parties then conferred about which persons to strike based on the answers given. The questionnaire contained the following question:

> ****358 *303** If Robert Jones is convicted of one or more counts of first degree murder in this case, it is a legal possibility that he could receive a sentence of death. In Arizona, a jury only decides the question of whether the defendant is guilty or not guilty; the jury does *not* decide the sentence to be imposed, nor does it make any recommendation to the court on the sentence to be imposed. The matter of the possible punishment is left solely to the court. Therefore, if you serve as a juror in this case, you will be required under your oath to disregard the possible punishment and not to let it affect in any way your decision as to guilty [sic] or innocence. *Can you disregard the possible punishment and decide this case based on the evidence produced in court?*

(Emphasis in original.) Defense counsel stated only that "[w]ithout waiving my request for my version of a questionnaire," he agreed to the proposed process. (R.T. 5/4/98, at 9.) He did not object to the trial court's particular question before the questionnaires were submitted. After the questionnaires were filled out and analyzed by the parties, the lawyers agreed to dismiss thirty jurors for cause

because those persons had indicated that they could not set aside their beliefs about the death penalty or their opinions already formed from media coverage. The defense did not object to the dismissals, nor request to further question any of the dismissed venire persons. The court then informed the attorneys that they should call attention to any additional questions that should be asked concerning the death penalty. The court dismissed another juror for cause because that juror stated he could not set aside his feelings on the death penalty. No other potential juror expressed this view. The defense then asked that the trial court pose additional specific questions concerning the death penalty. The court declined, stating that the questionnaires adequately addressed the issue, but agreed to inquire further whether any of the remaining jurors felt strongly about the death penalty, one way or the other. The judge reminded the jurors of the questionnaire, and asked them if they felt strongly about the death penalty. Three persons responded that they supported its imposition. Once again, defense counsel failed to object or request additional questions (although he did later strike these jurors with his peremptory strikes). Both parties passed the panel with no further objections.

¶ 26 In light of these facts, the trial court did not abuse its discretion. Not only did it ask the appropriate *Witherspoon/Wainwright* question in the questionnaire and to the remaining panel, but the defense counsel failed to object at any time to the questions. Thus, the court's procedure met the *Witherspoon/Wainwright* test.

[15][16] ¶ 27 Likewise, although the trial court did not specifically apply *Morgan v. Illinois,*[FN4] 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), it also satisfied the constraints of this test through voir dire. Jones essentially argues that the trial court should have applied a reverse-*Witherspoon* test under *Morgan.* In *Morgan,* the Supreme Court held that a jury pool containing prejudiced jurors, be it toward one extreme or another, could not effectively pass judgment in a capital case. In *Witherspoon,* the Court was concerned that a juror who felt so strongly against the death penalty that he could not set aside his belief and follow the evidence and the law could not make an unbiased determination concerning the sentence. *Morgan* recognizes the opposite extreme: defendants have a right to know whether a potential juror will automatically impose the death penalty once guilt is found, regardless of the law. Thus, defendants are entitled to address this issue during voir dire.

> FN4. Because judges, rather than jurors, sentence in Arizona, we have never held *Morgan* applies.

[17] ¶ 28 *Morgan,* however, does not require the trial court to life-qualify the jury in the absence of the defendant's request. *See United States v. McVeigh,* 153 F.3d 1166, 1206 (10th Cir.1998) ("upon a defendant's request, a trial court is obligated to ensure that prospective jurors are asked sufficient questions"); *United States v. Tipton,* 90 F.3d 861, 879 (4th Cir.1996) ("The right to any inquiry on this subject is dependent upon request...."). The trial court is under no ****359 *304** obligation to question the venire persons endlessly concerning other topics, even if those questions might indicate an affinity for the death penalty. *See Trevino v. Johnson,* 168 F.3d 173, 183 (5th Cir.1999).

¶ 29 Here, the defense counsel never submitted questions to the trial court articulating the *Morgan* question. During voir dire, the court specifically asked if any of the jurors had strong feelings about the death penalty, *either way.* Three people responded that they favored its application, and all three were removed by the defense with its peremptory strikes. The defense did not object to the failure to remove for cause, and failed to request any additional questions. Although the trial judge did not rigidly apply *Morgan,* he sought and obtained the required information from the panel. For these reasons, we reject Jones's third point of error.

D.

[18] ¶ 30 Jones next argues that the trial court

abused its discretion by allowing David Nordstrom to testify (1) about Jones's status as a paroled felon, (2) that following the murders, Jones borrowed duct tape to use in a subsequent robbery, and (3) that Jones was subsequently incarcerated in Phoenix. Jones argues that danger of unfair prejudice outweighed the probative value of these statements.

¶ 31 First, through unsolicited testimony, David Nordstrom mentioned on the stand that after Jones dyed his hair brown, he asked David for a roll of duct tape for use in another robbery. Shortly thereafter, when asked why he refused to return Jones's telephone calls, David responded that he knew Jones was in jail and had no desire to call him there. After David made several similar statements, the defense moved for a mistrial.

[19][20][21] ¶ 32 When unsolicited prejudicial testimony has been admitted, the trial court must decide whether the remarks call attention to information that the jurors would not be justified in considering for their verdict, and whether the jurors in a particular case were influenced by the remarks. *See State v. Stuard,* 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993). When the *witness* unexpectedly volunteers information, the trial court must decide whether a remedy short of mistrial will cure the error. *See State v. Adamson,* 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). Absent an abuse of discretion, we will not overturn the trial court's denial of a motion for mistrial. *See id.* The trial judge's discretion is broad, *see State v. Bailey,* 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989), because he is in the best position to determine whether the evidence will actually affect the outcome of the trial. *See State v. Koch,* 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983). In this case, the comments did not create undue prejudice, and the trial court did not abuse its discretion.

¶ 33 Defense counsel did not request any curative instruction, because he felt it would only draw attention to the remarks. The court refused to grant the motion for mistrial, finding that David did not testify that a robbery actually occurred, and that the jury probably would assume Jones was in jail for the immediate crimes. Furthermore, the prosecutor avowed that the remarks were both unexpected and unsolicited. The prosecutor informed the court that David had been fully instructed about the areas he was not permitted to discuss under the *in limine* rulings. For these reasons, the trial court concluded that a limiting instruction would cure any prejudice. The jury was instructed:

> Ladies and gentlemen, references have been made in the testimony as to other alleged criminal acts by the defendant unrelated to the charges against him in this trial. You are reminded that the defendant is not on trial for any such acts, if in fact they occurred. You must disregard this testimony and you must not use it as proof that the defendant is of bad character and therefore likely to have committed the crimes with which he is charged.

(R.T. 6/23/98, at 143–44.) During redirect, David responded to a question with the statement that his brother Scott and Jones were both convicted felons. Only when the counsel later approached the bench to consider questions submitted by the jury, however, did the defense renew its motion for a mistrial. Once again, the trial court determined ****360 *305** that the error could be cured through a limiting instruction, and repeated the instruction set out above.[FN5]

> FN5. Jones later waived the giving of any cautionary instructions during the final instructions to the jury.

[22] ¶ 34 Arizona has long recognized that testimony about prior bad acts does not necessarily provide grounds for reversal. *See, e.g., State v. Stuard,* 176 Ariz. 589, 601–02, 863 P.2d 881, 893–94 (1993) (holding that a trial judge's limiting instruction and striking of the offending statements cured the defects); *State v. Bailey,* 160 Ariz. 277, 279–80, 772 P.2d 1130, 1132–33 (1989) (holding that a remark that the defendant had been in jail did not require a mistrial because "[e]ven if the members of

the jury reached that conclusion, they would have no idea how much time he spent in prison or for what crime"). Here, the testimony made relatively vague references to other unproven crimes and incarcerations. Furthermore, the judge gave an appropriate limiting instruction, without drawing additional attention to the evidence.

¶ 35 Second, unlike the primary case on which Jones relies, *Dickson v. Sullivan,* 849 F.2d 403 (9th Cir.1988), in which a court official told jurors of the defendant's previous involvement in a similar case, the statements here were unsolicited descriptions from a witness concerning a dissimilar crime. When the statements are made by a witness, whose credibility is already at issue, they do not carry the same weight or effect as a statement from a court official, who is presumed to uphold the law. The defendant agreed during trial that the prosecution played no part in soliciting the information from David. Therefore, the statements are not as harmful as those made in *Dickson,* and the trial court did not abuse its discretion.

E.

¶ 36 Jones's fifth point of error concerns statements the prosecution made during closing arguments. During the arguments, the prosecutor made reference to the death penalty, compared Jones to Ted Bundy and John Wayne Gacy, and asked the jury to return a guilty verdict on behalf of the victims and their families. The defense moved for a mistrial, and its motion was denied. Although we agree that some of the prosecutor's statements were inappropriate, for the following reasons, we uphold the trial court's decision.

[23][24][25][26][27] ¶ 37 Misconduct by the prosecutor during closing arguments may be grounds for reversal because he is a public servant whose primary interest is the pursuit of justice. *See Berger v. United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). To determine whether a prosecutor's remarks are improper,

> [t]he trial court should consider (1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks. Misconduct alone will not mandate that the defendant be awarded a new trial; such an award is only required when the defendant has been denied a fair trial as a result of the actions of counsel. The trial court is in the best position to determine whether an attorney's remarks require a mistrial, and its decision will not be disturbed absent a plain abuse of discretion.

State v. Hansen, 156 Ariz. 291, 296–97, 751 P.2d 951, 956–57 (1988) (citations omitted). Furthermore, prosecutors have wide latitude in presenting their closing arguments to the jury: "excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury." *State v. Gonzales,* 105 Ariz. 434, 436–37, 466 P.2d 388, 390–91 (1970). In this case, the prosecutor's statements did not rise to the level of misconduct.

[28] ¶ 38 Jones argues that the prosecution's reference to the death penalty in closing argument constituted reversible error. We have recognized that calling attention****361 *306** to the possible punishment is improper because the jurors do not sentence the defendant. *See State v. Cornell,* 179 Ariz. 314, 327, 878 P.2d 1352, 1365 (1994). Jones, however, has taken the challenged statement out of context.

¶ 39 In the midst of his closing, during his explanation of reasonable doubt, the prosecutor made a single reference to the death penalty:

> This is a first-degree murder case and one of the possible sentences—it's up to the Judge, of course—is the death penalty. The State has to prove a case beyond a reasonable doubt, and that burden, beyond a reasonable doubt, is exactly the

same in this case as it is in a burglary case or a drunk driving case. The burden does not get higher because of the nature of the charges.

(R.T. 6/25/98, at 98–99.) This statement is the only reference to the death penalty in over 100 pages of closing argument. Jones did not ask for a curative instruction; he only made a general objection. We hold the statement does not constitute reversible error because it does not violate either of the concerns in *Hansen.*

¶ 40 First, the reference to the death penalty does not call attention to a fact that the jurors would not be justified in considering during their deliberations. In fact, the prosecutor stated that the possibility of the death penalty should *not* influence a determination of reasonable doubt. Second, the probability that the statement improperly influenced the jurors was very low. The jurors had been told from the very beginning of the trial, through both direct statements and voir dire questions, that the prosecution was seeking the death penalty. The prosecutor did not commit misconduct by making a brief reference to the death penalty in the context of discussing the burden of proof.

[29] ¶ 41 The second statement at issue concerns the reference to noted serial killers. Jones argues that these references were irrelevant and used only to inflame the jury. During the closing, the prosecutor stated:

The defendant is a nice guy. He's polite. I don't think there is any natural law or genetic evidence that murders aren't also polite. Have you heard of Ted Bundy? John Wayne Gacy? Serial murderers, and I am not calling him a serial murders [sic], who were very polite. Politeness has nothing to do with it.

(R.T. 6/25/98, at 193.) The state concedes that there was no mention of either Bundy or Gacy during the actual trial. It does not agree, however, that the prosecutor necessarily committed error when referring to them. Lower courts have recognized that jurors may be reminded of facts that are common knowledge. *See State v. Adams,* 1 Ariz.App. 153, 155, 400 P.2d 360, 362 (1965). The prosecutor, by referring to famous serial killers, did not introduce evidence completely outside the realm of the trial, but rather drew an analogy between Jones's attitude at trial and that of well-known murderers. The error, if any, could not have affected the outcome of the trial.

[30] ¶ 42 Finally, Jones argues that the prosecution's plea for a guilty verdict on behalf of the victims and their families requires a reversal. Although this reference involves more questionable statements, it does not rise to the level of misconduct.

¶ 43 In *State v. Ottman,* we held that the prosecutor's statements concerning the victim's wife were improper, but did not reverse because the trial court gave a limiting instruction. 144 Ariz. 560, 562, 698 P.2d 1279, 1281 (1985). The facts of that case are far more egregious than those considered here. In *Ottman,* the prosecutor asked the jury to

think of another woman [the victim's wife] who will be waiting for your verdict too.

On December 16th at about 7:30 in the evening she had everything to look forward to. She had her house here, they were retired, husband had a part-time job, her children are fine and well in New Jersey and at 9:30 she's at the hospital with her husband and he's dead. I can guarantee you that her life is totally destroyed. She had nothing to look forward to, nothing.

You may think sympathy for someone else but in terms of that woman, she wants justice and that's your duty to as jurors.

****362 *307** *Id.* Yet, even in light of these emotional remarks, we found any error was cured because the trial judge admonished the jury to ignore statements invoking sympathy. In contrast, the prosecutor in this case made a single remark: "I ask that you find him guilty on behalf of those people

and their families and the people of the State of Arizona." (R.T. 6/25/98, at 194.) The prosecutor did not attempt to inflame the jury or make an emotional plea to ease the suffering of the poor families. Those statements do not rise to the level of misconduct. Thus, the trial court properly denied the motion for a mistrial. *See also State v. Bible,* 175 Ariz. 549, 603, 858 P.2d 1152, 1206 (1993) (rejecting the defendant's claim that statements concerning victim's rights in the prosecutor's closing arguments did not constitute fundamental error because, coupled with the weight of the evidence against the defendant, he was not denied a fair trial). For these reasons, we reject Jones's fifth point of error.

F.

[31][32][33][34][35][36] ¶ 44 Jones next asserts that the trial court erred when it failed to grant his motion to transfer venue because of pretrial publicity. For venue issues, we are concerned with the prejudicial *effect* of pretrial publicity, rather than merely the *amount* of publicity. *See State v. Greenawalt,* 128 Ariz. 150, 162, 624 P.2d 828, 840 (1981). We have adopted a two-step inquiry to determine the effect of pretrial publicity: (1) did the publicity create a presumption of prejudice, and (2) has the defendant shown actual prejudice? *See State v. Murray,* 184 Ariz. 9, 26, 906 P.2d 542, 559 (1995). If "a defendant can show pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality, prejudice will be presumed without examining the publicity's actual influence on the jury." *State v. Bible,* 175 Ariz. 549, 563, 858 P.2d 1152, 1166 (1993). The defendant's burden of proof is "extremely heavy," and juror exposure to information concerning the trial does not raise a presumption that the defendant was denied a fair trial. *See id.* at 564, 858 P.2d at 1167; *see also Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 554, 96 S.Ct. 2791, 2800 (1976) (stating that courts rarely presume prejudice due to outrageous pretrial publicity). We evaluate the totality of the circumstances from the entire record to determine if the publicity was so great as to result in an unfair trial. *See Bible,* 175 Ariz. at 565, 858 P.2d at 1168. Here, the facts do not require reversal.

¶ 45 By the time Jones presented his motion to change venue, more than 850 print or television articles addressed the murders and subsequent investigation. Although the trial court recognized the large amount of coverage, it noted that that fact alone was insufficient to require a venue change. Only a few of the articles mentioned Jones directly. Furthermore, the majority of the statements concerned largely factual contentions. *See Bible,* 175 Ariz. at 564, 858 P.2d at 1167 (" 'Although the news coverage was extensive, it largely was factual in nature, summarizing the charges against the defendants and the alleged conduct that underlay the indictment.' " (quoting *United States v. Angiulo,* 897 F.2d 1169, 1181 (1st Cir.1990))). The trial judge also took the precautionary steps necessary to choose an impartial jury. Thus, no presumption of prejudice arose.

¶ 46 Additionally, Jones has failed to prove any actual prejudice. At the outset of the voir dire, both parties stipulated to the removal of thirty venire persons, some of whom answered the written questionnaire and indicated that their feelings about the case, formulated through the media coverage, could not be changed. Importantly, almost all of the jurors who did have exposure to the publicity stated that their exposure was negligible, and every juror who admitted he could not set aside his feelings concerning the media coverage eventually was excused. Under the totality of the circumstances of the case, the media coverage alone was not so great as to create a presumption of prejudice, and defendant has failed to present evidence of any actual prejudice in this case. For these reasons, Jones's sixth point of error is denied.

G.

[37][38] ¶ 47 Jones next argues that the introduction of the police artist's composite ****363 *308** sketch constituted an impermissible introduction of hearsay evidence. Evidentiary rulings are subject to the trial court's determination and will not be dis-

turbed, absent an abuse of discretion. *See Wait v. City of Scottsdale,* 127 Ariz. 107, 109–10, 618 P.2d 601, 603–04 (1980). During the trial, Mark Naiman testified that during the course of the Moon Smoke Shop robbery he had an opportunity to see one of the gunmen and later gave a police artist a description for a police sketch. The state offered the police sketch into evidence. The defense objected to foundation, arguing that the only person who could provide the proper foundation would be the individual who actually made the sketch. The court, however, admitted the sketch, stating, "[I]t appears that it would be the same as if it were a photograph. It doesn't matter how the depiction was created as long as this witness can state it is an accurate depiction of what he observed and that seems to be his testimony." (R.T. 6/18/98, at 72.)

¶ 48 Arizona Rule of Evidence 901(b)(1) allows a witness to authenticate a document, provided only that the individual have knowledge and "[testify] that a matter is what it is claimed to be." In this case, Naiman possessed such knowledge. He gave the artist the original description and he was in the best position to determine whether the drawing represented that description because he was present at both the robbery and the police interview. The trial court did not abuse its discretion in admitting the sketch under Rule 901.

H.

[39] ¶ 49 Jones's eighth point of error concerns his attorney's waiver at a pretrial hearing of Jones's right to be present at all stages of the trial. Jones requested that he be allowed to participate in all bench conferences, and the court agreed, allowing him to listen to bench conferences through headphones. On day four of the trial, the court held a conference before trial began, during which the defense counsel waived Jones's right to attend. In the course of the hearing, the defense released two witnesses from trial.

[40][41] ¶ 50 A defendant's right to be present during trial stems from the Confrontation Clause of the Sixth Amendment. The right to be present at all critical stages of a criminal trial is a fundamental right. *See Rushen v. Spain,* 464 U.S. 114, 117, 104 S.Ct. 453, 455, 78 L.Ed.2d 267 (1983). Arizona has recognized, however, that the right may be waived. *See State v. Armenta,* 112 Ariz. 352, 353–54, 541 P.2d 1154, 1155–56 (1975). Jones argues, citing a number of cases from the federal circuit courts and this Court, that a defendant's right to be present may not be waived by his attorney, absent a showing that the defendant was aware he had the right to attend and was told the proceeding would go forward in his absence. *See, e.g., State v. Perez,* 115 Ariz. 30, 31, 563 P.2d 285, 286 (1977). Jones argues that because he had no notice of this particular hearing, and because his attorney released a witness without an opportunity for cross-examination, his constitutional rights have been violated.

[42][43] ¶ 51 Although a defendant has the right to be present at trial, his right extends only to those situations in which his " 'presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' " *State v. Levato,* 186 Ariz. 441, 443, 924 P.2d 445, 447 (1996)(quoting *Snyder v. Massachusetts,* 291 U.S. 97, 105–06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934)). Counsel may, however, "acting alone make decisions of strategy pertaining to the conduct of the trial." *Id.* at 444, 924 P.2d at 448. Criminal defendants are often bound by their counsel's strategy decisions. Here, Jones was not excluded from a proceeding that involved any actual confrontation. The jury was not present, and the trial judge did not make any determination concerning Jones himself. The defense lawyer made a strategy decision only. For these reasons, the trial court did not err in holding the proceeding outside his presence, and Jones's eighth point of error is denied.

I.

¶ 52 Jones next argues that Arizona's death-qualification scheme violates both the Federal and State Constitutions. Although ****364 *309** we have upheld the practice of juror death-qualification, Jones asks this Court to reconsider its position.

Jones argues three points: (1) because jurors' opinions are frequently religious-based, questioning them on this issue violates article II, section 12 of the Arizona Constitution, (2) death-qualification is unnecessary because Arizona juries do not sentence defendants, and (3) the death-qualification process produces conviction-prone jurors. We have already addressed and rejected those arguments.

¶ 53 First, Jones argues that questioning a venire person about whether his religious beliefs prevent him from being fair and impartial violates the constitution. We specifically rejected this argument in *State v. West,* 176 Ariz. 432, 440, 862 P.2d 192, 200 (1993), *overruled on other grounds by State v. Rodriguez,* 192 Ariz. 58, 961 P.2d 1006 (1998). Second, we have specifically approved death-qualification, despite the fact that judges sentence defendants. *See State v. La Grand,* 153 Ariz. 21, 33, 734 P.2d 563, 575 (1987) (holding that *Wainwright* was properly applied and met, despite the fact that judges determine sentence). Third, the Supreme Court rejected the argument that the process produces conviction-prone jurors. *See Lockhart v. McCree,* 476 U.S. 162, 168–73 & nn. 4 & 5, 106 S.Ct. 1758, 1762–65 & nn. 4 & 5, 90 L.Ed.2d 137 (1986). Finally, we have recognized the long-standing acceptance of the death-qualification scheme. *See State v. Gulbrandson,* 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995); *State v. Stokley,* 182 Ariz. 505, 514, 898 P.2d 454, 463 (1995); *State v. Schaaf,* 169 Ariz. 323, 331, 819 P.2d 909, 917 (1991). For these reasons, the defendant's ninth point of error is denied.

III.

A.

[44][45] ¶ 54 In addition to the trial issues argued on appeal, Jones also raises sentencing issues. He first argues that the A.R.S. § 13–703.F.5 pecuniary gain factor is unconstitutional because it does not narrow its application from the many cases in which the death penalty is not available. To pass constitutional muster, sentencing schemes must narrow the class of persons to those for whom the sentence is justified. *See Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742–43, 77 L.Ed.2d 235 (1983). Here, Jones argues that broadening the factor to include ordinary robberies does not set this case apart from those in which the death penalty is not available.

¶ 55 In *State v. Spencer,* 176 Ariz. 36, 43, 859 P.2d 146, 153 (1993), we rejected this argument and held that if the receipt or expectation of pecuniary value is a cause of, or a motive for the murder, the F.5 factor applies. That is not to say that all robberies suffice to invoke the factor. Instead, robbery must be a motive or cause of the murder, rather than just the result. *See, e.g., State v. Correll,* 148 Ariz. 468, 479, 715 P.2d 721, 732 (1986). Thus, under our interpretation of the F.5 factor, Jones's argument on the merits of the F.5 factor fails.

[46] ¶ 56 Furthermore, under independent review, we find Jones and his co-defendant clearly intended to rob and murder their victims. They murdered the individuals to facilitate the robberies and then escape punishment. In the first robbery, Jones himself shot unsuspecting victim Chip O'Dell in the back of the head as he entered the Moon Smoke Shop. A second victim was hunted down by Scott Nordstrom and shot while trying to escape. Jones also attempted to shoot the remaining witnesses, despite the lack of provocation. All of these factors indicate that both Jones and Nordstrom began the robbery intending to murder anyone who happened to be in the store at the time. Likewise, in the second robbery, the victims were shot execution style, although none attempted to challenge the defendants. These murders were not "robberies gone bad." Instead, Jones and his co-defendant set out to accomplish the results they obtained, simply to acquire the money. Thus, the F.5 factor applies and has been proven beyond a reasonable doubt.

B.

[47] ¶ 57 Jones's final point of error involving sentencing concerns the trial court's finding that the A.R.S. § 13–703.F. 7 aggravating****365 *310** factor was proven beyond a reasonable doubt. Section

13–703.F.7 provides that when a "defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail," that fact may be considered an aggravating factor in the capital case. Here, Jones argues that the factor was not proven beyond a reasonable doubt because the only evidence presented was testimony from his parole officer, Ron Kirby, that Jones was, in fact, on parole at the time of the murders. Jones asserts that these statements, standing alone, do not meet the burden of proof beyond a reasonable doubt.

¶ 58 During the mitigation hearing, however, Jones failed to object to the testimony, to cross-examine the witness, or to challenge the evidence. Furthermore, in the pre-sentencing mitigation memorandum submitted by the defense to the trial court, Jones failed to address this issue at all. Instead, he now raises it for the first time on appeal. In the absence of contravention, the testimony alone provides sufficient grounds for the trial court's determination. The parole officer knew whether Jones was, in fact, on parole at the time, and the statute requires nothing more. Based on the testimony of the parole officer, we find that the F.7 factor has been proven beyond a reasonable doubt.

IV.

¶ 59 Jones contends that the trial court erred when it imposed the death penalty. We independently review both the aggravating and mitigating factors pursuant to A.R.S. § 13–703.01 and *State v. Wood,* 180 Ariz. 53, 68, 881 P.2d 1158, 1173 (1994). For the following reasons, we uphold the trial court's sentence.

A.

¶ 60 In addition to the A.R.S. § 13–703.F.5 and F.7 factors discussed above, the trial court found the existence of the aggravating factors F.1 (the defendant has been convicted of another offense for which a sentence of life imprisonment or death is imposable), F.2 (the defendant was previously convicted of a serious offense), and F.8 (the defendant has been convicted of one other homicide).

[48] ¶ 61 First, the trial court held Jones had been convicted of another offense for which life imprisonment or death is imposable. *See* A.R.S. § 13–703.F.1. The state proved this factor beyond a reasonable doubt because "each of the murders at the Moon Smoke Shop on May 30th, 1996, [and] each of the murders at the Fire [F]ighters' Hall on June 13th, 1996 satisfies this factor." (R.T. 12/7/98, at 18.) The court found the murders in the Fire Fighters Union Hall provided a sufficient basis to satisfy the F.1 factor for the murders in the Moon Smoke Shop. Likewise, the murders in the Moon Smoke Shop provided a sufficient basis for finding the factor for the murders in the Fire Fighters Union Hall. Although Jones argued at trial that the F.1 factor was not met because all six of the murders occurred in a single incident and the constraints of *State v. Walden,* 183 Ariz. 595, 905 P.2d 974 (1995) no longer apply, the trial court correctly determined that the F.1 factor had been met.

¶ 62 In *State v. Rogovich,* 188 Ariz. 38, 44, 932 P.2d 794, 800 (1997), we held that three different murders in the same killing spree satisfied the F.1 factor. In that case, the defendant was convicted of four counts of first-degree murder arising from two separate incidents. *See id.* He killed one individual at a convenience store in the morning, and killed three more later the same afternoon in a trailer park. We upheld the judge's determination that the three afternoon killings supported the F.1 factor. *See id.; see also State v. Lee,* 189 Ariz. 590, 604, 944 P.2d 1204, 1218 (1997) (holding " 'convictions entered prior to a sentencing hearing may ... be considered regardless of the order in which underlying crimes occurred or the order in which the convictions were entered.' ... For [F.1] purposes, ... conviction occurs upon determination of guilt." (quoting *State v. Gretzler,* 135 Ariz. 42, 57 n. 2, 659 P.2d 1, 16 n. 2 (1983)) (citations omitted)).

¶ 63 In this case, the jury determined that Jones was guilty of first-degree murder on six different counts. These murders included the two killings at

the Moon Smoke Shop, ****366 *311** and four killings at the Fire Fighters Union Hall. Under the statutory language of A.R.S. § 13–703.F.1, the trial court determines whether the defendant has a prior conviction of a crime that warrants the imposition of a life sentence. Because Jones was convicted for all six murders prior to sentencing, and because each set of murders provides a sufficient basis for finding the factor as to the other set of murders, we find the F.1 factor proven beyond a reasonable doubt.

[49] ¶ 64 Second, the trial court found that Jones's convictions on three counts of aggravated assault, three counts of armed robbery, and two counts of first-degree burglary satisfied the F.2 factor. Because Jones was convicted of these serious offenses before the sentencing phase, each offense provides sufficient grounds for satisfying the F.2 factors for the murder offenses. See *State v. Rogovich,* 188 Ariz. 38, 44, 932 P.2d 794, 800 (1997). The court was careful not to double count the murder offenses from the F.1 factor to satisfy F.2, stating, "Since the court has already considered the first-degree murder convictions in its 13–703(F)(1) analysis, those convictions will not be again considered in the determination of this factor." (R.O.A. at 858). The court properly determined that the non-capital offenses satisfied the F.2 factor beyond a reasonable doubt.

[50][51] ¶ 65 The trial court next found beyond a reasonable doubt that Jones committed multiple murders in the same crime. *See* A.R.S. § 13–703.F.8. The court held that both of the Moon Smoke Shop murders provided a sufficient basis for finding the F.8 factor for the other one, and that each of the Fire Fighters Union Hall murders provided a sufficient basis for finding the factor for each other. However, because this finding essentially counts the same murders previously counted in the F.1 analysis, we find the trial court erred. *See State v. Styers,* 177 Ariz. 104, 116, 865 P.2d 765, 777 (1993) (noting that the trial court may not consider the same fact to satisfy different aggravating factors). Although it is mathematically possible to satisfy both the F.1 and F.8 factors in this case without ever counting a single murder twice, we cannot determine from the record whether the trial judge actually did so. We find, however, that even if the trial judge did double count the murders under the F.1 and F.8 factors, on this record, the error is harmless.

¶ 66 First, either the F.1 or F.8 factor, once combined with the F.2, F.5, and F.7 factors, outweighs the mitigating factors for sentencing, regardless of whether the other is applied. Second, as we have noted, it is possible to mathematically apply the murders to satisfy both the F.1 and F.8 factors without double counting any single murder. The clear facts show that Jones committed four of the six murders, and aided in the other two. For these reasons, we find that even if the trial court improperly double-counted the murders for purposes of finding the F.8 factor, any error was harmless.

B.

[52] ¶ 67 Although Jones did not raise any issues regarding mitigating factors on appeal, we review them independently here. The defendant must prove the mitigating factors in A.R.S. § 13–703 by a preponderance of the evidence. *See State v. Laird,* 186 Ariz. 203, 207–08, 920 P.2d 769, 773–74 (1996).

[53][54] ¶ 68 In his pre-sentence mitigation memorandum, Jones argued that he did not have the capacity to appreciate the wrongfulness of his conduct. *See* A.R.S. § 13–703.G.1. Although a defendant must prove that his ability to conform to the law was significantly impaired, *see State v. King,* 180 Ariz. 268, 288–89, 883 P.2d 1024, 1044–45 (1994), the impairment need not have been so severe that it constitutes a complete defense to the crime. *See State v. Richmond,* 114 Ariz. 186, 197, 560 P.2d 41, 52 (1976). In this case, Jones argued (1) that his continual drug use impaired his ability to appreciate the nature of his crimes, and (2) that his antisocial personality disorder did the same.

[55][56] ¶ 69 Voluntary intoxication may be considered a mitigating factor if it impairs the defendant's ability to comprehend the nature of his crimes. *See State v. Kiles,* 175 Ariz. 358, 374, 857 P.2d 1212, 1228 (1993). Furthermore, voluntary intoxication may be ****367 *312** a factor when the defendant has a long history of substance abuse. *See State v. Jones,* 185 Ariz. 471, 489, 917 P.2d 200, 218 (1996). Here, the evidence presented shows that Jones has used drugs since he was introduced to them in his early teens by his stepfather. Furthermore, Dr. Jill T. Caffrey, a neuropsychologist, found Jones had an amphetamine dependence. Yet, under the evidence presented at trial, Jones drank only a small amount of beer on the night of the Moon Smoke Shop murders, and nothing at all on the night of the Union Hall murders. Although Jones had a long history of drug dependence, this fact alone does not meet the statutory mitigation requirement when the defendant is not actually under the influence of drugs at the time of the killings. *See State v. Miles,* 186 Ariz. 10, 918 P.2d 1028 (1996) (holding that the defendant could not present evidence of drug abuse because there was no evidence that the he was under the influence at the time of the crime). Not only did Jones fail to present any evidence that he was under the influence at the time of the murders, but Dr. Caffrey even noted that Jones committed other crimes when he was not on drugs. The state said it best in its reply to the mitigation memorandum: "Robert Jones is not a murderer because of drugs—he is a murderer who has used drugs in the past." (R.O.A. at 791.) For these reasons, the trial court properly found that Jones did not prove his incapacity to understand his crimes.

[57][58][59] ¶ 70 Jones also claims his personality disorder prevented him from understanding his crime. An antisocial personality disorder, combined with other factors, may be a mitigating circumstance. *See State v. McMurtrey III,* 136 Ariz. 93, 102, 664 P.2d 637, 646 (1983). Dr. Caffrey's report concludes that Jones did, in fact, have such a disorder. The trial court, however, held that no evidence showed this factor was a major and contributing cause of Jones's actions. Character or personality disorders alone are not sufficient to constitute significant impairment. *See State v. Murray,* 184 Ariz. 9, 42, 906 P.2d 542, 575 (1995). The defendant must also show that he was substantially impaired. Here, Jones made no showing that his condition significantly impaired his ability to understand the crimes. Furthermore, this Court has rejected the substantial impairment argument for defendants with more serious disorders than Jones. *See, e.g., State v. Laird,* 186 Ariz. 203, 208, 920 P.2d 769, 774 (1996) (rejecting the G.1 factor because, for a defendant with serious mental problems, he still understood the significance of his actions). For these reasons, the trial court properly found that Jones did not prove the G.1 factor by a preponderance of the evidence.

[60] ¶ 71 Jones next argued in his pre-sentence mitigation memorandum that he had proved the G.3 factor, relatively minor participation, by a preponderance of the evidence. Jones argued that the primary evidence presented at trial came from David Nordstrom and Lana Irwin. David Nordstrom had an obvious motive to lie to protect himself and his brother. Lana Irwin was unreliable because she could not remember events clearly. For these reasons, Jones argued that it is possible he never actually pulled the trigger in any of the murders. Scott Nordstrom could have done them all and simply blamed them on Jones. The evidence, however, suggests otherwise. Testimony from the surviving witnesses at the Moon Smoke Shop indicated that the two suspects were shooting at different times in different places. Thus, Jones could not have been a "minor participant" as required under the language of G.3. Furthermore, the jury found the evidence sufficiently credible to convict Jones. In the absence of any evidence that Jones was not a full participant in the crimes, the trial court properly found that the G.3 factor had not been proven by a preponderance of the evidence.

C.

[61] ¶ 72 Finally, this Court independently re-

weighs the trial court's findings concerning non-statutory mitigation factors, which also must be proven by a preponderance of the evidence.

[62] ¶ 73 The trial court held that although the defendant was able to relate to others in a socially acceptable way, given his ****368 *313** criminal history, lack of employment history, and Dr. Caffrey's report, Jones did not prove the good character factor. Jones presented testimony from two witnesses who stated that he was extremely polite. Testimony concerning good character, however, is not a mitigating factor when contradicted by evidence that the defendant has been involved in other crimes. *See State v. Gonzales,* 181 Ariz. 502, 515, 892 P.2d 838, 851 (1995). Here, Jones committed crimes as a juvenile, and has been in and out of prison for felony convictions since that time. In fact, he committed these murders while on parole for another offense. Thus, he did not prove the good character factor.

[63][64] ¶ 74 Jones next argued that 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,* 188 Ariz. 220, 231, 934 P.2d 784, 795 (1997). Jones produced evidence that 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 stepfathers, Eugene and Ronnie, were physically and emotionally abusive, as were Jones's 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.

[65] ¶ 75 Even if these facts were proven, they do not necessarily constitute mitigating factors. The trial court noted that the defense also produced numerous pictures depicting him as a happy child in a normal household. Even more importantly, the 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 his violent behavior. *See State v. Martinez,* 321 Ariz. Adv. Rep. 6, 14, 196 Ariz. 451, 465, 999 P.2d 795, 809 (2000). 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 that 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.

[66][67] ¶ 76 Jones next argued that his history of providing emotional and financial support to his mother and sister indicated he did good deeds before the murders. A great number of good deeds may be a mitigating circumstance. *See State v. Willoughby,* 181 Ariz. 530, 549, 892 P.2d 1319, 1338 (1995). The only evidence that Jones presented, however, was that once he grew big enough, he protected his sister and mother from beatings by Ronnie. His actions convinced his mother that she could leave Ronnie and fend for herself. The trial court recognized that these facts were "scant evidence" of good deeds, particularly in light of all the heinous crimes Jones committed. For these reasons, the trial court properly found that the factor had not been proven by a preponderance of the evidence.

[68][69] ¶ 77 Jones also presented affidavits from his mother and sister that indicate their love and support of him. Although close family ties may be mitigating, *see State v. Poland,* 144 Ariz. 388, 406–07, 698 P.2d 183, 201–02 (1985), general statements of support carry little weight. *See State v. Gulbrandson,* 184 Ariz. 46, 71, 906 P.2d 579, 604 (1995). The trial court found that while Jones's sister and mother love him and care for him, these facts did not mitigate the crimes. While in his mother's custody during parole, Jones continued to

engage in criminal activity. Therefore, although Jones proved by a preponderance of the evidence that he has family support, the trial court properly found that the fact was only slightly mitigating.

[70][71] ¶ 78 Jones next argued that he showed good behavior during the course of the trial. Although this factor has rarely been considered mitigating, it may be assigned some value. *See* ***314***State v. Spears,* 184 Ariz. 277, 294, 908 P.2d 1062, 1079 (1996). ****369*** The court noted that Dr. Caffrey observed that Jones tended to minimize his involvement in activities and tried to make himself look good. It further noted that the trial would be the ideal place to bring out Jones's best behavior. Clearly, the dichotomy between Jones's in-court behavior and his out-of-court criminal activity supports the court's finding. For these reasons, the trial court properly found that the factor was not proven.

[72][73] ¶ 79 Jones argued that those who know him well believe that he has "solid potential" for rehabilitation. If a defendant has potential to be rehabilitated, the court may consider the fact mitigating. *See State v. Murray,* 184 Ariz. 9, 40, 906 P.2d 542, 574 (1995). The trial court noted, however, that Dr. Caffrey's report indicated that Jones was marked with psychopathology and an inability to live in accordance with societal rules. Additionally, Jones has a history of criminal behavior. Therefore, the trial court properly held that the factor had not been proven.

[74] ¶ 80 The majority of Jones's mitigation memorandum concerned his devotion to his family and their strong feelings for him. Family devotion may be a mitigating factor where the family would suffer considerably from the defendant's loss. *See State v. Spears,* 184 Ariz. 277, 294, 908 P.2d 1062, 1079 (1996). The trial court found that Jones proved this factor by a preponderance of the evidence. In light of the defendant's violent behavior, however, the trial court properly found that the factor did not provide any mitigation additional to that already accorded to the circumstance of family support.

[75] ¶ 81 Finally, Jones argued that residual doubt remains. He asserted that the state's reliance on the testimony of David Nordstrom, David Evans, and Lana Irwin, all paid informants who received something of value for their testimony, should have convinced the trial court that residual doubt existed. The trial court regarded this argument as merely an extension of the attack on the credibility of these witnesses. The jury of twelve persons, however, found Jones guilty despite his attacks on the witnesses' credibility. Although the trial judge considered the issue, in light of the totality of evidence presented at trial, the trial court properly found that the factor had not been proven by a preponderance of the evidence.

V.

¶ 82 For the foregoing reasons, we affirm Jones's convictions and his sentences.

CONCURRING: THOMAS A. ZLAKET, Chief Justice, CHARLES E. JONES, Vice Chief Justice, STANLEY G. FELDMAN, Justice, FREDERICK J. MARTONE, Justice.

Ariz.,2000.
State v. Jones
197 Ariz. 290, 4 P.3d 345, 325 Ariz. Adv. Rep. 17

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Appendix B

Minute Entry, *State v. Jones*, Pima County No. CR-57526, (Sept. 18, 2002)

CC Jean

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FILED
September 19, 2002
PATRICIA A. NOLAND, Clerk
PC Burrell
Deputy

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. JOHN S. LEONARDO

CR-57526

COURT REPORTER: NONE

DATE: September 18, 2002

THE STATE OF ARIZONA,
Plaintiff,
vs.

ROBERT GLEN JONES, JR.,
Defendant.

MINUTE ENTRY

Ruling on Petition for Post-Conviction Relief, in Chambers:

The Court has reviewed the Petition for Post-Conviction Relief filed February 15, 2002, the Memorandum in Support of Petition for Post-Conviction Relief filed February 15, 2002, the Response to Petition for Post-Conviction Relief filed June 21, 2002, the Supplement to Response to Petition for Post-Conviction Relief and the Motion to Permit Filing of Supplement to Response to Petition for Post-Conviction Relief both filed July 22, 2002, the Second Supplement to Response to Petition for Post-Conviction Relief filed August 15, 2002, the Reply in Support of Petition for Post-Conviction Relief filed August 27, 2002, and the record.

Following a trial by jury, Petitioner Jones was convicted of six counts of first-degree murder, one count of first-degree attempted murder, three counts of aggravated assault, three counts of armed robbery, and two counts of first degree burglary. The Trial Court awarded consecutive death sentences for the first-degree murder counts. The Arizona Supreme Court reviewed the case on direct, automatic appeal and, in an

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opinion dated June 15, 2000, affirmed all convictions and sentences. The decision was appealed to the United States Supreme Court and certiorari was denied on April 16, 2001. In his Memorandum in Support of Post-Conviction Relief, Petitioner contends: (1) that he is entitled to relief on the grounds that his constitutional rights to a fair trial and due process under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated by misconduct by the Prosecution, (2) that material new facts exist that probably would have changed the verdict or sentence, (3) that he received ineffective assistance of counsel at trial in violation of his rights under the Sixth Amendment, (4) that no reasonable fact-finder would have found him guilty of these offenses beyond a reasonable doubt or that the court should not have imposed the death penalty, (5) that his appellate counsel was ineffective in violation of his rights under the Sixth Amendment, (6) that he was denied his rights under the Sixth and Fourteenth Amendments when he was denied a jury trial on aggravating and mitigating factors, (7) that the decision in *Spears v. Stewart*, 267 F.3d 1026 (2001) is unconstitutional and cannot be applied to this case, (8) that Arizona's Death Penalty Statute violates the Eighth Amendment because it does not sufficiently channel the sentencer's discretion, and (9) that his right to equal protection under the Fourteenth Amendment was violated when he received the death penalty for acts that would not have received so harsh a penalty in other states. Petitioner requests that his convictions be set aside but, at a minimum, that his sentences be reduced. Additionally, he requests an evidentiary hearing on each issue contained in the Petition.

Finding that Petitioner presents no colorable claim and that no purpose would be served by further Rule 32 proceedings, the Court hereby dismisses his Petition pursuant to Rule 32.6(c), 17 A.R.S. Rules of

Louise Beitel/jmc
Division Manager

Criminal Procedure.

I. Violation of Constitutional Rights to a Fair Trial and Due Process

Petitioner initially contends that the Prosecutor knowingly and intentionally engaged in egregious misconduct in order to obtain a conviction at any cost. Toward that end, he alleges that the Prosecutor presented perjured testimony, made a false avowal to the court, failed to disclose exculpatory evidence, mislead Petitioner's Counsel about the status of the investigations, and deliberately phrased his questions to witnesses so as to mislead the jury with the answers. Petitioner further alleges that the Prosecutor was willing to go to extreme measures in order to prop up the witness, Lana Irwin, whose testimony Petitioner argues was absolutely critical. Petitioner claims he was denied his rights to a fair trial and due process by having the jury impermissibly tainted against him.

Each of the six specific issues included in this section of the Petition is precluded under Rule 32.2(a)(3), Arizona Rules of Criminal Procedure, because they were not raised at trial or on direct appeal. Additionally, The Arizona Supreme Court has repeatedly held that a defendant must voice his objection to arguments that are objectionable, and failure to do so constitutes a waiver of any right to review. *State v. Holmes*, 110 Ariz. 494, 520 P.2d 1118 (1974). Also see *State v.* Taylor, 109 Ariz. 267, 508 P.2d 731 (1973) (listing cases in which the court refused to consider allegations of improper statements by prosecution when defendant failed to make timely objection). Moreover, even if the state did somehow mislead the jury, defendant waives his objection if he failed to make it at trial. *State v.* Kemp, 185 Ariz. 52, 912 P.2d 1281 (1996). Absent fundamental error, failure to object at trial renders a later objection moot.

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State v. Cook, 170 Ariz. 40, 821 P.2d 731 (1991). In order to constitute fundamental error, the prosecutor's comment had to be so egregious as to deprive the defendant of a fair trial, and to render the resulting conviction a denial of due process. *State v.* Dumaine, 162 Ariz. 392, 783 P.2d 1184 (1989) citing *United States ex rel. Shaw v. De* Robertis, 755 F.2d 1279 (7th Cir. 1985). In the alternative, the Court finds that, if each claim were considered on its merits, relief would also be denied based on substantive grounds.

A. Deliberate Subornation of Perjury Involving a Kicked-In Door

Petitioner initially argues that Prosecutor David White deliberately solicited testimony from Lana Irwin that he knew to be untrue and later in the trial further solicited false testimony from two detectives to corroborate the testimony given by Irwin. The testimony concerned a door to a storage area in the Moon Smoke Shop. Eight months earlier, in the Scott Nordstrom trial, *State v. Scott Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001), Detective Godoy had testified that the subject door was kicked-in by police officers after they arrived at the Moon Smoke Shop. In the Jones trial, Irwin testified that she learned of the kicked-in door when she overheard a conversation between Jones and Coates. In his testimony the day before, Detective Godoy had established that he found a kicked-in door when he arrived at the scene. Later in the trial, Detective Woolridge apparently corroborated Irwin's testimony about the door by testifying that Irwin told her about the kicked-in door during a pre-trial interview. Woolridge also testified that there was no testimony in the Nordstrom trial about a kicked-in door. The Court is aware that both detectives were intimately familiar with the details of the two cases, both attended the separate trials yet, during their testimony in the Jones trial, neither detective mentioned the fact that the subject door was kicked-in by

police officers. No objection was raised either at trial or on direct appeal.

In his Response to the Petition, Prosecutor White admits to a mistake by connecting Irwin's information about a door being kicked-in with the one forced open by the police but avows that it was wholly unintentional. White claims possible confusion about the door because, in fact, there are two doors located in the same vicinity and he cites some evidence (i.e. "the photo of the bathroom door shows some kind of mark at the right height to be a kick mark") that indicates the second door may have been kicked by one of the intruders. But the Prosecution offers the Court no further substantiation of that claim. Additionally, White admits that although "some of the questions and answers were not technically correct," they were "literally true" and "essentially correct."

Taken in context, the admissions and omissions of the State witnesses may be explained as unintentional but the mistake was exacerbated by White's opening and closing arguments in which he apparently emphasized the testimony about the kicked-in door in order to bolster Irwin's credibility. While Petitioner sees collusion between a prosecutor and his witnesses to secure a high-profile conviction, the Court is unwilling to reach that conclusion. However, the Court is troubled by the inconsistency in the testimony between the two trials. In the Nordstrom trial, there is uncontroverted testimony that the police kicked-in the door. In the later Jones trial, an implication is developed through witness testimony (Irwin, Godoy and Woolridge) and through the opening and closing arguments that one of the intruders kicked-in the door. Petitioner argues this is significant because it is one of the key details from the overheard conversations that serve to bolster Irwin's credibility. On the other hand, the Court is aware that the

testimony about the kicked-in door was but one of the many correlations between Jones' statements overheard by Irwin and the facts of the crimes. It is highly probable that the great weight of evidence elicited at trial would have resulted in Petitioner's conviction even if Irwin had not testified about the kicked-in door. In the overall context of the evidence presented at trial, the Court is convinced that the testimony concerning the kicked-in door likely did not prejudice the Petitioner nor affect the verdicts. Therefore, the claim must be rejected on the merits.

Petitioner also alleges that the Prosecution failed to disclose two police reports which document that the subject door was kicked-in by the police. Reports prepared by Officer Charvoz and Sergeant Grimshaw, both dated 5/30/96, establish that Sergeant Grimshaw instructed Officer Charvoz to kick in the door to the storage room because the door was locked and they were unable to determine if there was possibly another victim or suspect inside. Petitioner claims that, because his attorneys did not have the reports, they did not have reason to realize that Godoy and Woolridge's statements were false at trial. The Court notes that, although the subject testimony may have been misleading and may have included some omissions, the record contains no substantiation that it was false. In the bar complaint filed on this matter, S. Jonathan Young, Plaintiff's appellate attorney, alleged that Plaintiff's trial attorneys, Eric Larsen and David Braun, were adamant that they did not receive the reports. Additionally, both Larsen and Young stated in Affidavits that they did not recall the two police reports being included with the material that was disclosed by the Pima County Attorney's Office. However, the record contains correspondence from David L Berkman, Deputy County Attorney, which documents subsequent discussions he had with Braun and Larsen in which

the two attorneys expressed some uncertainty about whether the two police reports were included with the disclosure materials. Also, the County Attorney presented an Affidavit from the assigned Litigation Support Specialist who verified that the two reports were stamped "FIRST DISCLOSURE, July 28, 1997" and disclosed to Eric Larsen on that date. In his Reply, Petitioner comments that the fact that a document is stamped "disclosed" proves nothing about whether or not it was actually sent to opposing counsel. While that may be true, the Court considers that, because the stamping is part of an orderly and seemingly reliable, long-standing institutional process, it creates a rebuttable presumption that the documents were disclosed. Finding that Petitioner's unsupported allegations fail to overcome the presumption, his argument on this point must be rejected.

B. Misconduct Involving "Red Room" and the Position of Arthur Bell's Body

Petitioner next contends that White, with the complicity of the detectives, deliberately mislead the jury into believing that Bell's body was found leaning back when the police arrived. He argues this was necessary to correlate with the testimony given by Irwin. No objection was raised either at trial or on direct appeal.

A review of the record shows that White did not mislead. The record includes sufficient evidence to support a reasonable conclusion that, when the intruders departed the Fire Fighters' Union Hall, Arthur Bell's body was slouched in a chair at the bar with his head leaning back. Of the police officers who first arrived on the scene, two specifically stated in their report that Bell's head was leaning back. Officer Braun wrote "I could see a male in a chair at the bar. His head was leaning back." Officer Butierez was more

explicit in his report: "A man was in a bar stool up by the front of the bar. He was leaning back in the stool with his head leaning back also." Two other officers, Gallego and Parrish, describe the body position as "slouched over the bar stool" and "slumped over sitting at the bar" but there is no reference to the position of the head. Additionally, Nat Alicata, the first person to arrive at the Moon Smoke Shop after the murders, initially reported that Bell was "sitting at the chair . . . slumped on the chair on the bar sort of sideways." Later, Alicata stated to an investigator that he found Arthur Bell's body in a chair leaning backwards. The statements by Braun, Butierez and Alicata provide persuasive evidence that Arthur Bell was leaning backward when first found. Finding that there is no credible evidence to support Petitioner's theory that Mr. Bell's body was moved or that Lana Irwin was provided information so that her testimony would be consistent with the "changed" body position, the Court rejects Petitioner's argument.

Next, Petitioner contends that the State improperly sought to bolster Lana Irwin's credibility by claiming that the "red room" was another detail that Irwin supposedly overheard from Jones that was not released to the public. It is clear from the record that Irwin did not learn of the room's color from the police. The chance that she may have seen the color photograph of the Fire Hall published by the Arizona Daily Star on December 3, 1997 does not rule out the possibility that Irwin first learned that the murders occurred in a red room when she overheard the conversations between Jones and Coates in the Summer of 1996.

In the allegations concerning the "red room" and the position of Arthur Bell's body, Petitioner has only presented conclusory allegations of prosecutorial misconduct and no credible evidence to substantiate his claims. Moreover, even assuming that Petitioner had proven prosecutorial misconduct, he has not met his

burden of establishing that the purported misconduct resulted in actual prejudice at trial. Failing to establish the presence of fundamental error on this issue, Petitioner's claim of prosecutorial misconduct must be rejected. *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992).

C. False Suggestion Regarding Sketches

Next, Petitioner alleges that Detective Salgado gave testimony that was intended to deliberately mislead the jury by conveying the false impression that Jones, David, and Scott Nordstrom were the only people who had been identified from the police composite sketches. No objection was raised either at trial or on direct appeal.

The court would reject this argument. The objectionable testimony cited by Petitioner occurred during Prosecutor White's redirect examination of Detective Salgado. Earlier, in Mr. Larsen's cross-examination of the witness, he had established that other people had come forward identifying people other than Jones from the composites. The Court notes that Robert Jones was on trial. Jones was a known associate of the Nordstrom brothers. In an earlier trial, Scott Nordstrom had been convicted of first-degree murder for the same crimes. White's redirect of Salgado appears to the Court as a reasonable line of questioning given Jones' connection with the Nordstroms and the fact that the police identified the brothers as initial suspects in the investigation. Salgado's testimony did not prejudice Jones nor did it violate Jones' right to a fair trial and due process as claimed in the Petition. The Court further notes that, contrary to the State's assertion in its Response that Petitioner's counsel did not object to White's line of questioning, the

record shows that Mr. Larsen did object but was overruled by the Court.

D. Knowingly False Avowal to Court About Nordstrom's Phone

Next, Petitioner contends that White made a false avowal to the Court when he stated that Terri Nordstrom would testify that the phone used in the test of the monitoring system the State performed was the same phone that was in the Nordstrom home at the time the crimes were committed. No objection was made either trial or on direct appeal.

The Court finds no misconduct on the part of White and certainly not the egregious conduct required by *Dumaine*. While it is true that Terri Nordstrom did testify at the earlier trial that the phones were different, she provided no testimony on that point at the *Jones* trial. Petitioner's assumption that the testimony would have been the same is not supportable. She may well have testified as Mr. White avowed. Petitioner's counsel had the opportunity at trial to resolve that issue by questioning Mrs. Nordstrom about the phones but chose not to do so. The Court is also aware that testimony by Rebecca Matthews, Parole Supervisor, settled any question concerning the relevancy of the computer printout showing he results of the experiment. Her testimony established that the kind of phone used had no impact on the functioning of the monitoring system other than to cause an occasional busy signal. Because no misconduct by the Prosecutor has been established and because the Court is satisfied that the computer printout was properly admitted, the Petitioner's argument must be rejected.

E. Failure to Disclose Clothing Belonging to Jones

Next, Petitioner alleges that the State, during pretrial interviews, deliberately withheld a cowboy

hat and boots belonging to Robert Jones that had been obtained and tested, and kept this exculpatory evidence from Jones' counsel. No objection was made either at trial or on direct appeal.

The record shows that the State obtained a black cowboy hat and boots on March 18, 1998 and had them tested for blood. The tests were negative. On April 20, 1998, Petitioner's counsel interviewed Detectives Salgado and Woolridge who stated that the State did not have any clothing that they could link to the crime scene or to Jones. On April 23, 1998, the State disclosed the hat, boots and lab results to Petitioner. The State cites T*owery* and argues that judicial estoppel precludes Petitioner from gaining relief because his current position is different from that taken prior to trial. Petitioner argues that judicial estoppel does not prevent Jones from raising this claim because Jones' counsel's original position was taken without the benefit of additional information regarding perjured testimony by State witnesses which did not come to light until long after trial.

The Court agrees that judicial estoppel does not apply but not for the reason cited by Petitioner. One requirement that must exist before the court can apply judicial estoppel is that the party asserting the inconsistent position must have been successful in the prior judicial proceeding. *State v. Towery*, 186 Ariz. 168, 920 P.2d 290 (1996). Prior success is a prerequisite to the application of judicial estoppel because absent judicial acceptance of the prior position, there is no risk of inconsistent results. *Id.* at 183. The record reflects that Petitioner's Motion to Preclude the admission of certain evidence, to include the cowboy hat and boots, was never considered by the court. Rather, the court took up the Motion to Continue the trial and the Motion to Preclude became moot. Because Petitioner was not "successful" in precluding the hat and boots

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from being admitted in the earlier proceeding, judicial estoppel does not establish grounds to bar Petitioner from requesting relief. On the other hand, the requested relief can be granted only if a sufficient basis has been established. The Court is not convinced that Petitioner has met that burden.

Although disclosure of the cowboy hat, boots and lab results was not accomplished in as timely a manner as Petitioner would have preferred, the items were revealed by the Prosecutor almost two months prior to the initiation of trial. That would seem adequate time for Petitioner's counsel to prepare for trial if the items were considered potentially exculpatory evidence. Additionally, Petitioner's allegation that White and the detectives worked in concert to misconstrue the evidence and mislead Jones' counsel is not supported by the record. Although the answers provided to Petitioner's counsel by the detectives were understandably less responsive than desired, White's explanation that the detectives responded in that way because, at that time, the State could not directly link the clothing to Jones appears reasonable. In the motion hearing conducted on May 4, 1998, Mr. Larsen agreed that he had no basis for an allegation of bad faith by the State in this matter and the Court agreed, finding that the need to do further discovery "is not the fault of either side." The Court further notes that the United States Supreme Court has pointed out that the touchstone of due process in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940 (1982). The Court sees no evidence that Jones was denied a fair trial. When viewed in relation to the totality of the evidence presented by the State, the delay in disclosing the cowboy hat, boots and lab test results to Petitioner is insufficient to sustain a claim for relief. Therefore, Petitioner's argument must be rejected.

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F. Pattern of Misconduct

Finally, Petitioner raises a "potpourri" of miscellaneous allegations ostensibly supporting his contention that the misconduct of the State and its representatives deprived Jones of his constitutional rights to due process and a fair trial. He cites a Bar Complaint against David White, an FBI investigation of David White, an FBI investigation of Detective Godoy, a Mohave County Grand Jury indictment of Detective Godoy, a Bar Complaint against Pima County Attorney Ken Peasley, and the Rule 32 Petition in the *Nordstrom* trial.

It appears to the Court that Petitioner and his counsel have lost their focus in this section of the Petition. The grounds for relief in a Rule 32 action are clearly delineated in Rule 32.1, Ariz.R.Crim.P. What Petitioner presents, in shotgun fashion, is a collection of peripheral actions which present none of these specific grounds for relief. Although each of the individual actions may stand on their own merits, Petitioner fails to show how any or all of them could have affected the outcome of the *Jones* trial. Because Petitioner has failed to present a colorable claim, the Court must reject his argument.

II. Material New Facts Warrant a New Trial

The next matter presented relates to claims of newly discovered facts that Petitioner claims meet the criteria established for relief in *State v. Apelt,* 176 Ariz. 349, 369, 861 P.2d 634, 654 (1993).

A. Jones Was Not in the Truck With Scott and David

Petitioner argues that a phone call made from Scott Nordstrom's cell phone, shortly after the Moon

Smoke Shop crimes were committed, to a pay phone near Jones' east-side apartment proves that Jones was in his home and not in the truck. The State contends that Jones made the call to his roommate, Chris Lee. Petitioner counters that Lee did not yet live with Jones at the time the call was made. On the basis of the newly discovered evidence, Petitioner asserts that he is entitled to a reversal of his convictions and sentences.

Arizona law governing newly discovered evidence is clear. In order to be entitled to post-conviction relief on the ground of newly discovered evidence, a defendant must show that: (1) the newly discovered evidence is material; (2) the evidence was discovered after trial; (3) due diligence was exercised in discovering the material facts; (4) the evidence is not merely cumulative or impeaching; and (5) that the new evidence, if introduced, would probably change the verdict or sentence in a new trial. Rule 32.1(e), 17 A.R.S. Rules of Criminal Procedure; *State v. Orantez*, 183 Ariz. 218, 902 P.2d 824 (1995). If any of the criteria is not satisfied, the motion must be denied. *Apelt* at 369. The Court finds that the Petitioner fails to meet four of the critical criteria.

First, although Petitioner claims that the information regarding the phone number for the pay phone that Jones used was not discovered until after trial, Petition Exhibits 25 and 26 show that Jones remembered using a phone at the Circle K (#520:298-9516) during May 1996 and that phone is still there and operational. Second, it is apparent that due diligence was not exercised in discovering the material facts. Not only did Jones know the location and number of the relevant phone, but Petitioner's trial counsel, Eric Larsen, examined cell phone records that were introduced in the *Nordstrom* trial. Third, the evidence is both

cumulative and impeaching. Petitioner's affidavit to the effect that Chris Lee was not living with him on May 30, 1996 does not dispositively establish that as fact especially in light of testimony in the *Nordstrom* trial to the contrary. At most, this evidence perpetuates a defense theory that Jones received a call from Scott Nordstrom's cell phone on May 30 and, therefore, could not have participated in the Moon Smoke Shop crimes. This possibility and its implications for Mr. Jones' credibility were fully explored during Petitioner's trial. Moreover, the jury was fully aware of the theory yet unanimously resolved the issue against Petitioner. Since this evidence would present no new information to the jury and could only be employed to attack the credibility of witnesses who linked Petitioner to the crime scene (David Nordstrom, Lana Irwin), the evidence is clearly both cumulative and impeaching. Finally, the new evidence, if introduced, would probably not change the verdict. The defense theory rests totally on the argument that only Petitioner could have been in the apartment or positioned at the Circle K phone on May 30. That argument is speculative at best and is contradicted by the trial testimony by several witnesses who connect Jones to the crimes. To accept Jones' alibi as credible, the jury would have had to discount the testimony of each of the State's witnesses. It appears to this Court that that would have been a highly unlikely result. Because Petitioner's claim fails to satisfy at least four of the established criteria, it is hereby dismissed.

B. Newly Discovered Letters Written by David Nordstrom

Next, Petitioner contends that letters written by David Nordstrom to Buddy Carson while both were in Pima County Jail, a transcript of an interview of Officer Mace, and a statement by Eddie Santa Cruz should be considered as newly discovered evidence and would greatly undermine the credibility of David

Nordstrom. This claim is also dismissed because it fails to satisfy at least three of the established criteria.

First, the Carson materials were not discovered after trial. The record shows that the material was disclosed to Petitioner's trial counsel on January 21, 1998, approximately six months prior to the trial. During a recent interview, Eric Larsen apparently acknowledged being aware of the Buddy Carson matter. The Mace interview was conducted by Scott Nordstrom's counsel and the Pima County Prosecutor's Office has no record of it in their files. Second, the evidence is merely cumulative or impeaching. Petitioner's purpose for making this claim was clearly stated in the Petition: it "would have greatly undermined his [David Nordstrom] credibility." During the trial, the defense mounted an aggressive attack on David Nordstrom's credibility including his prior felonies, his drug use, his probation violations, his lack of steady employment, his possession of legal firearms, his curfew violations, his lies to the police, and his prior inconsistent statements. Evidence of scams perpetrated by David Nordstrom in jail would only add to the adverse characterization already painted by the defense and serve to enhance his impeachment. Finally, it is highly improbable that the Carson information would have changed the verdict. David Nordstrom was an important witness for the State and his credibility with the jury was essential to a successful prosecution. In spite of the defense's extensive attempts to impeach David and the multiple attacks on his veracity, the jury chose to convict Jones on every count of murder. It is unlikely that knowledge of the Carson matters would have influenced the jury to reach a different verdict.

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C. Misconduct Claims

Petitioner suggests that the Court can consider all the claims presented in Part I as claims involving material new facts. Each of the subject claims was dismissed above on procedural and substantive grounds. The Court finds that Petitioner presents no colorable basis on which to reconsider them as newly discovered material facts.

III. Jones Received Ineffective Assistance of Counsel at Trial in Violation of His Rights

Arizona courts apply the two-pronged test developed by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 68 (1985), to determine whether a conviction should be reversed on the grounds of ineffective assistance of counsel. First, the defendant must show that his or her counsel's performance fell below an objective standard of reasonableness as defined by prevailing professional norms. Second, the defendant must demonstrate that the deficient performance resulted n actual prejudice to the defendant. That is, defendant must show that, but for the ineffectiveness of counsel, the outcome of the case would have been different. *State v. Ramirez*, 126 Ariz. 464, 616 P.2d 924 (1980). Failure on the part of the defendant to meet either prong is fatal to a claim of ineffective assistance of counsel. *State v. Salazer*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). There is; however, a "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690. See also *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). Defense counsel is presumed to have acted properly. The burden is on the Petitioner to show that "counsel's decision was not a tactical one but,

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rather revealed ineptitude, inexperience, or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 691 P.2d 673 (1984). The Petition alleges thirteen instances of ineffectiveness of counsel but the Court rejects each of these claims.

A. Failure to Properly Conduct Investigation Regarding David Nordstrom

Petitioner alleges that Jones' trial counsel did not properly investigate false reports by David Nordstrom that Scott Nordstrom had threatened his family and himself or his related letters to Buddy Carson to try to set up a scam to sue Pima County. Court is unwilling to find fault when conclusory allegations are not supported by substantive argument. To the contrary, the record reflects evidence that trial counsel gave attention to these matters but determined that other issues should take priority. Moreover, the record reflects at least two instances that establish that the reports that Scott Nordstrom threatened both David and his family were credible. The record also indicates that trial counsel was well aware of both Buddy Carson and Eddie Santa Cruz but decided that presentation of either individual would have been detrimental to his case. Which witnesses to present, or whether to present any witnesses, are strategic decisions left to the professional discretion of the attorney. *State v. Dalgish*, 131 Ariz. 133, 139-40 (1982). It is not likely that there was any prejudice to the defense. Both the trial court and the Arizona Supreme Court concluded in *Nordstom* that Carson's testimony could not have effected the outcome of that case and there is no reason to believe that he would have had any greater impact in *Jones*. Also, Santa Cruz' reputation as a notorious jailhouse snitch likely would have opened him up to a damaging impeachment by the defense.

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B. Failure to Properly Investigate Kicked-in Door

Next, petitioner alleges that Jones' trial counsel failed to fully investigate the conflicted testimony concerning the kicked-in door and to use it to vindicate Jones. This claim is without merit. The kicked-in door was but one of the dozen or so correlations with the facts of the crime that were adduced from the testimony of Lana Irwin about the conversations she overheard between Jones and Coates. The Court is not convinced that, had an issue been made of the kicked-in door, it would have shaken the credibility of Irwin or changed the outcome of the trial.

C. Failure to Challenge David Nordstrom's Alibi

Next, Petitioner alleges that Jones' trial counsel's decision not to properly investigate David Nordstrom's alibi and to call certain witnesses to testify was not a reasonable decision and likely impacted the verdict. It appears to the Court that Petitioner's issue is dissatisfaction with the method used by trial counsel to challenge David Nordstrom's alibi and not that a challenge was not mounted. The record shows that trial counsel did pursue a strategy of attacking the accuracy of the parole records and arguing that the alibi could not be supported. Petitioner argues that trial counsel should have attacked David's alibi by calling other witnesses. The Court is not willing to speculate on what results would have been achieved had trial counsel followed the approach now recommended by Petitioner. The standard articulated by *Strickland* is whether counsel's performance was deficient and that "but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Proof of effectiveness must be a demonstrable reality rather than a matter of speculation. *State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984).

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The Court concludes that Jones' trial counsel's performance on this matter was not deficient and represented a reasonable strategy under the circumstances presented at trial.

D. Failure to Request Immunity for Zachary Jones

Next, Petitioner alleges that trial counsel's failure to make any objection or to seek immunity for Zachary Jones was ineffective assistance. Petitioner contends that, if immunized, Zachary Jones could have testified to statements made by David Nordstrom indicating he was laying blame on Robert Jones. The Court notes that there is some question whether a request for immunity would have been successful. Eric Larsen indicated in an interview that the prosecution clearly had no intention of granting immunity. Also, the record shows that Prosecutor White believed Zachary Jones conspired to falsely impeach David Nordstrom and probably would have withheld immunity. Absent any proof that immunity could have been obtained and, consequently, that the result of the trial would have been different, the Court is unwilling to conclude that trial counsel was ineffective. Also, the Court is not convinced that Zachary Jones would have provided exculpatory evidence. In fact, the record shows that Zachary Jones' attorney indicated his client's testimony "could be of a prejudicial nature and little, if any, probative value." Failing to meet either prong of the *Strickland* test, the claim is rejected.

E. Failure to Investigate Telephone Call

Petitioner contends that trial counsel's failure to fully investigate the call made from Scott Nordstrom's cell phone on the night of the Moon Smoke Shop murders constitutes ineffective assistance of counsel. But Petitioner never articulates with any specificity evidence that the call was not investigated. In

fact, there are indications in the record that Mr. Larsen did look at Scott Nordstrom's cell phone and pager records. The Court notes that Petitioner's theory that the call could not have been placed by Jones calling his roommate, Chris Lee, is challenged by evidence in the record that Chris Lee admitted living with Jones on May 30 and that Jones admitted to Eric Larsen that he had participated in the Moon Smoke Shop crimes. Therefore, it is not likely that the outcome of the case would have been different had trial counsel pursued Petitioner's current theory concerning the phone call. Because neither prong is satisfied, the claim is rejected.

F. Failure to Properly Research Pretrial Publicity and Use in Cross-Examination

Next, Petitioner contends that, had trial counsel investigated information that two of the details allegedly overheard by Lana Irwin were released in the media, he would have been able to impeach Irwin's story and likely cause a different verdict to result. Petitioner's conclusory assertions do not prove that Larsen was unaware that these details were publicly released; in fact, the record contains evidence that Eric Larsen was acutely aware of the extensive amount of pretrial coverage that appeared in the media (see Motion for Change of Venue dated 4/15/98). The record also presents strong indications that Eric Larsen conducted an aggressive cross-examination of Lana Irwin including impeachment on a number of matters. The Court considers it unlikely that Jones was prejudiced by trial counsel's decision not to ask the additional questions. Impeaching Irwin concerning media publication of the fact that the victims were shot in the head or that the room was red would not necessarily have been effective. At trial, Irwin testified that she lived in Phoenix and had not read anything or heard anything on the news about the Tucson murders. Whether she

had or not is not dispositive. Release of the article in the Arizona Daily Star on December 3, 1997 does not rule out the possibility that the jury would have believed that Irwin first learned of the details of the crimes during the conversations she overheard. Petitioner's argument fails both prongs and is rejected.

G. Failure to Interview Jones' Parole Officer and Call Him as a Witness

Petitioner alleges that an interview with Jones' parole officer, Ron Kirby, would have established that, in June 1996, Jones still had a full beard and long reddish-blond hair, which would have attacked the credibility of the State's contention that Jones changed his appearance following the crimes. Again, Petitioner provides no evidence that Eric Larsen did not investigate this aspect. Evidence in the record indicates that the sketches of the two suspects were released in the Arizona Daily Star on June 24, 1996 and that Jones cut and colored his hair sometime after that, most likely sometime in July. Because Ron Kirby's last contact with Jones was June19, it is clear that he could not have known about the appearance change and testimony that Jones still had a full beard on that date would not have been dispositive. Petitioner was not prejudiced by trial counsel's failure to interview Ron Kirby or call him as a witness. The claim of ineffective counsel is therefore rejected. The Court also rejects any claim of newly discovered evidence.

H. Failure to Review *Nordstrom* Trial Transcripts

Petitioner alleges that Jones' trial counsel failed to review the transcripts from the *Nordstrom* Trial but provides no evidence to substantiate his claim. Additionally, Petitioner offers only the issue of the kicked-in door as an example of resulting prejudice. The Court has concluded above that the testimony about the kicked-in door did not prejudice Petitioner nor affect the verdicts. Contrary to Petitioner's assertion, the

record contains numerous entries that document that Jones' trial attorneys accessed the *Nordstrom* materials. In addition to obtaining selected transcripts, it is clear that either Larsen or Braun: (1) reviewed some of the *Nordstrom* trial transcripts (2) attended some of the *Nordstrom* trial sessions, (3) reviewed telephone records, (4) reviewed transcripts of *Nordstrom* witnesses, (5) entered into a "common defense" agreement and exchanged information with Nordstrom's counsel, (6) assigned an investigator to conduct a "tremendous" amount of investigation concerning the *Nordstrom* trial, and (7) used *Nordstrom* trial transcripts to cross-examine some of the *Jones* witnesses.

The court has seen no evidence that Jones' trial counsel acted incompetently or failed to utilize opportunities afforded by the prior trial to develop a defense. If, in fact, counsel did not review all *Nordstrom* trial transcripts or that Petitioner's counsel "now disagrees with the strategy or claims errors in the trial tactics is not enough to support a finding that the trial lawyer's conduct was incompetent." *State v. Oppenheimer*, 138 Ariz. 120, 123 (App. 1983). The Court is satisfied that Jones' trial counsel performed to a reasonable standard. Because Petitioner's claim fails the first prong of *Strickland,* it is hereby dismissed.

I. Representation of Jones Despite Conflict of Interest

Petitioner alleges that Eric Larsen's friendship with the sister of one of the murdered victims created a conflict of interest that prejudiced Jones' defense. Alternately, Petitioner alleges that, even if Jones was not prejudiced by the relationship, Larsen should have disclosed the relationship to Jones. The Court has reviewed available case law on this subject and finds no authority that suggests that friendship with the

relative of a victim, absent proof of an actual conflict, disqualifies an attorney from representing the defendant. Our system of justice relies on conscientious attorneys and judges to address potential conflicts of interest and take appropriate action. Although in his opening argument Eric Larsen mentioned the relationship, he did so for tactical reasons and not because he considered there to be a conflict. Under the circumstances, the trial judge had no reason to initiate an inquiry. *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980). Because there was no objection raised at trial, Petitioner has the burden of demonstrating that an actual conflict of interest adversely affected his lawyer's performance. 446 U.S. at 348. Given the absence of proof of actual conflict or prejudice, the claim is dismissed.

J. Failure to Properly Handle Preliminary Hearing Information

Next, Petitioner alleges that, at the preliminary hearing, Jones' counsel failed to object to False testimony about Jones' clothing and also failed to adequately cross-examine the State's witnesses. The court notes that both the State's Response and Petitioner's Reply have annotated the heading to correctly identify the proceeding as a grand jury rather than a preliminary hearing. As such, Petitioner's counsel would not have been present and could not have objected or cross-examined witnesses. Petitioner's claim focuses on allegedly false statements by Detective Salgado indicating that several witnesses had said that Jones gave up wearing western garb after the composite sketches were published in the newspaper. The record reflects that Detective Salgado had received information from at least two witnesses (David Nordstrom and Chris Lee) that Jones stopped wearing western garb. Salgado's reference to "several" people may be characterized as an exaggeration but not a falsehood as Petitioner claims nor does it provide a reasonable basis for a

motion to remand. Additionally, as the State points out, the failure to seek a remand was mooted by Petitioner's conviction of the charges beyond a reasonable doubt. *State v. Charo*, 156 Ariz. 561, 566, 754 P.2 288, 293 (1988). Since Petitioner presents no credible evidence of ineffective assistance, the claim is dismissed.

K. Failure to Properly Make a Record

Petitioner again makes reference to the issue of immunity for Zachary Jones but repackages it in a different context. The Court has already addressed the Zachary Jones claim and found it to be without merit. Vague references to "other instances in which Jones' counsel failed to properly record objections at trial" do not present a colorable claim and furnish no basis for relief. *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985). Therefore, the claim is rejected.

L. Failure to Thoroughly Cross-examine and Impeach Witnesses

Next, Petitioner alleges that Jones' trial counsel failed to utilize prior inconsistent statements made by State witnesses to properly cross-examine them. The Court rejects this claim. Petitioner never articulates with any specificity how counsel's performance was less than objectively reasonable or how his defense was prejudiced by this performance. Additionally, because "matters of trial strategy and tactics are committed to defense counsel's judgment, and claims of ineffective assistance cannot be predicated thereon," *State v. Beaty*, 58 Ariz. 232, 20, 762 P.2d 519, 537 (1988), trial counsel's performance does not constitute ineffective assistance of counsel.

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M. Failure to Take Pictures of Getaway Truck

Petitioner alleges ineffective assistance of counsel because Jones' trial counsel did not present photographs to show how unlikely it would have been for a witness to observe only two individuals in the truck when three were present. The State had presented the results of an experiment that demonstrated it was possible. *State v. Beaty*, supra, held that matters of trial strategy are not grounds for ineffectiveness claims. Eric Larsen chose to challenge the State's argument by devoting two pages of his closing argument to attacking the experiment and the witness's credibility. Petitioner's speculation as to the possibility of an alternate experiment is noted but there is no evidence that it would have achieved any greater degree of success. Therefore, because the claim involved trial tactics and no prejudice has been demonstrated, the claim is rejected

IV. No Reasonable Fact-Finder Would Have Found Jones Guilty of These Offenses Beyond a Reasonable Doubt, or the Court Would Not have Imposed the Death Penalty

Petitioner contends that the issues discussed above in Parts I, II, and III qualify Jones for relief equally under Rule 32.1(h). According to that portion of the rule, a defendant is entitled to post-conviction relief if he "demonstrates by clear and convincing evidence that the facts underlying the claims would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty."

Having disposed of all of the claims Petitioner presented in Parts I, II and III on procedural and/or substantive grounds, the Court finds that no basis exists for relief under Rule 32.1(h). Therefore, the claim is

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dismissed.

V. Jones' Appellate Counsel Was Ineffective in Violation of Jones' Rights Under the Sixth Amendment

A. Any Issues Found Precluded Because Not Raised on Direct Appeal

Petitioner contends that Jones' appellate counsel provided ineffective assistance if any issue raised in the Petition is found precluded for failure to raise it on direct appeal.

Because each of the claims in Parts I, II and III of the Petition that were denied relief based on preclusion under Rule 32.2 were also dismissed based on substantive grounds, Petitioner cannot establish that he suffered prejudice because of the ineffective performance of his appellate counsel. Therefore, the claim is dismissed.

B. Failure to Raise Mitigation Issues on Appeal

Next, Petitioner alleges that the failure of Jones' appellate counsel to investigate and present mitigation issues on direct appeal constitutes ineffective assistance of counsel because, had additional mitigation evidence been presented, Jones might have received a life sentence rather than the death penalty.

A trial court has jurisdiction under Rule 32 to determine a claim of ineffective assistance of appellate counsel. *State v. Herrera*, 183 Ariz. 642, 644, 905 P.2d 1377, 1379 (App. 1995). To prove ineffective assistance of counsel, a petitioner must show both deficient performance and prejudice. 466 U.S. at 687. Failure on the part of a defendant to meet either test is fatal to a claim of ineffective assistance of counsel. *State v.* Salazar, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). Whether Jones' appellate counsel

offered additional mitigation evidence on direct appeal is not at issue. In its decision in *Jones*, the Arizona Supreme Court stated "Jones did not raise any issues regarding mitigating factors on appeal." *State v. Jones*, 197 Ariz. 290, 311, 4 P.3d 345, 366 (1998). However, that fact alone is not dispositive of ineffective assistance. The second prong of *Strickland* requires prejudice. In *Anderson*, an Arizona Appeals Court found that a defendant was not prejudiced by his counsel's failure to request a mitigation hearing where the court had considered defense counsel's sentencing memorandum addressing mitigating circumstances, and defendant did not establish that anything more would have been accomplished by a formal mitigation hearing. *State v. Anderson*, 177 Ariz. 381, 386, 868 P.2d 964, 969 (App. 1993). Also, the U.S. Supreme Court has suggested that there is no constitutional violation when a defendant chooses to put on no mitigation evidence. *Blystone v. Pennsylvania*, 494 U.S. 299, 306 (1990). Here, Petitioner claims that his appellate counsel offered no mitigation; however, he fails to suggest what mitigation, if any, could have and should have been offered. Neither does Petitioner submit any evidence from which the Court could reasonably conclude that, had other mitigation issues been raised, the appeal would have been resolved differently. To achieve a hearing on an ineffectiveness claim, a petitioner must satisfy an evidentiary burden by a preponderance of the evidence. *State v.* Prince, 142 Ariz. 256, 260, 689 P.2d 515, 519 (1984). Here, Petitioner's conclusory assertion does not meet that burden. Thus, Petitioner's allegation that his appellate counsel provided ineffective assistance does not present a colorable claim.

The Arizona Supreme Court has a duty to independently review the existence of aggravating or mitigating factors to determine if imposition of the death penalty is proper. *State v.* Richmond, 114 Ariz.

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186, 560 P.2d 41 (1976). On appeal, the Arizona Supreme Court had before it the Petitioner's Pre-Sentence Mitigation Memorandum, which included a number of mitigation factors pursuant to A.R.S. § 13-703. After an independent review of all statutory and non-statutory mitigation factors, the Court affirmed Jones' convictions and his sentences.

Having determined that the required showing of prejudice has not been met, the Court rejects Petitioner's claim that his appellate counsel provided ineffective assistance.

VI. Jones Was Denied His Rights Under the Sixth and Fourteenth Amendments When He Was Denied a Jury Trial on Aggravating and Mitigating Factors

Petitioner contends that the U.S. Supreme Court's recent decision in *Ring v. Arizona* has rendered Arizona's death penalty sentencing scheme unconstitutional because it requires a judge, rather than a jury, to determine the aggravating factors that make a defendant death-eligible. *Ring v. Arizona*, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Petitioner requests that this Court stay a decision on the *Ring* issue until such time as the Arizona Supreme Court issues a ruling on the applicability of *Ring* to post-conviction cases. Petitioner also requests permission to file a separate Memo within thirty days of the filing of his Reply to address *Ring*.

The Court is not inclined to stay a decision on this matter pending a decision by the Arizona Supreme Court on the *Ring* issue. In *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991), Arizona adopted and applied the retroactivity analysis that had been announced by the U.S. Supreme Court two years earlier. See *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). *Teague* held that a new rule can be retroactive to cases on collateral review only if it falls within one of the two narrow exceptions to the general rule of non-

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retroactivity. *Id.* at 311. The present case satisfies the criteria for non-retroactivity. First, Petitioner's direct appeal is complete and he is now engaged in a collateral post-conviction process. Second, neither of the specified exceptions are applicable to the facts of *Jones*. Therefore, this Court has no basis to apply *Ring* retroactively to this case.

This Court's position is supported by a recent decision in the Tenth Circuit Court of Appeals. In *Cannon*, the Circuit Court ruled that *Ring* was not made retroactive to cases on collateral review. *Cannon v. Miller*, 297 F.3d 989 (10th Cir. 2002). The Court reasoned that the Supreme Court decision in *Ring* did not announce a new rule of substantive criminal law under the Eighth Amendment thus barring retroactive application of the rule for purpose of collateral review without the Supreme Court's express holding that the rule applied retroactively.

Because *Ring* provides no basis for relief, the claim is rejected and Petitioner's request to file a separate Memo to address *Ring* is moot.

VII. The *Spears* Decision is Unconstitutional and Cannot be Applied

Next, Petitioner contends that the recent Ninth Circuit opinion in *Spears v. Stewart*, 267 F.3d 1026 (2001), unconstitutionally infringes on Jones' rights to due process by severely limiting the time frames in which his federal habeas corpus petition, and therefore this Petition, can be prepared and filed.

Petitioner's conclusory assertion does not provide a basis to challenge the constitutionality of the Ninth Circuit decision. Therefore, the claim is dismissed.

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VIII. Arizona's Death Penalty statute Violates the Eighth Amendment to the U.S. Constitution Because it Does Not Sufficiently Channel the Sentencer's Discretion

Petitioner contends that the Arizona Death Penalty Statute is unconstitutional because it provides little or no direction on how to weigh and compare the mitigating versus aggravating factors.

This claim was not raised at trial or on direct appeal and, therefore, is precluded under Rule 32.2(a)(3), Ariz. R. Crim. P. Moreover, the Arizona Supreme Court has previously ruled on this issue and rejected the argument now raised by Petitioner. *State v. White*, 194 Ariz. 344, 355, 982 P.2d 819, 830 (1999).

Therefore, the claim is dismissed.

IX. Jones' Rights to Equal Protection Under the Fourteenth Amendment to the U.S. Constitution Were Violated When He Received the Death Penalty for Acts That Would Not Have Received So Harsh a Penalty in Other States

Finally, Petitioner contends that it is a violation of the Equal Protection Clause of the Fourteenth Amendment for him to be subject to the death penalty in Arizona when other states do not authorize it for the same crimes.

Because it was not raised on trial or on direct appeal, the claim is waived pursuant to Rule 32.2(a)(3), Ariz. R. Crim. P.

Petitioner presents no basis for an Equal Protection challenge other than Arizona's approach is different than other states. But the U.S. Supreme Court has ruled that the States enjoy latitude to prescribe the method by which murderers shall be punished. *Blystone* at 309. And as long as the death penalty is not

imposed in an arbitrary and capricious manner, it is not unconstitutional by federal or state standards. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976). The Arizona Supreme Court has held that the death sentence is not cruel and unusual. *State v. Blazak*, 131 Ariz. 598, 601, 643 P.2d 694, 698 (1982).

An Equal Protection argument rests on the premise that a given statute provides different treatment for similarly situated individuals. Arizona's death penalty statute applies equally to everyone within its jurisdiction. *State v. White*, 168 Ariz. 500, 513, 815 P.2d 869, 882 (1991). That Petitioner would not be subject to the same punishment in other states is irrelevant. "[I]ndividual persons convicted of the same crime can constitutionally be given different sentences." *Id.* at 514.

Petitioner's equal protection claim is without merit and is hereby dismissed.

Hon. John S. Leonardo

cc:
Hon. John S. Leonardo
Criminal Calendaring
Clerk of Court – Criminal Desk
Clerk of Court – Appeals
Capital Litigation Attorney – Jonathan Bass
Attorney General – Bruce M. Ferg
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Division Manager

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Appendix C

Order, *State v. Jones*, Arizona Supreme Court No. CR-03-0002-PC
(Sept. 11, 2003)

Supreme Court

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 542-9396

NOËL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

September 11, 2003

RE: STATE OF ARIZONA v ROBERT GLEN JONES JR
Arizona Supreme Court No. CR-03-0002-PC
Pima County Superior Court No. CR-57526

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 9, 2003, in regard to the above-referenced cause:

ORDERED: Petition For Review [on Denial of Post-Conviction Relief] = DENIED.

Noel K Dessaint, Clerk

TO:
Hon Terry Goddard, Arizona Attorney General
Attn: Kent E Cattani, Esq
Donna J Lam, Assistant Arizona Attorney General, Tucson Office
Daniel D Maynard, Esq and Jennifer A Sparks, Esq
Robert Glen Jones Jr., ADOC #70566, Arizona State Prison, Florence - Eyman Complex-SMU #2 Unit
Ms Patricia A Noland, Clerk, Pima County Superior Court
Jennifer Bedier, Arizona Capital Representation Project [Information Copy Only]
Jonathan Bass, Arizona Death Penalty Judicial Assistance Program, Southern Counties [Information Copy Only]
kab

Appendix D

Memorandum of Decision and Order, *Jones v. Ryan*, No. CV-03-00478-TUC-DCB (Jan. 29, 2010)

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Robert Glen Jones, Jr., Petitioner, v. Charles L. Ryan, et al.,[1] Respondents.	No. CV 03-478-TUC-DCB DEATH PENALTY CASE **MEMORANDUM OF DECISION AND ORDER**

Robert Glen Jones, Jr. (Petitioner) has filed an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. (Dkts. 27, 28.)[2] For the reasons set forth herein, the Court determines that Petitioner is not entitled to habeas relief.

PROCEDURAL HISTORY

Following trial in June 1998, a jury convicted Petitioner on six counts of first-degree murder for killings that occurred two years earlier during robberies of the Moon Smoke Shop and the Fire Fighters Union Hall in Tucson. Petitioner was also convicted of first-degree attempted murder, aggravated assault, armed robbery, and first-degree burglary.

At sentencing, Pima County Superior Court Judge John Leonardo found numerous

---

[1] Charles L. Ryan, Interim Director of the Arizona Department of Corrections, is substituted for his predecessor pursuant to Fed. R. Civ. P. 25(d)(1).

[2] "Dkt." refers to the documents in this Court's file.

statutory aggravating factors: conviction of another offense for which a sentence of life imprisonment or death was imposable under A.R.S. § 13-703(F)(1); previous conviction of a serious crime, whether preparatory or complete, § 13-703(F)(2); offense committed as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value, § 13-703(F)(5); offense committed while in the custody of or on authorized or unauthorized release from the State Department of Corrections, a law enforcement agency or a county or city jail, § 13-703(F)(7); and conviction of one or more other homicides which were committed during the commission of the offense, § 13-703(F)(8). After weighing the aggravating and mitigating factors, Judge Leonardo sentenced Petitioner to death.[3]

The Arizona Supreme Court affirmed the convictions and sentences. *State v. Jones*, 197 Ariz. 290, 4 P.2d 345, (2000). A petition for certiorari was denied. *Jones v. Arizona*, 532 U.S. 978 (2001). Subsequently, Petitioner sought state post-conviction relief (PCR) under Rule 32 of the Arizona Rules of Criminal Procedure. Judge Leonardo denied PCR relief in a detailed 32-page ruling, and the Arizona Supreme Court summarily denied review. Petitioner thereafter initiated the instant habeas proceedings.

APPLICABLE LAW

Because it was filed after April 24, 1996, this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *see also Woodford v. Garceau*, 538 U.S. 202, 210 (2003).

I. Principles of Exhaustion and Procedural Default

Under the AEDPA, a writ of habeas corpus cannot be granted unless it appears that the petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see*

---

[3] At the time of Petitioner's trial, Arizona law required trial judges to make all factual findings relevant to capital punishment and to determine sentence. Following the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which held that a jury must determine the existence of facts rendering a defendant eligible for capital punishment, Arizona's sentencing scheme was amended to provide for jury determination of eligibility factors, mitigating circumstances, and sentence.

Coleman v. Thompson, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509 (1982). To exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999).

A claim is "fairly presented" if the petitioner has described the operative facts and the federal legal theory on which his claim is based so that the state courts have a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). Unless the petitioner clearly alerts the state court that he is alleging a specific federal constitutional violation, he has not fairly presented the claim. *See Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004). A petitioner must make the federal basis of a claim explicit either by citing specific provisions of federal law or federal case law, even if the federal basis of a claim is "self-evident," *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999), or by citing state cases that explicitly analyze the same federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and PCR proceedings. Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition or not presented in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(b), 32.4(a).

A habeas petitioner's claims may be precluded from federal review in two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed to present

it in state court and "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." *Id.* at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (stating that the district court must consider whether the claim could be pursued by any presently available state remedy).

Therefore, in the present case, if there are claims which have not been raised previously in state court, the Court must determine whether Petitioner has state remedies currently available to him pursuant to Rule 32. *See Ortiz*, 149 F.3d at 931 (district court must consider whether the claim could be pursued by any presently available state remedy). If no remedies are currently available, petitioner's claims are "technically" exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1.

In addition, if there are claims that were fairly presented in state court but found defaulted on state procedural grounds, such claims also will be found procedurally defaulted in federal court so long as the state procedural bar was independent of federal law and adequate to warrant preclusion of federal review. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). It is well established that Arizona's preclusion rule is independent of federal law, *see Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per curiam), and the Ninth Circuit has repeatedly determined that Arizona regularly and consistently applies its procedural default rules such that they are an adequate bar to federal review of a claim. *See Ortiz*, 149 F.3d at 932 (Rule 32.2(a)(3) regularly and consistently applied); *Poland v. Stewart*, 117 F.3d 1094, 1106 (9th Cir. 1997) (same); *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306 (9th Cir. 1996) (previous version of Arizona's preclusion rules "adequate").

Nonetheless, because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). As a general matter, however, the Court will not review the merits of procedurally defaulted claims unless a petitioner demonstrates legitimate cause for the failure to properly exhaust in state court and prejudice from the alleged

constitutional violation, or shows that a fundamental miscarriage of justice would result if the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* at 753. Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *King v. LaMarque*, 455 F.3d 1040, 1045 (9th Cir. 2006). "Prejudice" is actual harm resulting from the alleged constitutional error or violation. *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998). To establish prejudice resulting from a procedural default, a habeas petitioner bears the burden of showing not merely that the errors at his trial constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension. *United States v. Frady*, 456 U.S. 152, 170 (1982).

II. Standard for Habeas Relief

For properly exhausted claims, the AEDPA established a "substantially higher threshold for habeas relief" with the "acknowledged purpose of 'reducing delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "'highly deferential standard for evaluating state-court rulings' . . . demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005).

"The threshold question under AEDPA is whether [a petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 549 U.S. 70, 76 (2006). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529 U.S. at 381; *see Musladin*, 549 U.S. at 77. Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be "persuasive" in determining what law is clearly established and whether a state court applied that law unreasonably. *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405-06; *see Early v. Packer,* 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has

observed that "a run-of-the-mill state-court decision applying the correct legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406.

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. For a federal court to find a state court's application of Supreme Court precedent "unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Visciotti*, 537 U.S. at 25.

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based on an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El I*, 537 U.S. at 340; *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In considering a challenge under 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Miller-El II*, 545 U.S. at 240. However, it is only the state court's factual findings, not its ultimate decision, that are subject to § 2254(e)(1)'s presumption of correctness. *Miller-El I*, 537 U.S. at 341-42.

FACTUAL BACKGROUND

Petitioner was tried separately from his co-defendant, Scott Nordstrom. The State's primary witness at trial was Scott's brother, David Nordstrom, who had been released from prison in January 1996, following a conviction for theft. At the time of the offenses in this

case, David was living with his father and wore an ankle tracking monitor as part of his parole.

David testified that sometime prior to April 1996, he obtained a .380 semi-automatic handgun from a friend and gave it to Petitioner, who told David he wanted it for protection. On May 30, 1996, David was riding with Scott and Petitioner in Petitioner's white pickup truck when Petitioner suggested they steal a car. Petitioner was wearing his usual attire: a long-sleeved Western shirt, Levis, boots, sunglasses, and a black cowboy hat. In a parking lot near Tucson Medical Center, Petitioner broke into a VW station wagon but was unable to start it. However, he found a 9mm pistol and stated when he returned to the truck, "I've got my gun now."

The three then discussed committing a robbery, and Petitioner suggested the Moon Smoke Shop. According to David, Petitioner parked behind the store, gave Scott the .380 semi-automatic, armed himself with the 9mm pistol, and told David he and Scott would go in, rob the store, and be right out. David moved into the driver's seat and then heard gunshots. When Petitioner and Scott returned to the truck, Petitioner said, "I shot two people," and Scott stated, "I shot one." Petitioner split the money from the robbery with David and Scott.

The survivors of the smoke shop robbery testified that four employees were in the store at the time: Noel Engles, Tom Hardman, Steve Vetter, and Mark Naiman. Engles was behind the counter, Vetter and Naiman were kneeling behind it, and Hardman was sitting behind another counter. The robbers followed a customer, Chip O'Dell, into the store and immediately shot him in the head. Engles, Vetter, and Naiman were all focused on stock behind the counter and none saw the robbers or O'Dell enter. Upon hearing the gunshot, Engles looked up to see someone in a long-sleeved shirt, dark sunglasses, and dark cowboy hat wave a gun and yell to get down. Hardman fled to a back room, and Engles saw a second robber move toward the back and heard someone shout, "Get the fuck out of there!" Engles dropped to his knees and pushed an alarm button.

The gunman at the counter nudged Naiman in the head with a pistol and demanded that he open the cash register. After doing so, the gunman reached over the counter and began firing. Naiman ran out of the store and called 911 at a payphone. After hearing the gunmen leave, Engles ran out the back door to get help and saw a light-colored pickup truck carrying two people turn sharply from the back alley onto a surface street. Naiman and Engles survived, as did Vetter, despite being shot in the arm and face. O'Dell and Hardman both died from bullet wounds to the head. Three 9mm shell casings were found in the front area of the store, one near O'Dell and two near the register. Two .380 shells were found near Hardman's body in the back of the shop. Naiman provided a description of one of the gunmen, which was used by a police artist to create a composite drawing.

Two weeks after the smoke shop robbery, on June 13, 1996, the Fire Fighter's Union Hall was robbed. The Union Hall was a private club; members had to use key cards to enter, and the bartender buzzed in guests. Member Nathan Alicata discovered the bodies of the bartender, Carole Lynn Noel, as well as Maribeth Munn, Judy Bell, and Arthur Bell, when he went to the hall around 9:00 that night. The police found three 9mm shell casings, two live 9mm shells, and two .380 shell casings. Approximately $1300 had been taken from the open cash register. The medical examiner concluded that the bartender had been shot twice and suffered a blunt force trauma. The three other victims had been shot through the head at close range as their heads lay on the bar; Arthur Bell also had a contusion on the right side of his head in a shape consistent with a handgun.

David testified that on the night of the Union Hall robbery he was at his father's home, which the State corroborated with documentary records relating to his ankle monitor. According to David, Petitioner visited him at his father's home late that evening and told David that he and Scott had robbed the Union Hall. Petitioner further told David that Scott had kicked and shot the bartender because she could not open the safe and that Petitioner shot three other patrons in the back of the head. Later, David, Scott, and Petitioner threw the weapons into a pond south of Tucson. David and Scott also burned a wallet belonging to one

of the Union Hall victims.

Several months later, David saw an appeal on television for information concerning the murders and told his girlfriend, Toni Hurley, what he knew. Hurley testified that she made an anonymous call to a crime tip hotline, which led to David's contact with police. He then accurately relayed to investigators numerous details of the crimes that were not publically known.

In addition to David's testimony, the State presented important testimony from Lana Irwin. Irwin had met Petitioner in the summer of 1996, shortly after the murders, when he visited her apartment in Phoenix on several occasions. Petitioner knew Irwin's friend, Steven Coates, and sometimes stayed overnight. She testified that she overheard conversations in which Petitioner told Coates about the murders, saying he had killed four people by shooting them in the head while his partner had killed two. Although she could relay only snippets of the conversation, Irwin testified that Petitioner described shooting one man at a doorway entrance and that another man was shot in a "back room." He also talked about killing three women and an "older man" at a "bar or restaurant" that looked like a "red room" and said they had to be shut up so they didn't say anything. Irwin also said that Petitioner talked about a door being open during one of the incidents but that another door in the back of the building was closed and had to be kicked in. He further said a third accomplice, his partner's brother, waited in a truck during at least one of the incidents.

DISCUSSION

I. Prosecutorial Misconduct

In Claim 1, Petitioner raises the following allegations of prosecutorial misconduct:

A. The prosecutor suborned perjury from detectives to bolster the credibility of witness Lana Irwin regarding a kicked-in door;

B. The State introduced false evidence regarding the position of Arthur Bell's body;

C. The prosecutor misconstrued police sketches;

D. The prosecutor knowingly made a false avowal to the court about

David Nordstrom's phone; and

E. The State failed to disclose clothing belonging to Petitioner.

(Dkt. 27 at 7-27.) In Claim 12, Petitioner asserts that the prosecutor made improper remarks during closing argument. (*Id.* at 53.)

Petitioner properly exhausted Claim 12 on direct appeal but did not raise any of the allegations in Claim 1. Instead, Petitioner presented them in his PCR petition. (*See* ROA-PCR doc. 16 at 3-21.)[4] Although the PCR court alternately determined that the claims were meritless, denying them in summary fashion, the court first found the claims precluded pursuant to Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure because they could have been raised on direct appeal. (ROA-PCR doc. 70 at 3.) Thus, the state court "explicitly invoke[d] a state procedural bar rule as a separate basis for decision."[5] *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). This preclusion ruling rests on an independent and adequate state procedural bar. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per curiam) (Arizona's Rule 32.2(a) is independent of federal law); *Ortiz*, 149 F.3d at 931-32 (Rule 32.2(a) is regularly and consistently applied). Therefore, the allegations raised in Claim 1 are procedurally barred, absent a showing of cause and prejudice or a fundamental miscarriage of justice.

As cause to excuse his default, Petitioner asserts that failure to present Claim 1 properly to the Arizona Supreme Court was due to the ineffective assistance of appellate

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[4] "ROA-PCR doc." refers to sequentially-numbered documents in the seven-volume post-conviction record on appeal prepared for Petitioner's petition for review to the Arizona Supreme Court (Case No. CR-03-0002-PC). "ROA" refers to sequentially-numbered pages in the six-volume record on appeal prepared for Petitioner's direct appeal to the Arizona Supreme Court (Case No. CR-98-0537-AP). "RT" refers to the reporter's transcript. As is custom in this District, copies of the state court records on appeal, as well as the original trial transcripts, appellate briefs, and presentencing report, were provided to this Court by the Arizona Supreme Court. (*See* Dkt. 48.)

[5] The Arizona Supreme Court summarily denied review without comment. Thus, with respect to this and other claims presented in his PCR petition, the trial court's PCR ruling is the last reasoned determination by a state court.

counsel. (Dkt. 27 at 38.) Before ineffective assistance of counsel may be used as cause to excuse a procedural default, it must have been presented to the state court as an independent claim. *Edwards v. Carpenter*, 529 U.S. 446, 451-53 (2000). Respondents concede that Petitioner properly exhausted this appellate ineffectiveness claim in his PCR petition. (Dkt. 34 at 46; *see also* ROA-PCR doc. 16 at 36.) The PCR court determined that appellate counsel was not ineffective because none of Petitioner's substantive claims would have been successful on appeal. (ROA-PCR doc. 70 at 27.) This Court agrees.

Where ineffective assistance of appellate counsel is raised as cause for excusing a procedural default, application of *Strickland v. Washington*, 466 U.S. 668 (1984), requires the Court to look to the merits of the omitted issue. *Hain v. Gibson,* 287 F.3d 1224, 1231 (10th Cir. 2002); *United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995) (to determine if appellate counsel provided ineffective assistance by failing to raise an issue on appeal "we examine the merits of the omitted issue"). If the omitted issue is meritless, counsel's failure to appeal does not constitute a Sixth Amendment deprivation. *Cook*, 45 F.3d at 392-93. Because, as set forth below, the Court has determined that Petitioner's prosecutorial misconduct allegations are without merit, appellate counsel was not ineffective for failing to raise them on appeal and appellate ineffectiveness does not constitute cause to excuse Petitioner's default.

A. Kicked-in Door

At Scott Nordstrom's trial, which took place approximately seven months before Petitioner's, Detective Joseph Godoy testified that police broke down a door in the back area of the Moon Smoke Shop after arriving on the scene:

> A: In the back room there are three different areas where I found money. One was inside a drawer, one inside a brief case. Then we broke down the door. Actually broke a door, found some money in this other room back here.
>
> Q: Okay. Let's talk about those places one at a time. The door that had to be broken into, uniform officers did that?
>
> A: Yes.

Q: The intruders didn't do that?

A: No, they did not.

(Dkt. 28, Ex. 2.) In addition, reports from two responding police officers – Officers Charvoz and Grimshaw – state that there was a locked room adjacent to the back area of the Moon Smoke Shop, that a key could not be found to open the door, and that consequently the door was kicked in by one of the officers. (Dkt. 28, Ex. 3.)

At Petitioner's trial, the prosecutor had Detective Godoy identify two photographs of the door that during Nordstrom's trial Godoy had explained was kicked in by police. (RT 6/18/98 at 97.) However, the prosecutor framed the question in such a way that it implied the damage exhibited in the photographs had been discovered, not caused, by police:

Q: Let me show you two other photographs. Did you find any damage to one of the doors in the back area?

A. Yes.

Q: Showing you what has been marked State's 15 and 16, do those represent a door that you saw that was damaged?

A. Yes.

(*Id.*) In addition, Detective Brenda Woolridge, who had taken Lana Irwin's statement, testified that Irwin told her something about a door being kicked in. (RT 6/25/98 at 38.) Woolridge further testified that, in fact, a door in the back area of the smoke shop had been kicked in, as shown in State's exhibit 50, and that this fact was not mentioned during Nordstrom's trial. (*Id.*)

During opening statement and closing argument, prosecutor David White argued that the evidence showed O'Dell was killed near the open front door of the Moon Smoke Shop and Hardman was killed in the back area. (RT 6/18/98 at 11; RT 6/25/98 at 130-31.) White described Hardman as running to the back at the outset of the robbery and asserted that Scott Nordstrom had kicked in a door to get to him. (*Id.*) White further noted that information about the condition of the door had not been publicly released or presented at Nordstrom's trial, and thus Lana Irwin could not have known about this fact unless she overheard it from

Petitioner. (RT 6/25/98 at 131.)

Petitioner contends that the testimony of Detectives Woolridge and Godoy constituted perjury and that White must have known this in light of the fact that he had already prosecuted Nordstrom. (Dkt. 27 at 12.) He argues that the detectives' testimony was material "because they corroborated the story of a very important witness to the state who would not have been very credible, or helpful, if she did not know these details that she allegedly learned from Mr. Jones." (*Id.*) Petitioner also asserts that White failed to disclose the reports indicating that officers had kicked in the door, thereby preventing trial counsel from discovering the perjury. (*Id.* at 13.) In support of this allegation, he has proffered affidavits from trial counsel Eric Larsen asserting that he has "no specific recollection" of receiving the reports of Officers Charvoz and Grimshaw and from appellate counsel Jonathan Young avowing that the reports were not part of the file he received from Larsen. (Dkt. 28, Exs. 4 & 5.)

In addressing the merits of Petitioner's claim, the PCR court stated:

> The Court is aware that both detectives were intimately familiar with the details of the two cases, both attended the separate trials yet, during their testimony in the Jones trial, neither detective mentioned the fact that the subject door was kicked-in by police officers. No objection was raised either at trial or on direct appeal.
>
> In his Response to the Petition, Prosecutor White admits to a mistake by connecting Irwin's information about a door being kicked-in with the one forced open by police but avows that it was wholly unintentional. White claims possible confusion about the door because, in fact, there are two doors located in the same vicinity and he cites some evidence (i.e. "the photo of the bathroom door shows some kind of mark at the right height to be a kick mark") that indicates the second door may have been kicked by one of the intruders. But the Prosecution offers the Court no further substantiation of that claim. Additionally, White admits that although "some of the questions and answers were not technically correct," they were "literally true" and "essentially correct."
>
> Taken in context, the admissions and omissions of the State witnesses may be explained as unintentional but the mistake was exacerbated by White's opening and closing arguments in which he apparently emphasized the testimony about the kicked-in door in order to bolster Irwin's credibility. While Petitioner sees collusion between a prosecutor and his witnesses to secure a high-profile conviction, the Court is unwilling to reach that conclusion. However, the Court is troubled by the inconsistency in the

testimony between the two trials. In the Nordstrom trial, there is uncontroverted testimony that the police kicked-in the door. In the later Jones trial, an implication is developed through witness testimony (Irwin, Godoy and Woolridge) and through the opening and closing arguments that one of the intruders kicked-in the door. Petitioner argues this is significant because it is one of the key details from the overheard conversations that serve to bolster Irwin's credibility. On the other hand, the Court is aware that the testimony about the kicked-in door was but one of the many correlations between Jones' statements overheard by Irwin and the facts of the crimes. It is highly probable that the great weight of evidence elicited at trial would have resulted in Petitioner's conviction even if Irwin had not testified about the kicked-in door. In the overall context of the evidence presented at trial, the Court is convinced that the testimony concerning the kicked-in door likely did not prejudice the Petitioner nor affect the verdicts. Therefore, the claim must be rejected on the merits.

Petitioner also alleges that the Prosecution failed to disclose two police reports which document that the subject door was kicked-in by the police. Reports prepared by Officer Charvoz and Sergeant Grimshaw, both dated 5/30/96, establish that Sergeant Grimshaw instructed Officer Charvoz to kick in the door to the storage room because the door was locked and they were unable to determine if there was possibly another victim or suspect inside. Petitioner claims that, because his attorneys did not have the reports, they did not have reason to realize that Godoy and Woolridge's statements were false at trial. The Court notes that, although the subject testimony may have been misleading and may have included some omissions, the record contains no substantiation that it was false. In the bar complaint filed on this matter, S. Jonathan Young, Plaintiff's appellate attorney, alleged that Plaintiff's trial attorneys, Eric Larsen and David Braun, were adamant that they did not receive the reports. Additionally, both Larsen and Young stated in Affidavits that they did not recall the two police reports being included with the material that was disclosed by the Pima County Attorney's Office. However, the record contains correspondence from David L. Berkman, Deputy County Attorney, which documents subsequent discussions he had with Braun and Larsen in which the two attorneys expressed some uncertainty about whether the two police reports were included with the disclosure materials. Also, the County Attorney presented an Affidavit from the assigned Litigation Support Specialist who verified that the two reports were stamped "FIRST DISCLOSURE, July 28, 1997" and disclosed to Eric Larsen on that date. In his Reply, Petitioner comments that the fact that a document is stamped "disclosed" proves nothing about whether or not it was actually sent to opposing counsel. While that may be true, the Court considers that, because the stamping is part of an orderly and seemingly reliable, long-standing institutional process, it creates a rebuttable presumption that the documents were disclosed. Finding that Petitioner's unsupported allegations fail to overcome that presumption, his argument on this point must be rejected.

(ROA-PCR doc. 70 at 4-7.)

False Testimony

Prosecutorial misconduct will rise to a constitutional violation warranting federal

habeas relief only if such conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). In *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the Supreme Court held "that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." To prevail on a *Napue* claim, Petitioner must show that (1) the testimony was actually false, (2) the prosecution knew or should have known that the testimony was false, and (3) the false testimony was material. *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc). Materiality is determined by whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury," in which case the conviction must be set aside. *United States v. Agurs*, 427 U.S. 97, 103 (1976). "Under this materiality standard, [t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Hayes*, 399 F.3d at 984 (quotation omitted).

Like the PCR court, this Court is troubled by the contradiction between Godoy's testimony at the Nordstrom trial and that given at Petitioner's trial. However, Petitioner is not entitled to habeas relief unless he can demonstrate that the testimony was in fact false, that the testimony was material, and that the state court's findings were objectively unreasonable. The Court concludes that he cannot make this showing.

In its response to Petitioner's state PCR petition, the State provided materials from a State Bar of Arizona disciplinary complaint against prosecutor White based on the contradictory testimony in Petitioner's and Nordstrom's trials and the alleged disclosure violation. In a letter to Staff Bar Counsel, White denied that he failed to disclose the police reports but conceded that he made a mistake of fact during Petitioner's trial:

> The Moon Smoke Shop consists of one large room, where all the selling takes place. Off the main room is a smaller storage/work area. Off of that storage/work room are two other rooms. One is an office and the other is a bathroom. Both the smaller rooms off the storage room have doors, similar to interior doors in a residence. A diagram of the business is attached as Exhibit

> Three. When uniformed police officers arrived at the Moon Smoke Shop in response to the 911 call, they kicked open the door to the small office area to search for additional victims and/or suspects. That fact was noted in the Grimshaw and Charvoz reports and was brought out at the trial in State v. Nordstrom.
>
> More than half a year later, as I was preparing for trial in State v. Jones, Det. Woolridge, one of the detectives assigned to the case, brought to my attention that Lana Irwin knew about a door being kicked or pounded on in the case. See Woolridge Affidavit, attached as Exhibit Four. I recalled a door being kicked in at the Moon and mis-took the door the officers kicked in with the door Det. Woolridge (and Lana Irwin) was referring to – the door to the bathroom.

(ROA-PCR doc. 58, Ex. M.) In another letter to bar counsel, White's attorney in the disciplinary matter further explained the layout of the smoke shop and the fact that there were two adjacent doors in the back area:

> With respect to the door in question, we have to remember that there were two doors. Tab 5 indicates the two doors in question. The door underneath the ladder was the bathroom door, and the one in front of the ladder was the storage door. If you take a look at Tab 3, you will see in the testimony from Detective Edward Salgado, the lead detective on the case, that he states in his grand jury testimony on page 7, that there was evidence that the deceased, Mr. Hardman, had locked himself in the restroom of the business. Detective Salgado indicated there was damage to that door. Also, the deceased was found outside of the bathroom. In the trial of the Nordstrom case, Noel Engles (see Tab 4) testified on page 10, that while he was on the ground he heard someone telling one of the victims in the back to "Get the fuck out of here." It is believed this was referenced to the victim, Mr. Hardman, coming out of the bathroom. The fact that one of the eyewitnesses to the crime at the Moon Smoke Shop indicated that there was a demand to come out of one of the back rooms, the fact that Salgado testified that there was damage to the bathroom door, the fact that the two doors in question were right next to each other, and the fact that this case involved so many witnesses and so many exhibits led to the mistake by David White. Under Tab 6 you can see from inside the bathroom door looking out, and you see where Mr. Hardman lay. Tab 7 shows the damage to the storage door. These doors are right next to each other and Mr. White plainly mixed them up.

(ROA-PCR doc. 58, Ex. N.)

Based on its review of the record, the Court questions whether the testimony from Detectives Godoy and Woolridge was plainly false. Nevertheless, even assuming it was false, the Court concludes it was not material and that the state court's similar conclusion was not objectively unreasonable. The testimony about the door goes solely to the credibility of witness Lana Irwin. Although Irwin provided important corroborative evidence, the primary

evidence against Petitioner was the detailed testimony of David Nordstrom. Nordstrom described the crimes in detail, recounting his own participation in the Moon Smoke Shop robbery and the information he received directly from Petitioner concerning the Union Hall murders. Moreover, as noted by the state court, Irwin's testimony about the kicked-in door "was but one of the many correlations between Jones' statements overheard by Irwin and the facts of the crime." (ROA-PCR doc. 70 at 6.) For example, she heard Petitioner say he shot and killed four people while his partner killed two, which was corroborated by the forensic evidence indicating four of the victims were killed with a 9mm weapon, which David claimed Petitioner had used, and two with a .380 pistol, which David says Scott had used. Irwin knew that the victims had been shot in the head, that one had been shot standing by a door, and that another had been chased and shot in a back room, all of which was corroborated by eyewitnesses and forensic evidence. She also knew that Petitioner's accomplices were brothers, that one had stayed in the truck, and that at the "bar or restaurant" three women and a man who had been "pistol whipped" had been killed. (RT 6/19/98 A.M. at 72-73.) Again, this was all corroborated by other evidence at trial. Under these circumstances, the Court concludes that any false or misleading testimony on the question of the kicked-in door did not deprive Petitioner of a fair trial or undermine confidence in the guilty verdict. *See Agurs*, 427 U.S. at 103; *Napue*, 360 U.S. at 271 (holding that a new trial is not required if the false testimony could not in reasonable likelihood have affected the verdict).

Disclosure Violation

Although not cited by Petitioner, an allegation that the prosecution failed to disclose material evidence is governed by *Brady v. Maryland*, 373 U.S. 83, 87 (1963). A successful *Brady* claim requires three findings: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material to the issue of guilt or punishment. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see also Harris v. Vasquez*, 949 F.2d 1497, 1528 (9th Cir. 1990).

As already set forth, the PCR court determined that the prosecution had in fact disclosed the reports of Officer Charvoz and Sergeant Grimshaw because the reports had been stamped as disclosed and Petitioner offered nothing other than affidavits from counsel that they had not seen them. In response to the PCR petition, the State provided disclosure cover sheets indicating that over 1,000 pages of material were disclosed in co-defendant Nordstrom's case on January 24, 1997, and that over 2,000 pages of material were disclosed on July 28, 1997, in Petitioner's case. (ROA-PCR doc. 58, Ex. M at Exs. 2 & 3.) The Charvoz and Grimshaw reports each bear separate stamps labeled "First Disclosure" and the January 24 and July 28 dates. (*Id.*) In addition, the State provided an affidavit from the prosecutor's litigation support specialist, who avowed that she personally handled the disclosure in Petitioner's and Nordstrom's cases and that review of her file indicated that the reports in question were disclosed to Petitioner's counsel on July 28, 1997. (ROA-PCR doc. 58, Ex. N at Tab 8.)

In light of the conflicting evidence presented by Petitioner and the State, the Court concludes that the state court's determination was not objectively unreasonable and that Petitioner has not overcome the presumption of correctness with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Miller-El II*, 545 U.S. at 240. Moreover, as already discussed above, testimony about the kicked-in door was not material. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, controlling Supreme Court law.

B. Arthur Bell's Body

Lana Irwin testified that she overheard Petitioner describe one of the victims as an "older man" whom he shot and left sitting in a chair with his "head back." (RT 6/19/98 A.M. at 49-50.) The medical examiner testified that when she arrived at the scene, Bell's body was

"leaning backwards over the back of the chair." (*Id.* at 7.) A photograph of Bell with his head leaning back was admitted at trial. (*Id.* at 132.) Detective Godoy did not address the position of Bell's body except to say that he was found "still in the chair." Similarly, Nathan Alicata, who discovered the crime scene at the Union Hall, testified only that Arthur Bell, the only male victim, was "sitting in a chair about four chairs, five chairs from the turn of the bar." (RT 6/18/98 at 128.) In his closing argument, prosecutor White noted that Irwin could have only known about Bell's body leaning back if she learned it from Petitioner. (RT 6/25/98 at 133.)

Petitioner asserts that White deliberately misled the jury into believing that Bell's body was found leaning back in an effort to bolster Lana Irwin's testimony.[6] (Dkt. 27 at 13-18.) In support of this claim, he cites a pretrial interview in which Alicata described Bell as "[s]lumped on the chair on the bar sort of sideways." (PCR-ROA doc. 16, Ex. 15 at 13.) He also cites three police reports, prepared by officers who cleared the scene but did not testify at trial, that Bell was found "slumped over" at the bar. (Dkt. 28, Ex. 6.) Petitioner acknowledges that two other officers described Bell's head as leaning back when they arrived, but nevertheless argues that Bell's body had to have been moved from the "slumped forward position" to "leaning back" at the time the photographs of the scene were taken. (Dkt. 27 at 17-18.) He further argues that White's misconduct is evidenced by his failure to ask Alicata or Godoy specific questions about the position of Bell's body. (*Id.*)

In denying relief on this claim, the PCR court stated:

> A review of the record shows that White did not mislead. The record includes sufficient evidence to support a reasonable conclusion that, when the

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[6] In his amended petition, the heading for this claim states, "The State Introduced False Evidence Involving the "Red Room" and the Position of Arthur Bell's Body." (Dkt. 27 at 13.) However, although Petitioner makes passing reference to a "red room" in the body of this claim, he does not make any direct allegations of prosecutorial misconduct involving this evidence; rather, his argument is based solely on the position of Arthur Bell's body. Therefore, the Court finds any allegation with respect to the "red room" to be too cursory to state a claim and addresses only the arguments concerning the position of Arthur Bell's body.

> intruders departed the Fire Fighters' Union Hall, Arthur Bell's body was slouched in a chair at the bar with his head leaning back. Of the police officers who first arrived on the scene, two specifically stated in their report that Bell's head was leaning back. Officer Braun wrote "I could see a male in a chair at the bar. His head was leaning back." Officer Butierez was more explicit in his report: "A man was in a bar stool up by the front of the bar. He was leaning back in the stool with his head leaning back also." Two other officers, Gallego and Parrish, describe the body position as "slouched over the bar stool" and "slumped over sitting at the bar" but there is no reference to the position of the head. Additionally, Nat Alicata, the first person to arrive [at the Union Hall] after the murders, initially reported that Bell was "sitting at the chair . . . slumped on the chair on the bar sort of sideways." Later, Alicata stated to an investigator that he found Arthur Bell's body in a chair leaning backwards. The statements by Braun, Butierez and Alicata provide persuasive evidence that Arthur Bell was leaning backward when first found. Finding there is no credible evidence to support Petitioner's theory that Mr. Bell's body was moved or that Lana Irwin was provided information so that her testimony would be consistent with the "changed" body position, the Court rejects Petitioner's argument.

(ROA-PCR doc. 70 at 7-9.)

The PCR court's ruling was not objectively unreasonable. Although some of the officers' reports described Bell as slumped over, none expressly addressed the position of Bell's head. Officer Gallego stated that Bell was "slouched over another bar stool." (Dkt. 28, Ex. 6.) Officer Parrish described Bell's body as "slumped over sitting at the bar," and Officer Poblocki recounted in his report that witness Nat Alicata saw Bell "sitting on a bar stool slumped over the bar." (*Id.*) The phrase "slouched over" does not necessarily mean slouched forward versus backward. Moreover, two other officers expressly stated that each observed Bell's head leaning back when they arrived on the scene (PCR-ROA doc. 16, Ex. 17), and this was corroborated by the medical examiner's testimony.

Even assuming the prosecution misled the jury on this point, Petitioner cannot establish prejudice. As already discussed, there were numerous other aspects of Irwin's testimony that were corroborated by independent evidence, including the fact that a man killed at the bar had been pistol whipped. The Court concludes that Petitioner has not demonstrated prosecutorial misconduct relating to the position of Arthur Bell's body.

C. Police Sketches

Two composite sketches were prepared by a police artist based on descriptions

provided by Mark Naiman, one of the smoke shop employees. He described the robber who had aimed a gun at him as "a white male, caucasian, 25 to 30, about 5'10" to six feet" wearing "blue denim jeans with a black buttoned down shirt, a fairly worn cowboy hat, black, sunglasses and a handlebar moustache, but no kind of facial details besides that." (RT 6/18/98 at 69.) The other sketch depicted a much different looking person with a longer, narrower face that bore a resemblance to both of the Nordstrom brothers. (RT 6/24/98 at 101-02.)

During Nordstrom's trial, a witness testified that while in prison he saw the sketches and thought the one with the hat looked like Scott Nordstrom and the other resembled his brother, David. (Dkt. 28, Ex. 17.) During Petitioner's trial, Detective Edward Salgado testified on cross-examination that he applied for a search warrant based on an informant's identification of the Nordstroms as resembling the composites, and thus it was "fair to say that other people had come forward identifying other people *other than Mr. Jones* from those composites." (RT 6/24/98 at 101 (emphasis added).) On re-direct, the prosecutor clarified that there were two sketches, that the one without the hat and sunglasses had a slim, narrow face that resembled both of the Nordstrom brothers, and that it was this similarity in the sketch that "people were telling [Detective Salgado] about." (*Id.* at 102-03.)

Petitioner argues that Salgado's testimony "inaccurately suggested that the only 'discrepancy' in the identifications was over *which* of the Nordstrom brothers looked like the hatless suspect because they *both* resembled him, but that the suspect with the hat was always clearly identified as Mr. Jones." (Dkt. 27 at 20.) This, he argues, is in contravention of the evidence admitted at Nordstrom's trial in which the witness identified both Nordstroms based on both sketches and did not identify Petitioner. (*Id.*) According to Petitioner, Salgado's misleading testimony, elicited by the prosecutor, constituted misconduct and deprived him of a fair trial because it allowed the jury "to falsely believe that witnesses had consistently identified Mr. Jones from the sketches." (*Id.* at 20-21.)

In rejecting this claim, the PCR court stated, in pertinent part:

> Next, Petitioner alleges that Detective Salgado gave testimony that was intended to deliberately mislead the jury by conveying the false impression that Jones, David, and Scott Nordstrom were the only people who had been identified from the police composite sketches. . . .
>
> The court would reject this argument. The objectionable testimony cited by Petitioner occurred during Prosecutor White's redirect examination of Detective Salgado. Earlier, in Mr. Larsen's cross-examination of the witness, he had established that other people had come forward identifying people other than Jones from the composites. The Court notes that Robert Jones was on trial. Jones was a known associate of the Nordstrom brothers. In an earlier trial, Scott Nordstrom had been convicted of first-degree murder for the same crimes. White's redirect of Salgado appears to the Court as a reasonable line of questioning given Jones' connection with the Nordstroms and the fact that the police identified the brothers as initial suspects in the investigation. Salgado's testimony did not prejudice Jones nor did it violate Jones' right to a fair trial and due process as claimed in the Petition.

(ROA-PCR doc. 70 at 9-10.)

Even assuming the prosecutor misled the jury on this narrow point, an abundance of other evidence, unrelated to the sketches, supported Petitioner's conviction – in particular, the detailed, corroborated testimony of David Nordstrom concerning the crimes and the testimony of Lana Irwin. In addition, it is undisputed that the description of the assailant provided by Naiman bore a resemblance to Petitioner's build and dress style as testified to by other witnesses, including Nordstrom and David Evans. In fact, Evans testified to a conversation between Petitioner, Chris Lee, and himself during which they discussed Petitioner's similarity to one of the sketches and Lee asked Petitioner whether he was involved. (RT 6/19/98 P.M. at 98.) Petitioner responded, "If I told you, I'd have to kill you." (*Id.*) He further remarked, "You don't leave witnesses." (*Id.* at 99.) At another point, Petitioner told Evans he needed to leave Tucson and go to Phoenix because he had killed someone. (*Id.* at 105.) The overwhelming evidence of guilt unrelated to the sketches renders any alleged "false impression" inconsequential. Petitioner has not shown that White's conduct denied him a fair trial nor does this issue undermine confidence in the verdict. The state court's denial of this claim was not objectively unreasonable.

D. David Nordstrom's Phone

Fritz Ebenal, David Nordstrom's parole officer, testified that David was subject to

electronic monitoring via an ankle bracelet with a transmitter which allowed authorities to monitor his whereabouts. (RT 6/23/98 at 242.) The ankle bracelet was synced with a small computer, which was attached to a phone line in David's home and programmed to alert authorities if David left the vicinity of the computer inside the home. (*Id.* at 243-44.) According to Ebenal, David had a curfew as a condition of parole that required him to be home by 7:15 p.m. on the evening of June 13, 1996, the date of the Union Hall murders. (*Id.* at 259.) He stated that the electronic monitor revealed no curfew violation that night, indicating that David was at home after 7:15 p.m. (*Id.* at 259, 262.)

Rebecca Matthews, a parole supervisor, testified that the electronic monitoring system at David's home would provide an accurate result no matter the type of telephone used. (RT 6/24/98 at 30-31.) Matthews also testified that David's system was tested in the fall of 1997 and found to be operating properly. (*Id.* at 33-47.)

Petitioner asserts that the trial court permitted evidence of the 1997 testing by Matthews only on the prosecutor's avowal that Terri Nordstrom (David's stepmother) would testify that the tested phone was the same one used in the summer of 1996. He asserts that White knew this assurance was false because testimony at Scott Nordstrom's trial by Terri Nordstrom revealed that the 1997 test utilized a different phone than the one in operation in June 1996. (Dkt. 28, Ex. 11 at 67-68.)

In rejecting this claim, the PCR court ruled:

> The Court finds no misconduct on the part of White and certainly not the egregious conduct required by [*State v. Dumaine*, 162 Ariz. 392, 783 P.2d 1184 (1989)]. While it is true that Terri Nordstrom did testify at the earlier trial that the phones were different, she provided no testimony on that point at the *Jones* trial. Petitioner's assumption that the testimony would have been the same is not supportable. She may well have testified as Mr. White avowed. Petitioner's counsel had the opportunity at trial to resolve that issue by questioning Mrs. Nordstrom about the phones but chose not to do so. The Court is also aware that testimony by Rebecca Matthews, Parole Supervisor, settled any question concerning the relevancy of the computer printout showing [t]he results of the experiment. Her testimony established that the kind of phone used had no impact on the functioning of the monitoring system other than to cause an occasional busy signal. Because no misconduct by the Prosecutor has been established and because the Court is satisfied that the computer printout was properly admitted, the Petitioner's argument must be

rejected.

(ROA-PCR doc. 70 at 10.)

Leaving aside the issue of whether the prosecutor's avowal was misleading, the Court agrees with the PCR court that any misleading statement was immaterial in light of the testimony by Matthews – who was found by the trial court to be an expert on this technology – that the type of phone used was not material to the functionality of the monitoring system. Specifically, Matthews testified that the system "will record regardless of what type of phone is used" and that the type of phone would not affect the system's accuracy. (RT 6/24/98 at 30-31.) She elaborated that although some phones might cause the backup system to get a busy signal when calling the home system after an alert, "it wouldn't affect the actual monitoring because the [monitoring device] still monitors what's going on, records it, and it calls the computer in Phoenix." (*Id.* at 31.) The state court's ruling on this claim was not objectively unreasonable.

E. Jones's Clothing

Detective Woolridge testified that she obtained a black hat and a pair of western boots from Carol Stevenson in March 1998. (RT 6/25/98 at 43-45.) Stevenson in turn testified that she had obtained the boots from Petitioner's mother. (*Id.* at 66-68.) Believing these items might be relevant in Petitioner's case, authorities had them tested for blood. (*Id.* at 45.) The tests were negative. (*Id.* at 84.)

Petitioner contends that during a pretrial interview, prosecutor White and Detectives Salgado and Woolridge "deliberately hid the fact that this hat and boots had been obtained and tested, keeping exculpatory evidence from Mr. Jones' counsel." (Dkt. 27 at 23.) Specifically, he contends that during an interview of the two detectives by defense counsel on April 20, 1998, White remained silent while the detectives gave evasive and misleading answers to his questions about whether they had found any items of clothing including hats, sunglasses, and cowboy boots in connection with clothing worn by Petitioner. Three days later, the State disclosed the hat, boots, and lab results to Petitioner. (ROA at 305.)

In rejecting this claim, the PCR court stated:

> Although disclosure of the cowboy hat, boots and lab results was not accomplished in as timely a manner as Petitioner would have preferred, the items were revealed by the Prosecutor almost two months prior to the initiation of trial. That would seem adequate time for Petitioner's counsel to prepare for trial if the items were considered potentially exculpatory evidence. Additionally, Petitioner's allegation that White and the detectives worked in concert to misconstrue the evidence and mislead Jones' counsel is not supported by the record. Although the answers provided to Petitioner's counsel by the detectives were understandably less responsive than desired, White's explanation that the detectives responded in that way because, at the time, the State could not directly link the clothing to Jones appears reasonable. In the motion hearing conducted on May 4, 1998, Mr. Larsen agreed that he had no basis for an allegation of bad faith by the State in this matter and the Court agreed, finding that the need to do further discovery "is not the fault of either side." The Court further notes that the United States Supreme Court has pointed out that the touchstone of due process in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940 (1982). The Court sees no evidence that Jones was denied a fair trial. When viewed in relation to the totality of the evidence presented by the State, the delay in disclosing the cowboy hat, boots and lab tests results to Petitioner is insufficient to sustain a claim for relief. Therefore, Petitioner's argument must be rejected.

(ROA-PCR doc. 70 at 12.) This Court agrees.

Petitioner's assertion of prosecutorial misconduct is predicated on the notion that exculpatory evidence – clothing possibly belonging to Petitioner that was obtained and tested for blood with negative results – was withheld from the defense. However, to warrant relief under *Brady*, Petitioner must establish that the government willfully or inadvertently suppressed material evidence. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). It is undisputed that, despite the evasiveness of the detectives during the April 1998 interviews, the evidence was disclosed to the defense nearly two months prior to trial. Thus, this claim fails. The state court's ruling was not objectively unreasonable.

F. Summary of Claim 1

Petitioner's allegations of prosecutorial misconduct lack merit. As such, he has failed to establish prejudice from appellate counsel's omission of these claims on appeal, and the state court's denial of his appellate ineffectiveness claim was not based on an unreasonable application of law or determination of fact. *See Gonzalez v. Knowles*, 515 F.3d 1006, 1017

(9th Cir. 2008) (counsel cannot be deemed ineffective for failing to raise claims which have no merit); *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001) (appellate counsel may not be held ineffective for failing to raise claims that have no merit). As a result, Petitioner has failed to establish cause and prejudice for the default of Claim 1's allegations in state court.

G. Closing Argument

In Claim 12, Petitioner asserts that during closing argument the prosecutor improperly referred to the possibility of a death sentence, compared Petitioner to Ted Bundy and John Wayne Gacy, and asked the jury to return a guilty verdict on behalf of the victims and their families. (Dkt. 27 at 52-53; *see also* RT 6/25/98 at 98-99, 193-94.) Petitioner argues that these statements so infected the trial with unfairness that it amounted to a violation of due process and that the trial court erred in denying his motion for mistrial. (Dkt. 27 at 53.)

The Arizona Supreme Court thoroughly addressed this claim on direct appeal, finding that although some of the remarks were inappropriate, Petitioner was not deprived of a fair trial:

> Jones argues that the prosecution's reference to the death penalty in closing argument constituted reversible error. We have recognized that calling attention to the possible punishment is improper because the jurors do not sentence the defendant. *See State v. Cornell,* 179 Ariz. 314, 327, 878 P.2d 1352, 1365 (1994). Jones, however, has taken the challenged statement out of context.
>
> In the midst of his closing, during his explanation of reasonable doubt, the prosecutor made a single reference to the death penalty:
>
> > This is a first-degree murder case and one of the possible sentences – it's up to the Judge, of course – is the death penalty. The State has to prove a case beyond a reasonable doubt, and that burden, beyond a reasonable doubt, is exactly the same in this case as it is in a burglary case or a drunk driving case. The burden does not get higher because of the nature of the charges.
>
> (R.T. 6/25/98, at 98-99.) This statement is the only reference to the death penalty in over 100 pages of closing argument. Jones did not ask for a curative instruction; he only made a general objection. We hold the statement does not constitute reversible error because it does not violate either of the concerns in [*State v. Hansen*, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988)].
>
> First, the reference to the death penalty does not call attention to a fact that the jurors would not be justified in considering during their deliberations.

In fact, the prosecutor stated that the possibility of the death penalty should *not* influence a determination of reasonable doubt. Second, the probability that the statement improperly influenced the jurors was very low. The jurors had been told from the very beginning of the trial, through both direct statements and voir dire questions, that the prosecution was seeking the death penalty. The prosecutor did not commit misconduct by making a brief reference to the death penalty in the context of discussing the burden of proof.

The second statement at issue concerns the reference to noted serial killers. Jones argues that these references were irrelevant and used only to inflame the jury. During the closing, the prosecutor stated:

> The defendant is a nice guy. He's polite. I don't think there is any natural law or genetic evidence that murders aren't also polite. Have you heard of Ted Bundy? John Wayne Gacy? Serial murderers, and I am not calling him a serial murders [sic], who were very polite. Politeness has nothing to do with it.

(R.T. 6/25/98, at 193.) The state concedes that there was no mention of either Bundy or Gacy during the actual trial. It does not agree, however, that the prosecutor necessarily committed error when referring to them. Lower courts have recognized that jurors may be reminded of facts that are common knowledge. *See State v. Adams,* 1 Ariz. App. 153, 155, 400 P.2d 360, 362 (1965). The prosecutor, by referring to famous serial killers, did not introduce evidence completely outside the realm of the trial, but rather drew an analogy between Jones's attitude at trial and that of well-known murderers. The error, if any, could not have affected the outcome of the trial.

Finally, Jones argues that the prosecution's plea for a guilty verdict on behalf of the victims and their families requires a reversal. Although this reference involves more questionable statements, it does not rise to the level of misconduct.

In *State v. Ottman,* we held that the prosecutor's statements concerning the victim's wife were improper, but did not reverse because the trial court gave a limiting instruction. 144 Ariz. 560, 562, 698 P.2d 1279, 1281 (1985). The facts of that case are far more egregious than those considered here. In *Ottman,* the prosecutor asked the jury to

> think of another woman [the victim's wife] who will be waiting for your verdict too.
>
> On December 16th at about 7:30 in the evening she had everything to look forward to. She had her house here, they were retired, husband had a part-time job, her children are fine and well in New Jersey and at 9:30 she's at the hospital with her husband and he's dead. I can guarantee you that her life is totally destroyed. She had nothing to look forward to, nothing.
>
> You may think sympathy for someone else but in terms of that woman, she wants justice and that's your duty to as jurors.

> *Id.* Yet, even in light of these emotional remarks, we found any error was cured because the trial judge admonished the jury to ignore statements invoking sympathy. In contrast, the prosecutor in this case made a single remark: "I ask that you find him guilty on behalf of those people and their families and the people of the State of Arizona." (R.T. 6/25/98, at 194.) The prosecutor did not attempt to inflame the jury or make an emotional plea to ease the suffering of the poor families. Those statements do not rise to the level of misconduct. Thus, the trial court properly denied the motion for a mistrial.

Jones, 197 Ariz. at 305-07, 4 P.3d at 360-62.

In determining if a defendant's due process rights were violated by a prosecutor's remarks during closing argument, a reviewing court "must consider the probable effect of the prosecutor's [comments] on the jury's ability to judge the evidence fairly." *United States v. Young*, 470 U.S. 1, 12 (1985). To make such an assessment, it is necessary to place the prosecutor's remarks in context. *See Boyde v. California*, 494 U.S. 370, 385 (1990); *United States v. Robinson*, 485 U.S. 25, 33-34 (1988); *Williams v. Borg*, 139 F.3d 737, 745 (9th Cir. 1998). In *Darden*, for example, the Court assessed the fairness of the petitioner's trial by considering, among other circumstances, whether the prosecutor's comments manipulated or misstated the evidence; whether the trial court gave a curative instruction; and the weight of the evidence against the accused. 477 U.S. at 181-82.

The Court concludes that none of the allegedly improper remarks, considered either separately or cumulatively, so infected the trial with unfairness as to deny Petitioner his federal constitutional rights. None of the references misstated the evidence, and the record does not indicate that Petitioner sought a curative instruction. Moreover, the trial court instructed the jury that statements made by counsel during argument are not evidence and that its verdict must be based only on admissible evidence presented during trial. (*See* RT 6/25/98 at 197.) Finally, there was substantial evidence of Petitioner's guilt. The Arizona Supreme Court's rejection of this claim was not based on an unreasonable application of the law or determination of the facts.

II. Ineffective Assistance of Counsel

In Claim 2, Petitioner asserts numerous allegations of ineffective assistance of trial

counsel. Respondents acknowledge these claims were properly exhausted in state court. (Dkt. 34 at 33.)

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. at 687-88. The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. To prove deficient performance, a defendant must also overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Trial counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"; "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Hayes v. Woodford*, 301 F.3d 1054, 1066 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 691). To determine whether the investigation was reasonable, the court "must conduct an objective review of [counsel's] performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (citation and quotation marks omitted). "In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made and by giving a 'heavy measure of deference to counsel's judgments.'" *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (quoting *Strickland*, 466 U.S. at

689, 691).

With respect to *Strickland*'s second prong, a petitioner must affirmatively prove prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

A court need not address both components of the inquiry, or follow any particular order in assessing deficiency and prejudice. *Strickland*, 466 U.S. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice, without evaluating counsel's performance, then that course should be taken. *Id.*

Under the AEDPA, this Court's review of the state court's decision is subject to another level of deference. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002); *see Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (noting that a "doubly deferential" standard applies to *Strickland* claims under the AEDPA). Therefore, to prevail on this claim, Petitioner must make the additional showing that the state court, in ruling that counsel was not ineffective, applied *Strickland* in an objectively unreasonable manner. 28 U.S.C. § 2254(d)(1).

A. Failure to Investigate David Nordstrom

Petitioner contends that if trial counsel had been more diligent in investigating David Nordstrom, he would have discovered "a false report by David that [Scott] Nordstrom had threatened his family, as well as David's efforts to set up a scam to sue Pima County." (Dkt. 27 at 28.) To support the latter assertion, Petitioner cites interviews conducted by police with two individuals, Buddy Carson and Eddie Santa Cruz. Specifically, Petitioner contends:

> When Officer Mace met with Carson, Carson gave him three handwritten notes that Carson claimed he had received from David. One of the notes concerns a scheme that David had devised to have someone assault him while he was in jail so that he could sue Pima County. This scheme was repeated in a second coded note given to Carson from David and turned over to Mace. The materials given to Mace were analyzed by a forensic document analyst who found that they were all authored by David. In addition, another inmate,

> Eddie Santa Cruz, gave a statement corroborating Carson and implicating David, rather than Mr. Jones, in the murders.

(*Id.* (citations omitted).)

In rejecting this claim, the state PCR court stated:

> Petitioner alleges that Jones' trial counsel did not properly investigate false reports by David Nordstrom that Scott Nordstrom threatened his family and himself or his related letters to Buddy Carson to try to set up a scam to sue Pima County. [The] Court is unwilling to find fault when conclusory allegations are not supported by substantive argument. To the contrary, the record reflects evidence that trial counsel gave attention to these matters but determined that other issues should take priority. Moreover, the record reflects at least two instances that establish that the reports that Scott Nordstrom threatened both David and his family were credible. The record also indicates that trial counsel was well aware of both Buddy Carson and Eddie Santa Cruz but decided that presentation of either individual would have been detrimental to his case. Which witnesses to present, or whether to present any witnesses, are strategic decisions left to the professional discretion of the attorney. *State v. Dalgish*, 131 Ariz. 133, 139-40 (1982). It is not likely that there was any prejudice to the defense. Both the trial court and the Arizona Supreme Court concluded in *Nordstrom* that Carson's testimony could not have effected the outcome of that case and there is no reason to believe that he would have had any greater impact in *Jones*. Also, Santa Cruz' reputation as a notorious jailhouse snitch likely would have opened him up to a damaging impeachment by the defense.

(ROA-PCR doc. 70 at 18.) The Court agrees.

Petitioner provides no evidence to support his claim that David faked a threat from his brother. Conversely, the record indicates that Nordstrom's defense counsel stipulated during Scott's trial that Scott had sent David a note threatening to kill him. (ROA-PCR doc. 58, Ex. I.) In addition, Detective Woolridge stated in a report that Buddy Carson informed her that Scott said he was going to kill David. (ROA-PCR doc. 58, Ex. U at 3.)

Nor has Petitioner provided any evidence to support his assertion that counsel failed to investigate these issues, as opposed to exercising his professional judgment not to call Buddy Carson and Eddie Santa Cruz as witnesses. The PCR court concluded that counsel was aware of Carson and Santa Cruz and chose not to call them because of their lack of credibility. Both were convicted criminals and the PCR court noted that Santa Cruz was "a notorious jailhouse snitch." Petitioner has not contested these findings.

Finally, Petitioner cannot establish prejudice from the alleged failure to call Carson

or Santa Cruz. The record reveals that "the defense attacked David's credibility on every basis." *Jones*, 197 Ariz. at 300, 4 P.3d at 355. For instance, counsel brought out that David was a convicted felon, habitually used drugs and alcohol, violated the terms of his probation (including his curfew), obtained no steady employment, possessed illegal firearms, falsified employment records, and lied to police. (RT 6/23/98 at 161-64.) David's stepmother called him a "liar," and his natural mother characterized him as a "manipulative," "conniving," and "untruthful" person. (RT 6/25/98 at 55, 85.) In addition, the defense impeached David numerous times with prior inconsistent statements to police and pointed out that he received virtually no punishment for his admitted role in the Moon Smoke Shop murders. Finally, defense counsel argued to the jury that David was the triggerman, based on his admitted participation in the smoke shop murders and his possession of the .380 handgun. (RT 6/18/98 at 37-38; RT 6/25/98 at 156-58.) Given the abundance of damaging impeachment evidence presented at trial and defense counsel's aggressive use of it to attack David's credibility, it is not reasonable to conclude that additional allegations from Carson and Santa Cruz would have resulted in a different verdict. The PCR court's ruling was not based on an unreasonable application of *Strickland* or an unreasonable determination of the facts.

B. Failure to Investigate Kicked-In Door

Petitioner contends that if counsel had been better prepared he could have pointed out inconsistencies in the testimony provided by Detectives Woolridge and Godoy with respect to the kicked-in door at the Moon Smoke Shop. He asserts that the implication that the robbers kicked in the door is not accurate and that this information could have impeached Lana Irwin's testimony. (Dkt. 27 at 29.)

In denying relief on this claim, the PCR court stated, in pertinent part:

> The kicked-in door was but one of the dozen or so correlations with the facts of the crime that were adduced from the testimony of Lana Irwin about the conversations she overheard between Jones and Coates. The Court is not convinced that, had an issue been made of the kicked-in door, it would have shaken the credibility of Irwin or changed the outcome of the trial.

(ROA-PCR doc. 70 at 19.) This Court agrees.

As already noted with respect to Claim 1-A, the issue of the "kicked-in" door was merely one small part of the totality of Lana Irwin's testimony, much of which was corroborated by other evidence. In addition, although Irwin provided important evidence, David Nordstrom was the State's primary witness. Finally, had counsel further investigated and pursued the door issue, the State would likely have clarified the existence of two doors in the rear area of the smoke shop and argued that although police kicked in the storage room door, that fact did not eliminate the possibility that Nordstrom had kicked or struck the bathroom door to get to Hardman. Engles overheard one of the robbers shout (presumably to Hardman) to "[g]et the fuck out of there," Hardman's body was found in front of the bathroom, and the bathroom door had some kind of mark possibly indicating it had been kicked. Thus, the Court concludes there is no reasonable probability of a different verdict had defense counsel more thoroughly investigated the kicked-in door issue.

C. Failure to Challenge David Nordstrom's Alibi

Petitioner argues that counsel failed to effectively challenge David Nordstrom's alibi that he could not have been present during the Union Hall murders because the electronic monitoring system indicated he was at home. (Dkt. 27 at 29.) Specifically, Petitioner contends that counsel should have more effectively challenged Ebenel's and Matthews's testimony about the electronic monitoring system used to verify David's whereabouts. (*Id.* at 29-30.) Petitioner also contends that additional witnesses could have testified that Petitioner was sometimes out past curfew. (*Id.* at 30.)

The PCR court rejected this claim:

> It appears to the Court that Petitioner's issue is dissatisfaction with the method used by trial counsel to challenge David Nordstrom's alibi and not that a challenge was not mounted. The record shows that trial counsel did pursue a strategy of attacking the accuracy of the parole records and arguing that the alibi could not be supported. Petitioner argues that trial counsel should have attacked David's alibi by calling other witnesses. The Court is not willing to speculate on what results would have been achieved had trial counsel followed the approach now recommended by Petitioner. The standard articulated by *Strickland* is whether counsel's performance was deficient and that "but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Proof of effectiveness must be a demonstrable

reality rather than a matter of speculation.

(ROA-PCR doc. 70 at 19.)

Review of the trial record indicates that counsel cross-examined Ebenal and Matthews on the reliability of the electronic monitoring system as well as the record keeping relating to it. Ebenal admitted that the system was not fool-proof. (RT 6/23/98 at 262.) Matthews acknowledged that the system was not tested until 18 months after the night in question and that, although the same type of equipment was tested, it may not have been the same equipment in operation on June 13, 1996. (RT 6/24/98 at 48.) During closing argument, defense counsel re-emphasized that the equipment was not fool-proof and that Matthews conceded during direct examination that the equipment works only 99 percent of the time. (RT 6/25/98 at 157-58.) To bolster this argument, counsel noted that David testified he had a 5:30 p.m. curfew the day of the smoke shop murders, but that the system did not record a violation even though, by his own admission, he was present during those crimes and that they occurred after 6:00 p.m. (*Id.*) Counsel also questioned whether a test on a system 18 months after the fact revealed anything about its reliability at the time of the Union Hall murders. (*Id.*)

Petitioner contends that two other witnesses, Deborah Collins and David Nordstrom's employer, John Mikiska, could have testified that David was occasionally out at night or working beyond his curfew.[7] (Dkt. 27 at 30.) Even assuming the veracity of this evidence, it does not establish that there were *unrecorded* curfew violations. Petitioner provides no specifics as to time on these occasions nor does he allege that the monitoring system did not record curfew violations. In fact, Ebenal testified that some violations were documented when Petitioner was found to have gone to work outside of his curfew hours. (RT 6/23/98

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[7] Deborah Collins testified during Scott Nordstrom's trial that David Nordstrom baby sat for her friend's daughter "after dark" on two occasions in May 1996. (Dkt. 28, Ex. 8.) John Mikiska testified at Nordstrom's trial that David occasionally worked late and had to call a number to let someone know when he would not be home by his curfew. (Dkt. 28, Ex. 12.)

at 250-52.) In addition, although Petitioner testified that he had 5:30 p.m. curfew on the night of the smoke shop robbery, Ebenal could not recall David's curfew for that date and said it was 7:15 p.m. on the night of the Union Hall robbery. (*Id.* at 259.)

The Court concludes that even if counsel had more thoroughly cross-examined Ebenal and Matthews and presented Collins and Mikiska as witnesses, there is no reasonable probability these efforts would have led to Petitioner's acquittal. Petitioner has not shown that the state court's ruling on this claim was based on an unreasonable application of *Strickland* or determination of the facts.

D. Failure to Request Immunity for Zachary Jones

Petitioner's trial investigator documented that on April 23, 1998, he interviewed Zachary Jones, an inmate at the Pima County Jail where David Nordstrom was also in custody.[8] Zachary told him that he overheard David tell another inmate that David was going to lay blame for "all my bad deeds" on Petitioner. (ROA at 322.) The investigator noted that Zachary Jones was willing to testify. (*Id.* at 323.) At some point, defense counsel learned that Zachary might exercise his rights under the Fifth Amendment and refuse to testify.

On June 17, 1998, just prior to commencement of trial, the court held a hearing "at the request of the defense who have indicated that they wish to speak I guess a second time with Zachary Jones and also as to what his position will be if he is called as a witness in this case as he apparently will be with regard to the Fifth Amendment." (RT 6/17/98 at 2.) Zachary's attorney stated to the court that he had advised Zachary to "take the Fifth Amendment" if called to testify. (*Id.* at 2-3.) Later, Petitioner's counsel told the court why he wished to call Zachary Jones to testify:

> Zachary Jones spoke at length [to my investigator] about a conversation that he had with David Nordstrom, that Zachary Jones had information from Nordstrom that: Someone out there who is almost my twin brother, I can lay all my bad deeds on, so I can have a second chance at life.
>
> He also acknowledged sending some letters to [Robert] Jones, which

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[8] Zachary Jones is unrelated to Robert Jones. (Dkt. 27 at 32.)

> I have, signed by Zachary Jones, outlining basically what he put into the interview with [my investigator].

(RT 6/17/98 at 6.)

At this point, the prosecutor stated:

> It is the State's belief, and I believe we have a witness who will testify if need be, that there was a conspiracy in the Pima County Jail on the part of Mr. Robert Jones and other inmates to solicit inmates to fabricate accounts about David Nordstrom bragging that he had pulled the wool over the State's eyes and he had really been personally responsible for these killings.
>
> It is our position that Mr. Robert Jones, either personally or through others, was soliciting people to make those statements.
>
> It is my position that Mr. Zachary Jones was solicited by the defendant or others to make such a statement and did.
>
> . . . .
>
> Here's why I think Mr. Zachary Jones may have a valid Fifth Amendment claim. If he comes into court and says and sticks with the account that Mr. Larsen has given and I can prove that that is false, he is committing perjury.
>
> If he comes into court and says, and I think there is some possibility that, okay, you know, I didn't ever have this conversation with David Nordstrom, he is admitting to participating in a conspiracy to commit perjury because he will have to admit that he agreed with Robert Jones to falsify the story about David Nordstrom and submit it to officials involved in a criminal investigation.

(*Id.* at 7-8.)

The following week, defense counsel again indicated his intention to call Zachary as a witness. (RT 6/25/98 at 5.) In response, Zachary's attorney reiterated an intention to have Zachary take the Fifth, noting prosecutor White's statement to the court the previous week, that if he believed Zachary testified falsely and could prove it, Zachary could be exposed to prosecution for perjury.[9] (*Id.* at 7.) At that point, Zachary was called to testify. He conceded

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[9] In Claim 6 of his amended petition, Petitioner characterizes the prosecutor's remarks as an improper "threat" to prosecute Zachary Jones. On direct appeal, the Arizona Supreme Court disagreed with this characterization, finding that White's statements did not constitute a threat but were instead "remarks made to the court to explain Zachary's somewhat confusing decision to invoke the Fifth Amendment." *Jones*, 197 Ariz. at 301, 4 P.3d at 356. The court further noted that nothing in the record indicates White contacted

having a conversation with Petitioner but refused to provide any details, asserting his Fifth Amendment right to remain silent. (*Id.* at 11.) The Court upheld his right to decline to answer such questions and, as a result, defense counsel did not call him as a witness. (*Id.* at 12.)

Petitioner contends that counsel performed ineffectively by not seeking immunity for Zachary Jones so he could testify to what he overheard David Nordstrom say concerning his efforts to blame Petitioner for his deeds. (Dkt. 27 at 32.)

In denying relief on this claim, the PCR court stated:

> Petitioner contends that, if immunized, Zachary Jones could have testified to statements made by David Nordstrom indicating he was laying blame on Robert Jones. The Court notes that there is some question whether a request for immunity would have been successful. Eric Larsen indicated in an interview that the prosecution clearly had no intention of granting immunity. Also, the record shows that Prosecutor White believed Zachary Jones conspired to falsely impeach David Nordstrom and probably would have withheld immunity. Absent any proof that immunity could have been obtained and, consequently, that the result of the trial would have been different, the Court is unwilling to conclude that trial counsel was ineffective. Also, the Court is not convinced that Zachary Jones would have provided exculpatory evidence. In fact, the record shows that Zachary Jones' attorney indicated his client's testimony "could be of a prejudicial nature and little, if any, probative value." Failing to meet either prong of the *Strickland* test, the claim is rejected.

(ROA-PCR doc. 70 at 20.)

The Court agrees with the PCR court that Petitioner has failed to establish that defense counsel would have obtained immunity for Zachary Jones if he had sought to do so. In fact, the prosecutor indicated that he believed the proposed testimony from Zachary was probably

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Zachary directly or made any personal threats concerning his testimony. *Id.* This Court agrees and finds that Petitioner has failed to demonstrate that the Arizona Supreme Court's ruling on this issue was unreasonable. Although substantial interference by a prosecutor in a defense witness's free choice to testify may violate due process, *Webb v. Texas*, 409 U.S. 95, 97-98 (1972), here White was merely informing the court of the possible effects of Zachary's testimony. *See United States v. Risken*, 788 F.2d 1361, 1370-71 (8th Cir. 1986) (finding no misconduct where prosecutor's remarks were limited to warning witness about consequences of perjury and prosecutor made no threat to prosecute witness for other crimes or to retaliate for testifying).

a fabrication. (RT 6/25/98 at 7.) Thus, any claim that counsel could have succeeded in obtaining immunity for Zachary seems unlikely and, at best, speculative. Such a claim cannot sustain a finding of constitutional ineffectiveness. Counsel is not obliged to file a motion he reasonably believes would fail. *See Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999); *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994). Even if Zachary had testified, it is pure speculation that his testimony would have been exculpatory in light of his credibility problems, including the potential evidence alluded to by the prosecution that would show Zachary's story was false. Petitioner has failed to establish that the state court's denial of relief on this claim was based on an unreasonable application of *Strickland.*

E. Failure to Investigate Telephone Calls

Petitioner asserts that evidence introduced at Scott Nordstrom's trial showed that someone used a cell phone to make a series of calls to a pay phone near Petitioner's apartment in the minutes after the murders at the Moon Smoke Shop. (Dkt. 27 at 33; Dkt. 34 at 40.) The evidence established that Scott Nordstrom had access to the phone. During closing argument in Scott Nordstrom's trial, prosecutor White implied that Petitioner must have been trying to reach Chris Lee, his roommate who used that pay phone to page Petitioner. (Dkt. 28, Ex. 14.)

Petitioner contends that Lee was not his roommate at the time and thus no one would have attempted to call him at that number. He argues that the evidence shows the "only logical explanation" is that either Scott or David was calling Petitioner. He asserts that this was powerful evidence that Petitioner was not present during the Moon Smoke Shop murders and that counsel was ineffective for not further investigating the information.

In denying relief, the PCR court stated:

> Petitioner contends that trial counsel's failure to fully investigate the call made from Scott Nordstrom's cell phone on the night of the Moon Smoke Shop murders constitutes ineffective assistance of counsel. But Petitioner never articulates with any specificity evidence that the call was not investigated. In fact, there are indications in the record that Mr. Larson did look at Scott Nordstrom's cell phone and pager records. The Court notes that Petitioner's theory that the call could not have been placed by Jones calling his

> roommate, Chris Lee, is challenged by evidence in the record that Chris Lee admitted living with Jones on May 30 and that Jones admitted to Eric Larsen that he had participated in the Moon Smoke Shop crimes. Therefore, it is not likely that the outcome of the case would have been different had trial counsel pursued Petitioner's current theory concerning the phone call. Because neither prong is satisfied, the claim is rejected.

(ROA-PCR doc. 70 at 20-21.)

The Court agrees with the PCR court that Petitioner has not established ineffectiveness. First, he has proffered no evidence to support his conclusory allegation that counsel failed to investigate the cell phone calls. Second, although according to Petitioner "there is no admissible or record evidence of Mr. Jones admitting involvement in the Moon to his trial counsel," he does not deny telling Larsen that he was there and participated. (Dkt. 46 at 29.) Rather, he argues only that Larsen's statement to this effect, given to the State's attorney during an unrecorded telephone interview, is "undercut by Larsen's later statement, in response to a Bar Complaint by Mr. Jones as a result of this statement, where Larsen explains he was recalling a 'lighthearted' conversation about general criminal principles where Mr. Jones supposedly made a comment about it being his job to do the crimes and the police's job to catch him." (*Id.*) If Petitioner told Larsen he was at the smoke shop, Larsen ethically was prohibited from putting on evidence that Petitioner was not there. In any event, the Court notes that the calls, even assuming they were not placed by Petitioner, hardly exculpate him from the Moon Shop murders and have no bearing on the Union Hall crimes. Under these circumstances, Petitioner cannot establish that counsel's alleged failure to investigate the phone records amounted to ineffective assistance of counsel or that the state court's denial of this claim was unreasonable.

F. Failure to Research Pretrial Publicity

Petitioner asserts that two of the facts Lana Irwin claimed to overhear from Petitioner – that the Union Hall was a "red room" and that the victims had been shot in the back of the head – had been set forth in an article in a Tucson newspaper prior to her initial statement to police. (Dkt. 27 at 34.) Petitioner contends that had counsel cross-examined Irwin on this

point he could have effectively refuted any impression that she could only have learned this information from Petitioner.

The state PCR court rejected this claim:

> Petitioner's conclusory assertions do not prove that Larsen was unaware that these details were publicly released; in fact, the record contains evidence that Eric Larsen was acutely aware of the extensive amount of pretrial coverage that appeared in the media (see Motion for Change of Venue dated 4/15/98). The record also presents strong indications that Eric Larsen conducted an aggressive cross-examination of Lana Irwin including impeachment on a number of matters. The Court considers it unlikely that Jones was prejudiced by trial counsel's decision not to ask the additional questions. Impeaching Irwin concerning media publication of the fact that the victims were shot in the head or that the room was red would not necessarily have been effective. At trial, Irwin testified that she lived in Phoenix and had not read anything or heard anything on the news about the Tucson murders. Whether she had or not is not dispositive. Release of the article in the Arizona Daily Star on December 3, 1997 does not rule out the possibility that the jury would have believed that Irwin first learned of the details of the crimes during the conversations she overheard. Petitioner's argument fails both prongs and is rejected.

(ROA-PCR doc. 70 at 21-22.) The Court agrees.

Defense counsel thoroughly cross-examined Irwin. Both during direct exam and cross-examination, Irwin testified to being a drug addict who was in jail for possession of marijuana when she met investigators. (RT 6/19/98 A.M. at 51.) She was given a reduced sentence in return for her cooperation, as well as being housed at State expense in return for her testimony. (*Id.* at 52-53.) Counsel challenged Irwin's veracity by eliciting testimony that she initially told detectives she had a dream about a red room where people were killed, a story she admits she fabricated because she initially did not want to tell them how she came to know about the crimes. (*Id.* at 51, 66-67.) Moreover, as noted by the PCR court, Irwin lived in Phoenix at the time the article was published and testified that she had not heard or read anything about the crimes and did not read newspapers. Thus, questions by counsel regarding the Tucson article would likely have bolstered, not diminished, her credibility. (*Id.* at 73-74.) The state court's determination that there was no reasonable probability Petitioner would have been acquitted had counsel questioned Irwin about the article was not based on an unreasonable application of *Strickland.*

G. Failure to Interview Petitioner's Parole Officer

At trial, David Nordstrom, Lana Irwin, and David Evans each testified that Petitioner changed his appearance after the murders, cutting and dyeing his hair and beard from red to black. (RT 6/23/98 at 132; 6/19/98 A.M. at 43; RT 6/19/98 P.M. at 101.) Petitioner contends counsel was ineffective for failing to interview and call Petitioner's parole officer, who could have testified that Petitioner's appearance did not change.

In rejecting this claim, the PCR court noted that Petitioner had provided no evidence to support his assertion that defense counsel failed to contact Petitioner's parole officer. (ROA-PCR doc. 70 at 22.) The court also noted that the parole officer was not in contact with Petitioner after June 19, 1996, and the testimony from Nordstrom, Irwin, and Evans was that the change in Petitioner's appearance occurred after that date. (*Id.*)

This Court agrees with the PCR court that Petitioner has failed to establish that counsel was ineffective. Petitioner's cursory allegations are insufficient to establish ineffective assistance of counsel. He has failed to rebut the state court finding that his parole officer had no contact with him after June 19, 1996. *See* 28 U.S.C. § 2254(e)(1); *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir. 2001). Nor has he provided support for his claim that counsel failed to investigate this issue. Finally, Petitioner has not shown prejudice from this alleged omission. The state court's rejection of this claim was not unreasonable.

H. Failure to Review Nordstrom Trial Transcripts

Petitioner next asserts that counsel was ineffective for failing to review the transcripts from Scott Nordstrom's trial. He asserts that if counsel had read those transcripts he would have discovered the discrepancy in the detectives' testimony concerning the kicked-in door. (Dkt. 27 at 35.)

The PCR court rejected this claim, noting that it had already concluded "that the testimony about the kicked-in door did not prejudice Petitioner nor affect the verdicts." (ROA-PCR doc. 70 at 22.) The court further noted that the record established that trial counsel had reviewed some of the *Nordstrom* transcripts, attended some of the *Nordstrom*

trial sessions, entered into a "common defense" agreement and exchanged information with Nordstrom's counsel, and assigned an investigator to conduct investigation concerning Nordstrom's trial. (*Id.* at 23.) As already noted, the Court agrees that Petitioner was not prejudiced by any failure of counsel in failing to highlight the discrepancies in the detectives' testimony about the door. Petitioner has not shown that the state court's rejection of this claim was unreasonable.

I. Conflict of Interest

In his opening statement, defense counsel Larsen stated he was "a friend with the sister of one of [the victims]." (RT 6/18/98 at 35.) Petitioner now argues that Larsen had a conflict of interest that deprived him of effective assistance of counsel and prejudiced his defense.

The PCR court rejected this claim, finding "no authority that suggests that friendship with the relative of a victim, absent proof of an actual conflict, disqualifies an attorney from representing the defendant." (ROA-PCR doc. 70 at 23-24.) This Court agrees.

To establish an ineffective assistance of counsel claim based on a conflict of interest, it is not sufficient to show that a "potential" conflict existed. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002). Rather, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). An actual conflict of interest for Sixth Amendment purposes is one that "adversely affected counsel's performance." *Mickens*, 535 U.S. at 171. Petitioner has not established that Larsen actively represented conflicting interests or that any conflict of interest affected his performance. *See United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003) (petitioner must allege specific facts demonstrating that counsel's relationship with a third party adversely affected the defense or prevented pursuit of viable litigation strategy). Therefore, the state court's denial of this claim was not based an unreasonable determination of the facts or application of the law.

J. Failure to Challenge Grand Jury Testimony

Detective Salgado testified to the grand jury that "witnesses" told him that following the Moon Smoke Shop murders and the publication of sketches of the perpetrators, Petitioner changed his appearance and stopped wearing western-style attire:

> GRAND JUROR: So all we're basing this on is the statement from Mr. Nordstrom?
>
> SALGADO: That's part of it. And the fact that Robert Jones had had a vehicle that was similar to the suspect vehicle at the scene.
>
> The other witnesses that knew both David and Robert Jones, stating that Robert Jones always wore the cowboy hat and the western wear, and liked to wear sunglasses. And once the photographs were published, he immediately stopped wearing that type of clothing.

(RT 7/2/97 at 18-19.)

Petitioner contends that this information was provided solely by David Nordstrom and that Salgado gave the misleading impression that other witnesses confirmed it. He contends counsel "should have reviewed the transcripts and taken action, perhaps remanding for a determination of probable cause, because it was clear from the grand juror's question that jurors were not inclined to indict if 'all we are basing this on is the statement from Mr. Nordstrom?'" (Dkt. 27 at 36-37.)

In denying relief, the state PCR court stated:

> The record reflects that Detective Salgado had received information from at least two witnesses (David Nordstrom and Chris Lee) that Jones stopped wearing western garb. Salgado's reference to "several" people may be characterized as an exaggeration but not a falsehood as Petitioner claims nor does it provide a reasonable basis for a motion to remand. Additionally, as the State points out, the failure to seek a remand was mooted by Petitioner's conviction of the charges beyond a reasonable doubt.

(ROA-PCR doc. 70 at 24-25.)

The Court agrees that Salgado's testimony is more properly characterized as an exaggeration than an outright falsehood. As such, the Court concludes that the state court's finding that there would have been no reasonable basis for a remand to the grand jury is

based on a reasonable determination of the facts. Moreover, even assuming there was error in permitting Salgado to testify as he did, the error was harmless and any claim of ineffective assistance predicated on it cannot rise to the level of a constitutional violation. *See United States v. Mechanik*, 475 U.S. 66, 70 (holding that any error with respect to the charging decision by the grand jury is rendered harmless by subsequent conviction by the petit jury).

K. Failure to Impeach Witnesses With Prior Inconsistent Statements

Petitioner provides no specific examples to support this assertion. Without more, this claim is insufficient to establish ineffective assistance of counsel.

L. Failure to Take Pictures of Petitioner's Truck

David Nordstrom testified that he, Scott Nordstrom, and Petitioner rode in Petitioner's truck to the Moon Smoke Shop. However, witness Noel Engles, one of the shop employees, testified that immediately after the robbery he ran out the back door and saw two people in a light-colored truck driving away. (RT 6/18/98 at 54.) To counter this testimony, the State presented staged photos of a truck with three people in the cab but with the person in the middle "bending forward" so as not to be visible. (RT 8/24/98 at 86-90.)

Petitioner contends that defense counsel should have staged his own presentation by taking pictures of a truck like Petitioner's to refute the State's demonstration and to show how unlikely it would have been for three individuals the size of Petitioner and the Nordstroms to be seated in the cab of Petitioner's truck and not be seen by Engles. (Dkt. 27 at 37.)

In denying this claim, the PCR court stated:

> Petitioner alleges ineffective assistance of counsel because Jones' trial counsel did not present photographs to show how unlikely it would have been for a witness to observe only two individuals in the truck when three were present. The State had presented the results of an experiment that demonstrated it was possible. *State v. Beaty*, supra, held that matters of trial strategy are not grounds for ineffectiveness claims. Eric Larsen chose to challenge the State's argument by devoting two pages of his closing argument to attacking the experiment and the witness's credibility. Petitioner's speculation as to the possibility of an alternate experiment is noted but there is no evidence that it would have achieved any greater degree of success. Therefore, because the claim involved trial tactics and no prejudice has been

demonstrated, the claim is rejected.

(ROA-PCR doc. 70 at 26.)

During closing argument, defense counsel vigorously challenged the prosecution's experiment showing that three adult males could have been in the car with one hidden from view. (RT 6/25/98 at 160-61.) Petitioner's assertion that counsel would have been more effective if he had taken pictures of a truck and produced his own experiment to counter the State's theory is speculative and insufficient to establish a claim of ineffectiveness. Counsel emphasized that Engles saw only two people in the truck, not three as claimed by David Nordstrom, and challenged the plausibility of the State's theory. It is unclear that producing pictures of a truck to help demonstrate this point would have significantly benefitted the defense. Petitioner has not demonstrated that the state court's ruling was based on an unreasonable application of the law or determination of the facts.

M. Failure to Raise Issues on Appeal

Petitioner asserts that appellate counsel rendered ineffective assistance by failing to raise claims regarding prosecutorial misconduct. In Part I of this Order, the Court has already determined that appellate counsel's failure to raise prosecutorial misconduct allegations on appeal was not prejudicial; therefore, this aspect of Petitioner's claim lacks merit.

Petitioner also alleges that appellate counsel performed ineffectively by failing to raise arguments concerning mitigation evidence. Petitioner contends that "[t]here were substantial mitigation issues that should have been argued on appeal, in particular, the fact that Mr. Jones did not simply have a 'dysfunctional family background,' but was constantly and severely physically and emotionally abused during his entire youth by his mother, two different stepfathers, and grandmother." (Dkt. 27 at 38.) Petitioner cites the fact he was taught to steal cars by his stepfather "and witnessed considerable violence and abuse at a young age." (*Id.* at 39.) He contends that if appellate counsel had "argued that greater weight should have been given to these mitigating factors, there is at least a reasonable

possibility that the Arizona Supreme Court, in its reweighing, would have found that Mr. Jones should have received life sentences rather than death." (*Id.*) Respondents concede that Petitioner exhausted a general allegation of appellate ineffectiveness in his PCR petition, but contend that the specific arguments Petitioner now makes are procedurally defaulted because the new allegations are fundamentally different from the conclusory claim presented in the PCR petition. (Dkt. 34 at 48.) The Court agrees.

In his PCR petition, Petitioner asserted simply that appellate counsel "failed to raise any issues relating to mitigation at sentencing." (ROA-PCR doc. 16 at 36.) Petitioner did not assert in state court that appellate counsel should have argued as mitigating factors on appeal the fact that he suffered severe physical and emotional abuse by relatives, witnessed considerable violence and abuse at a young age, and was taught by his stepfather to steal cars. As a result, the claim raised in the amended habeas petition was not properly exhausted in state court. Because the time to present such a claim has long since passed, and because Petitioner has presented no cause for the failure to raise these allegations in his state PCR proceeding, this aspect of his appellate ineffectiveness claim is procedurally barred.

Moreover, the claim lacks merits. As noted by the PCR court in its order denying relief on Petitioner's conclusory appellate ineffectiveness claim, the Arizona Supreme Court undertook an independent review of the existence of aggravating and mitigating factors to determine if imposition of the death penalty was appropriate in this case. (ROA-PCR doc. 70 at 28-29.) The supreme court expressly noted that it was required to independently review the mitigation evidence even though Petitioner did not raise on appeal any issues regarding mitigating factors. *Jones*, 197 Ariz. at 311, 4 P.3d at 366. The court then considered whether Petitioner lacked the capacity to appreciate the wrongfulness of his conduct, was a minor participant in the crimes, and had good character. *Id.* at 311-13, 4 P.3d at 366-68. It also considered his dysfunctional family history, including the fact he was abused by his stepfathers, mother, and grandmother and was introduced to drugs by his stepfather; his history of drug abuse; the fact that he had provided emotional and financial support to his

mother and sister; his good behavior during trial; his potential for rehabilitation; familial support; and residual doubt. *Id.* at 313-14, 4 P.3d at 368-69. It is evident from a review of the Arizona Supreme Court's decision that there is no reasonable probability the outcome would have been different had appellate counsel specifically asked the court to consider, as mitigating factors in its independent review, that he suffered severe physical and emotional abuse by relatives, witnessed violence and abuse at a young age, and was taught by his stepfather to steal cars. The PCR court reasonably applied *Strickland* in rejecting this claim.

III. Jury Selection Issues

A. Erroneous Death Qualification

Prior to trial, Petitioner filed a motion asking the trial court to adhere to the standard enunciated in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), to determine whether a potential juror's views on the death penalty warranted removal for cause. (ROA at 150; *see also* RT 4/20/98 at 31-32.) In response, the trial court stated:

> The Witherspoon case, of course, involved a situation where the jury had a participation, participating role in sentencing.
>
> And I think that what this division has always done, of course, is to ask jurors whether they can set aside whatever feelings they might have about the death penalty and exclude it from having any effect on their determination of guilt or innocence.
>
> That's what I would propose to do in this case, not exactly in the form you have proposed from Witherspoon because I don't think that is applicable in this case because it is a different situation altogether with the Court determining punishment and the jury having no say in it whatever.

(RT 4/20/98 at 32.)

Prior to the start of trial, the court had prospective jurors fill out a questionnaire that included the following question:

> If Robert Jones is convicted of one or more counts of first degree murder in this case, it is a legal possibility that he could receive a sentence of death. In Arizona, a jury only decides the question of whether the defendant is guilty or not guilty; the jury does *not* decide the sentence to be imposed, nor does it make any recommendation to the court on the sentence to be imposed. The matter of the possible punishment is left solely to the court. Therefore, if you serve as a juror in this case, you will be required under your oath to disregard the possible punishment and not to let it affect in any way your decision as to

> guilty [sic] or innocence. *Can you disregard the possible punishment and decide the case based on the evidence produced in court?*

Jones, 197 Ariz. at 303, 4 P.3d at 358. After reviewing the completed questionnaires, the defense agreed to dismiss thirty jurors for cause based on their responses to this question as well as their opinions on media coverage. (RT 6/15/98 at 2.) Before agreeing to the dismissal, the defense did not request that any be subjected to further questioning.

During voir dire, the court referenced the death penalty question that had been on the questionnaire and asked if anyone had "very strong feelings one way or the other about the death penalty." (RT 6/17/98 at 54.) Three jurors responded and indicated support for imposition of capital punishment in the event of a conviction. (*Id.* at 54-55.) Defense counsel did not move to strike (although they did exercise peremptories against each), nor request further questioning.

In Claim 9, Petitioner contends that the trial court's failure to follow the guidelines provided in *Witherspoon* violated his constitutional rights. (Dkt. 27 at 50.) In particular, he alleges that *Witherspoon* "prohibits the exclusion of a juror who expresses qualms about capital punishment and requires that the court establish either that the juror would automatically vote against the imposition of capital punishment without regard to the evidence, or that the juror's attitude toward the death penalty would prevent him or her from making an impartial decision as to the defendant's guilt." (*Id.*) Instead, he contends, the trial court violated *Witherspoon* by simply telling prospective jurors "you will be required under your oath to disregard the possible punishment and not let it affect in any way your decision as to guilty [sic] or innocence." (*Id.*; *see also* RT 6/17/98 at 15-19.) Petitioner further contends that the language in the questionnaire used a standard found unconstitutional in *Adams v. Texas*, 448 U.S. 38 (1980). (*Id.*)

The Arizona Supreme Court rejected this claim on appeal:

> We have recognized that death-qualification is appropriate in Arizona, even though juries do not sentence: "[W]e have previously rejected the argument that, because the judge determines the defendant's sentence, the jury should not be death qualified. We have also repeatedly reaffirmed our

> agreement with *Witherspoon v. Illinois* and *Adams v. Texas*." Even more importantly, however, this Court has applied and adopted the more liberal *Wainwright v. Witt* test. In *Wainwright*, the Supreme Court took a step back from the rigid test articulated in *Witherspoon*, which required the prospective juror to unequivocally state that he could not set aside his feelings on the death penalty and impose a verdict based only on the facts and the law, and held that a juror was properly excused from service if the juror's views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" The trial judge has the power to decide whether a venire person's views would actually impair his ability to apply the law. For this reason, "deference must be paid to the trial judge who sees and hears the juror." Thus, we recognize that the trial judge has discretion in applying the test; the inquiry itself is more important than the rigid application of any particular language.
>
> Although the trial judge incorrectly stated that the *Witherspoon/Wainwright* standard did not apply because Arizona juries do not sentence defendants, in fact his approach complied with the constraints of *Witherspoon/Wainwright*.

Jones, 197 Ariz. at 302, 4 P.3d at 357 (citations omitted).

In *Witherspoon*, the Supreme Court held that a prospective juror may only be excluded if he indicates he is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of proceedings." 391 U.S. at 522 n.21. The court further held that the exclusion of jurors for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" violated the federal constitution. *Id.* In *Adams*, the Court held that a prospective juror's views on the death penalty could not be challenged for cause "unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." 448 U.S. at 45. In *Wainwright*, the Court reaffirmed the standard enunciated in *Adams*, holding that juror bias need not be established with "unmistakable clarity" but that dismissal for cause is appropriate if the prospective juror's views "prevent or substantially impair" his ability to follow the law. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

The Court agrees that any error by the trial court, in suggesting that the

Witherspoon/Wainwright standard did not apply because the jury did not determine sentence, was harmless. The questionnaire, which asked prospective jurors whether they "could disregard the possible punishment and decide the case based on the evidence produced in court," effectively met the requirements outlined in *Adams* and *Wainwright*. In addition, the court questioned jurors during voir dire on whether any had strong feelings about the death penalty. Petitioner has not argued that any prospective juror was erroneously struck for cause based on qualms about the death penalty. The Court finds that Petitioner has failed to show that his federal constitutional rights were violated or that the ruling of the Arizona Supreme Court was either contrary to or based on an unreasonable application of controlling law.

B. Refusal to Life Qualify Jurors

In Claim 10, Petitioner contends that the trial court refused to "life qualify" prospective jurors in contravention of *Morgan v. Illinois*, 504 U.S. 719 (1992). In *Morgan*, the Supreme Court held:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

504 U.S. at 729.

In rejecting this claim, the Arizona Supreme Court noted, as a threshold matter, that "[b]ecause judges, rather than jurors, sentence in Arizona, we have never held *Morgan* applies." *Jones*, 197 Ariz. at 303 n.4, 4 P.3d at 358 n.4. The court further found that the trial court's voir dire satisfied the constraints of *Morgan* because (1) defense counsel did not request any specific *Morgan*-type questions, and (2) the trial court specifically asked whether jurors had strong feelings "either way." *Id.* at 304, 4 P.3d at 359. As already noted, three

venirepersons responded that they favored application of the death penalty, but the defense neither moved to strike for cause nor requested further questioning of these individuals. Petitioner has not established that the decision of the Arizona Supreme Court rejecting this claim was either contrary to, or based on an unreasonable application of, clearly established Supreme Court law.

C. Unconstitutionality of Death Qualification

In Claim 11, Petitioner argues generally that "death qualifying" jurors violates his constitutional rights. Clearly established federal law holds that the death-qualification process in a capital case does not violate a defendant's right to a fair trial and impartial jury. *See Lockhard v. McCree*, 476 U.S. 162, 178 (1986); *Wainright*, 469 U.S. at 424; *Adams*, 448 U.S. at 45; *see also Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996) (death qualification of Arizona jurors is not inappropriate). As a result, the mere fact the trial court death-qualified jurors does not establish a federal constitutional violation.

D. Change of Venue

In Claim 13, Petitioner argues that the trial court's denial of his motion for a change of venue violated his rights to due process and an impartial jury. (Dkt. 27 at 54.) A criminal defendant in entitled to a fair trial by "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Therefore, "if pretrial publicity makes it impossible to seat an impartial jury, then the trial judge must grant the defendant's motion for a change of venue." *Casey v. Moore*, 386 F.3d at 906 (citing *Harris v. Pulley,* 885 F.2d 1354, 1361 (9th Cir. 1988)).

Petitioner's motion cited adverse pretrial publicity, including newspaper and television reports describing many of the facts surrounding the crimes, emphasizing the shocking circumstances, and depicting Petitioner in a less than favorable light. (ROA at 156-69.) Appended to the motion was a list of over 150 newspaper articles published between May 31, 1996, following the smoke shop killings, and March 1998, several months after Nordstrom's conviction. (*Id.* at 172-89.) The list provided only the headline and about 25

words of the article. (*Id.*) Also appended was an extensive 63-page list of television news reports (including brief "voice over" announcements and more extensive in-depth reports). (*Id.* at 191-253.)

In denying the motion for change of venue, the trial court stated:

> Undeniably, there has been a great deal of publicity about this case. But that in and of itself is not grounds for a change of venue. I think the Court can take precautionary measures in choosing a jury that will insure that whoever is selected to sit as a juror can do so impartially and set aside whatever media exposure they have experienced.

(RT 4/20/98 at 3-4.) On appeal, the Arizona Supreme Court affirmed:

> By the time Jones presented his motion to change venue, more than 850 print or television articles addressed the murders and the subsequent investigation. Although the trial court recognized the large amount of coverage, it noted that that fact alone was insufficient to require a venue change. Only a few of the articles mentioned Jones directly. Furthermore, the majority of the statements concerned largely factual contentions. The trial judge also took the precautionary steps necessary to choose an impartial jury. Thus, no presumption of prejudice arose.
>
> Additionally, Jones has failed to prove any actual prejudice. At the outset of the voir dire, both parties stipulated to the removal of thirty venire persons, some of whom answered the written questionnaire and indicated that their feelings about the case, formulated through the media coverage, could not be changed. Importantly, almost all of the jurors who did have exposure to the publicity stated that their exposure was negligible, and every juror who admitted he could not set aside his feelings concerning the media coverage was eventually excused. Under the totality of the circumstances of the case, the media coverage alone was not so great as to create a presumption of prejudice, and defendant has failed to present evidence of any actual prejudice in this case.

Jones, 197 Ariz. at 307, 4 P.3d at 362 (citations omitted). This Court has independently reviewed the record, examining the exhibits proffered by Petitioner for "volume, timing, and content," *Harris v. Pulley,* 885 F.2d at 1360, and concludes that the Arizona Supreme Court's characterization of the record is not based on an unreasonable determination of the facts.

Jury selection in Petitioner's trial began in June 1998, two years after the crimes. During this period, numerous items appeared in the two local newspapers: the Arizona Daily Star and the Tucson Citizen. From June 1996 until January 18, 1997, the papers published a combined total of 32 articles, reporting on either the facts of the crimes, the loss to the

victims' families, the on-going investigation, or the upswing in violent crime generally. (ROA at 185-89.) After the Nordstrom brothers were arrested in January 1997 and through Scott's trial and conviction in December 1997, an additional 111 items appeared. (*Id.* at 173-84.) It appears from the limited information available in the record that the vast majority of these articles centered on the brothers' arrests, David's plea, the search for the weapons, and Scott's six-week trial. (*Id.*) Although Petitioner was indicted during this period, only 11 articles focused on him. (*Id.*) Of these, two described seizures of Petitioner's letters and trucks, three reported his indictment, one provided some personal background information ("Broken homes, drug abuse history link Jones, David Nordstrom," Ariz. Daily Star, Jul. 3, 1997), one revealed that Petitioner was also pending charges for a robbery-murder in Phoenix ("Jones still in custody in Phoenix murder," Ariz. Daily Star, Jul. 3, 1997), and four reported his arraignment and trial date. (*Id.* at 180-84.) Of the remaining 13 articles that appeared in the first several months of 1998, two reported that Petitioner had been charged with having a handcuff key in his cell and the remainder related to "top stories of 1997," Nordstrom's sentencing, and a lawsuit from the victims' families stemming from failure to supervise paroled felons. (*Id.* at 172-73.)

The record also contains a list of what appear to be summaries of hundreds of television broadcasts over a 15-month period. (ROA at 191-253.) Although extensive, this report includes numerous brief "sound bites" and broadcasts on multiple stations throughout each reporting day. Between January 1997 and March 1998, local television stations broadcast some kind of report concerning the smoke shop and Union Hall crimes on 99 separate days, 40 of which were during Scott's trial. (*Id.*) As with the newspaper articles, these broadcasts were mostly factual in nature and focused on the crimes and investigation, the Nordstrom brothers' arrests, David's plea deal, the search for the weapons, Scott's trial, supervision of parolees, and various other legal proceedings. (*Id.*) News stories concerning Petitioner occurred on 16 different days: five days of coverage in January and February 1997 after Petitioner was identified as the third suspect; eight days between May and August 1997

reporting on grand jury proceedings, indictment, and arraignment; two in December 1997 following Nordstrom's conviction, relating to Petitioner's impending trial date; and one in March 1998 reporting on the confiscated handcuff key. (*Id.* at 195, 197, 199-200, 205, 212-13, 215-18, 249-52.)

In addressing pretrial publicity, the United States Supreme Court has discussed two types of prejudice: presumed prejudice, where the setting of the trial is inherently prejudicial, and actual prejudice, where voir dire is inadequate to offset extensive and biased media coverage. *Murphy v. Florida*, 421 U.S. 794, 798 (1975). Petitioner argues only that the state courts should have found presumed prejudice. (*See* Dkt. 27 at 55.) A court presumes prejudice only in the face of a "trial atmosphere utterly corrupted by press coverage," *Dobbert v. Florida*, 432 U.S. 282, 303 (1977), or a "wave of public passion that would make a fair trial unlikely by the jury," *Patton v. Yount*, 467 U.S. 1025, 1040 (1984). The presumption of prejudice is "rarely applicable and is reserved for an 'extreme situation.'" *Harris*, 885 F.2d at 1361 (internal citations omitted). The Supreme Court has found presumed prejudice in only three cases: *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532, 536 (1965); and *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

In *Rideau*, the defendant's detailed 20-minute confession was broadcast on television three times. 373 U.S. at 724. In a community of 150,000, nearly 100,000 people saw or heard the broadcast. *Id.* "What the people of Calcasieu Parish saw on their television sets was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff." *Id.* at 725. As the Supreme Court explained, the televised confession "*was* Rideau's trial," and "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id.* at 726 (emphasis added).

In *Sheppard*, "massive, pervasive and prejudicial publicity" prevented the defendant from receiving a fair trial. 384 U.S. at 335. Much of the publicity was not fact-based or objective, but sensational and openly hostile. For example, articles "stressed [Sheppard's]

extra marital love affairs as a motive for the crimes," while editorials characterized him as a liar and demanded his arrest. *Id.* at 340-41. Other news stories described evidence that was never produced at trial. *Id.* at 340.

In *Estes*, the Court found presumptive prejudice based on the trial's carnival-like atmosphere. A pretrial hearing was televised live and then replayed, with the broadcasts reaching 100,000 viewers. *Estes*, 381 U.S. at 550. During the hearing, "the courtroom was a mass of wires, television cameras, microphones, and photographers. The petitioner, the panel of prospective jurors, who were sworn the second day, the witnesses, and the lawyers were all exposed to this untoward situation." *Id.* at 550-51. The Supreme Court found that such media intrusion was inherently prejudicial due to its effect on the witnesses, the judge, the defendant, and, most significantly, on the "televised jurors." *Id.* at 545.

The publicity engendered by Petitioner's case presents a stark contrast with the media excesses which presumptively deprived the defendants of a fair trial in *Rideau*, *Sheppard*, and *Estes*. Here, there was no confession, let alone a televised one. Moreover, as the Arizona Supreme Court accurately observed, "Only a few of the articles mentioned Jones directly" and "the majority of the statements concerned largely factual contentions." *Jones*, 197 Ariz. at 307, 4 P.3d at 362. Thus, they were "less prejudicial than inflammatory editorials or cartoons." *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir. 1998), *as amended*, 152 F.3d 1223 (9th Cir.1998); *see also Gallego v. McDaniel*, 124 F.3d 1065, 1071 (9th Cir. 1997) (adopting district court's finding that news stories were "well-balanced, factual accounts"). From the limited information provided by Petitioner, it appears the news items were not sensational or inflammatory, *see Casey v. Moore*, 386 F.3d at 908-09; *Leavitt v. Arave*, 383 F.3d 809, 826 (9th Cir. 2004), and clearly lacked the virulence or hostility of many of the stories reported in *Sheppard*. Based upon the quantity and quality of the media coverage, the Court concludes that Petitioner's trial was not one of those rare cases where pretrial publicity transformed the proceedings into a "hollow formality." *Rideau*, 373 U.S. at 726.

The Arizona Supreme Court noted that the trial court was diligent in discerning the impact that pretrial publicity had on prospective jurors. In fact, 30 jurors were excused for cause based in part on their answers regarding pretrial publicity. (*See* RT 6/15/98 at 2.) The court further noted that "almost all of the jurors who did have exposure to the publicity stated that their exposure was negligible," *Jones*, 197 Ariz. at 307, 4 P.3d at 362, a finding Petitioner does not refute. Under these circumstances, the Court concludes that the ruling of the Arizona Supreme Court was not based on an unreasonable application of clearly established law or an unreasonable determination of the facts.

IV. Evidentiary Issues

A. Admission of Other Bad Acts Evidence

In Claim 7, Petitioner argues that his rights to due process and a fair trial were violated when David Nordstrom commented during his testimony about Petitioner's involvement in other crimes.[10] (Dkt. 27 at 47.) In particular, David stated that Petitioner came to his house in July 1996, "[a]nd we talked about [how] he was going to rob somebody and he wanted some duct tape, so I gave him a roll of duct tape because I use duct tape in my job, so I gave him a roll of it." (RT 6/23/98 at 132.) David further stated that he stopped taking calls from Petitioner shortly thereafter "because [Petitioner] was in jail." (*Id.* at 133.) Later in his testimony, David mentioned that he kept a .380 handgun, one of the guns used in the murders, because Petitioner and Scott didn't want to keep it in Petitioner's truck because they were "felons, convicted – they were both on parole" and "[i]f they got pulled over, then they'd be in trouble having a gun." (*Id.* at 204-05.)

Noting that references to other acts were barred by his successful motion in limine, defense counsel moved for a mistrial following each of the above statements. (RT 6/23/98

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[10] In his amended petition, Petitioner also references "bad act" statements by Lana Irwin during her testimony. (Dkt. 27 at 47.) However, as Respondents correctly note, Petitioner's claim in state court was limited to David's statements. (Dkt. 34 at 58.) He did not properly exhaust any allegations based on Irwin's statements. Thus, this aspect of Claim 7 is procedurally barred.

at 134, 209.) In response, the court observed that there had been no reference as to why Petitioner was in jail or whether he actually committed another robbery, and the court speculated that the jury might assume he was in jail for matters related to this case. (*Id.* at 135.) The court also noted "we have had, of course, other references to non-charged conduct in this case" but agreed "it's unfortunate that the comments were made." (*Id.* at 136,138.) The court determined that a limiting instruction rather than a mistrial the appropriate remedy. (*Id.* at 138.) The court then gave the following curative instruction to the jury:

> Ladies and gentleman, references have been made in the testimony as to other alleged criminal acts by the defendant unrelated to the charges against him in this trial.
>
> You are reminded that the defendant is not on trial for any such acts, if in fact they occurred. You must disregard this testimony and you must not use it as proof that the defendant is of bad character and therefore likely to have committed the crimes with which he is charged.

(*Id.* at 143-44.)

In denying appellate relief, the Arizona Supreme Court stated:

> When unsolicited prejudicial testimony has been admitted, the trial court must decide whether the remarks call attention to information that the jurors would not be justified in considering for their verdict, and whether the jurors in a particular case were influenced by the remarks. When the *witness* unexpectedly volunteers information, the trial court must decide whether a remedy short of mistrial will cure the error. Absent an abuse of discretion, we will not overturn the trial court's denial of a motion for mistrial. The trial judge's discretion is broad because he is in the best position to determine whether the evidence will actually affect the outcome of the trial. In this case, the comments did not create undue prejudice, and the trial court did not abuse its discretion.
>
> . . . .
>
> Arizona has long recognized that testimony about prior bad acts does not necessarily provide grounds for reversal. Here, the testimony made relatively vague references to other unproven crimes and incarcerations. Furthermore, the judge gave an appropriate limiting instruction, without drawing additional attention to the evidence.
>
> Second, unlike the primary case on which Jones relies, *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988), in which a court official told jurors of the defendant's previous involvement in a similar case, the statements here were unsolicited descriptions from a witness concerning a dissimilar crime. When the statements are made by a witness, whose credibility is already at issue, they do not carry the same weight or effect as a statement from a court

> official, who is presumed to uphold the law. The defendant agreed during trial that the prosecution played no part in soliciting the information from David. Therefore, the statements were not as harmful as those made in *Dickson*, and the trial court did not abuse its discretion.

Jones, 197 Ariz. at 304-05, 4 P.3d at 359-60.

To establish entitlement to habeas relief, Petitioner must show that the improper references rendered his trial fundamentally unfair in violation of due process. *See Darden*, 477 U.S. at 181. The court has "very narrowly" defined the category of infractions that violate the due process test of fundamental fairness. *Dowling v. United States*, 493 U.S. 342, 352 (1990). Pursuant to this narrow definition, the Court has declined to hold, for example, that evidence of other crimes or bad acts is so extremely unfair that its admission violates fundamental conceptions of justice. *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991); *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967). Moreover, to establish a constitutional violation based on the improper admission of such evidence, or by extension, the refusal of the court to grant a mistrial after it is introduced, Petitioner must show that the trial court's error had a "substantial and injurious" effect on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

In *Jeffries v. Blodgett*, 5 F.3d 1180, 1193 (9th Cir. 1993), the court held that a reference to the defendant's prior history of imprisonment did not render his trial fundamentally unfair where "the statement was inadvertent and not a prosecutorial attempt to elicit otherwise inadmissible evidence" and "the trial court's remedial instruction to the jury cured any possible prejudice caused by the incident." Here, the reference was made inadvertently by a witness whose credibility was already at issue; the prosecution did not affirmatively seek to elicit the information. In fact, defense counsel noted that David "ignored Mr. White's and the Court's instructions and prior rulings" in making the statements in question. (RT 6/23/98 at 136, 209.) As such, this situation is more akin to *Jeffries*, where the Court found no constitutional violation, than *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988), where the information was relayed by a court employee. For that reason,

and in light of the substantial evidence of guilt presented at trial, the Court concludes that any references to other acts did not have a substantial and injurious effect on the jury's verdict, and the state court's ruling in this regard was not unreasonable.

B. Admission of Prior Consistent Statements

In Claim 8, Petitioner argues that his rights to due process, to confront witnesses, and to equal protection were violated by the erroneous admission of prior consistent statements by David Nordstrom, David Evans, and Lana Irwin.[11] (Dkt. 27 at 48-49.) With regard to Evans and Irwin, the Arizona Supreme Court determined on appeal that the statements had been properly admitted under Rule 801(d)(1)(B) of the Arizona Rules of Evidence "to rebut an express or implied charge against the declarant of recent fabrication" because both statements were made before either witness had a motive to fabricate. *Jones*, 197 Ariz. at 299, 4 P.3d at 354. Regarding Nordstrom, the court found that his prior statements were erroneously admitted under Rule 801 because his motive to fabricate necessarily arose at the time of the murders. *Id.* at 300, 4 P.3d at 355. However, the court determined that the error was harmless because the defense "attacked David's credibility on every basis" in an effort to portray him as the murderer. *Id.* "Moreover, even if Hurley's testimony had been excluded, all of David's testimony about Jones's involvement and admissions would still have been admissible." *Id.*

It is not the province of this Court to determine whether a state court properly determined a question of state evidentiary law. *Estelle*, 502 U.S. at 67-68. The mere assertion that admitting the statements violated Petitioner's federal constitutional rights does not convert a state evidentiary law ruling into a federal constitutional violation. *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). Petitioner's claim simply challenges the propriety of the trial court's admission of the statements under the Arizona Rules of

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[11] In state court, Petitioner framed this claim only as a violation of federal due process. Therefore, only that aspect of the claim has been properly exhausted.

Evidence. In light of the overwhelming evidence of Petitioner's guilt presented at trial, unrelated to the prior consistent statements of the three witnesses in question, the Court cannot conclude that their admission had a substantial and injurious effect on the jury's verdict. *See Brecht*, 507 U.S. at 637-38. The Arizona Supreme Court's denial of this claim was not based on an unreasonable determination of controlling federal law.

C. Admission of Artist's Sketch

In Claim 14, Petitioner asserts that admission of the sketch resembling him in both physical appearance and dress, based on a partial description by Mark Naiman, violated his right to due process. (Dkt. 27 at 55-56.) The Arizona Supreme Court ruled that the sketch did not constitute impermissible hearsay and was properly admitted under Rule 901(b)(1) of the Arizona Rules of Evidence. *Jones*, 197 Ariz. at 308, 4 P.3d at 363.

Again, it is not the province of a federal court on habeas corpus review to pass on the propriety of a state court determination on the admissibility of evidence. *See Estelle*, 502 U.S. at 67-68. Rather, to establish a due process violation based on the erroneous admission of evidence, Petitioner must demonstrate that the admission so infected his trial with error that its admission violated his right to a fair trial. *See Darden*, 477 U.S. at 181. Considering the other evidence presented at trial, admission of the sketch did not have a substantial and injurious effect on the jury's verdict. *See Brecht*, 507 U.S. at 637-38. The Arizona Supreme Court's denial of this claim was not based on an unreasonable determination of controlling federal law.

V. Right to Be Present

In Claim 15, Petitioner contends that his right to be present at every stage of the proceedings was violated when, on the fourth day of trial, "the court held a hearing in Mr. Jones' absence and, with the concurrence of Mr. Jones' counsel, but without Mr. Jones' approval or consent, released defense witness Andrew Sheldon from a defense subpoena based on psychiatric grounds, and released state's witness Brittany Irwin based on [defense counsel's] statement that he no longer wanted to cross-examine her prior testimony." (Dkt.

27 at 56; *see* RT 6/23/98 at 3-7.)

The Arizona Supreme Court rejected this claim on direct appeal:

> Although a defendant has the right to be present at trial, his right extends only to those situations in which his "'presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" Counsel may, however, "acting alone make decisions of strategy pertaining to the conduct of the trial." Criminal defendants are often bound by their counsel's strategy decisions. Here, Jones was not excluded from a proceeding that involved any actual confrontation. The jury was not present, and the trial judge did not make any determination concerning Jones himself. The defense lawyer made a strategy decision only. For these reasons, the trial court did not err in holding the proceeding outside his presence, and Jones's eighth point of error is denied.

Jones, 197 Ariz. at 308, 4 P.3d at 363 (citations omitted). The Court agrees that this claim is meritless.

As the Arizona Supreme Court noted, the United States Supreme Court has held that a defendant has a due process right to be present at a proceeding when his presence has a reasonably substantial relation to his opportunity to present a defense. *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934); *see Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *United States v. Gagnon*, 470 U.S. 522, 526 (1985). The Court has emphasized that the "privilege of presence is not guaranteed 'when presence would be useless, or the benefit but a shadow.'" *Stincer*, 482 U.S. at 745 (quoting *Snyder*, 291 U.S. at 106-07). Rather, a defendant has the right to be present only "to the extent that a fair and just hearing would be thwarted by his absence." *Id.*

Here, Petitioner fails to identify any prejudice he suffered from the release of these two witnesses or explain how his failure to attend the proceeding in question thwarted his ability to effectively defend himself against the charges. *Id.* As a result, the determination of the Arizona Supreme Court was neither contrary to, nor an unreasonable application of, controlling law.

VI. Sentencing Issues

A. Jury Determination of Aggravating Factors

In Claim 3, Petitioner contends he was denied the right to a jury trial on the issue of

aggravating factors relevant to imposition of the death penalty, as required by *Ring v. Arizona*, 536 U.S. 584 (2002). In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Court held that *Ring* does not apply retroactively to cases such as Petitioner's that were already final on direct review at the time *Ring* was decided. Petitioner acknowledges the holding in *Summerlin* but argues that the court wrongly decided that *Ring* did not apply retroactively. The decisions of the Supreme Court are binding on this Court, Petitioner's argument notwithstanding.

B. Failure to Channel Sentencer's Discretion

In Claim 4, Petitioner argues that Arizona's capital sentencing scheme fails to sufficiently channel the sentencer's discretion because it provides "little or no direction" on how to weigh and compare mitigation against aggravation. (Dkt. 27 at 40.) Respondents correctly note that the PCR court found this claim precluded under Arizona law because Petitioner could have raised it on appeal but did not. (Dkt. 34 at 51; *see also* ROA-PCR doc. 70 at 31.)

Moreover, this claim is plainly meritless. Arizona's death penalty scheme allows only certain, statutorily defined, aggravating circumstances to be considered in determining eligibility for the death penalty. "The presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by [the sentencer]." *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990). Rulings of both the Ninth Circuit and the United States Supreme Court have upheld Arizona's death penalty statute against allegations that particular aggravating factors do not adequately narrow the sentencer's discretion. *See Lewis v. Jeffers*, 497 U.S. 764, 774-77 (1990); *Walton v. Arizona*, 497 U.S. 639, 649-56 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584; *Woratzeck v. Stewart*, 97 F.3d 329, 335 (9th Cir. 1996).

C. Equal Protection Violation

In Claim 5, Petitioner argues that his right to equal protection was violated because

the crimes he committed would not have resulted in death sentences had they been committed in other states. (Dkt. 27 at 40.) The PCR court rejected this claim:

> Petitioner presents no basis for an Equal Protection challenge other than Arizona's approach is different than other states. But the U.S. Supreme Court has ruled that the States enjoy latitude to prescribe the method by which murderers shall be punished. And as long as the death penalty is not imposed in an arbitrary and capricious manner, it is not unconstitutional by federal or state standards. The Arizona Supreme Court has held that the death sentence is not cruel and unusual.
>
> An Equal Protection argument rests on the premise that a given statute provides different treatment for similarly situated individuals. Arizona's death penalty statute applies equally to everyone within its jurisdiction. That Petitioner would not be subject to the same punishment in other states is irrelevant.

(ROA-PCR doc. 70 at 31-32 (citations omitted).)

This claim is plainly meritless. The Supreme Court has declared that equal protection requires simply that "the State must govern impartially. General rules that apply evenhandedly to all persons *within* the jurisdiction unquestionably comply with this principle." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979) (emphasis added). Moreover, as noted by the PCR court, the United States Supreme Court has further held that, within the limits defined by Supreme Court precedent with respect to imposition of a death sentence, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone*, 494 U.S. at 309. Thus, the fact that some states have chosen not to have a death penalty, or that states which do have death penalties may have different statutory criteria for imposing such a sentence, is insufficient to establish an equal protection violation. *See id.* ("The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice."). The PCR court's ruling was neither contrary to nor an unreasonable application of Supreme Court precedent.

D. Unconstitutional Pecuniary Gain Aggravating Factor

In Claim 16, Petitioner challenges the validity of his death sentence based on his contention that the pecuniary gain aggravating factor at A.R.S. § 13-703(F)(5) is

unconstitutional because it fails to narrow the class of persons eligible for the death penalty. (Dkt. 27 at 57.) The Ninth Circuit has expressly denied this claim, and thus it is without merit. *See Woratzeck*, 97 F.3d at 335.

EVIDENTIARY HEARING

At the start of these proceedings, the Court issued case management and scheduling orders providing Petitioner an opportunity – after completion of his amended petition, the State's answer, and his traverse – to file requests for evidentiary development, including motions for discovery, expansion of the record, or an evidentiary hearing. (Dkt. 5 at 4; Dkt. 21 at 2.) The Court further directed that any motion for evidentiary development shall:

> (1) separately identify which enumerated claim(s) and sub-claim(s) Petitioner contends needs further factual development;
>
> (2) with respect to each claim or sub-claim identified in #1, (i) describe with specificity the facts sought to be developed; (ii) identify the specific exhibit(s) Petitioner contends demonstrate or support the existence of each fact sought to be developed; and (iii) explain why such fact(s) and exhibit(s) are relevant with respect to each claim or sub-claim;
>
> (3) with respect to each exhibit and each fact identified in #2, explain in complete detail why such exhibit(s) and such fact(s) sought to be developed were not developed in state court;
>
> (4) with respect to each exhibit and each fact identified in #2, explain in complete detail why the failure to develop such exhibit(s) and such fact(s) in state court was not the result of lack of diligence, in accordance with the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 420 (2000);
>
> Any motion for evidentiary hearing shall further address:
>
> (5) with respect to each claim or sub-claim identified in #1, explain how the factual allegations, if proved, would entitle Petitioner to relief; and
>
> (6) with respect to each claim or sub-claim identified in #1, whether the state court trier of fact reliably found the relevant facts after a full and fair hearing. *See Jones v. Wood*, 114 F. 3d 1002, 1010 (9th Cir. 1997).

(Dkt. 5 at 4.)

Notwithstanding this directive, Petitioner in his amended petition asserted simply a request for "an evidentiary hearing on each issue raised in this petition." (Dkt. 27 at 59.)

Prior to expiration of the Court's deadline for evidentiary development requests in January 2005, Petitioner sought discovery of materials from the State Bar of Arizona concerning the complaint filed against prosecutor White relating to the kicked-in door issue and requested an additional 45 days to file additional motions for evidentiary development.[12] (Dkts. 47, 50.) The Court denied the motion for a subpoena without prejudice to provide Petitioner an opportunity to obtain the requested materials directly from the State Bar pursuant to Rule 70(c)(6) of the Arizona Rules of the Supreme Court. (Dkt. 53.) The Court granted both the requested continuance and a subsequent request, ultimately directing that any motions for evidentiary development be filed by March 24, 2005. (Dkt. 55.) Petitioner filed none.

Over a year later, in September 2006, Petitioner filed a motion seeking access to the prosecutor's trial file. (Dkt. 56.) Although habeas counsel had reviewed the file years earlier, they asserted that new information revealed during re-sentencing proceedings for co-defendant Nordstrom, whose case was not final at the time *Ring* was decided, indicated that the prosecutor may have withheld some home arrest records for David Nordstrom. (Dkt. 58 at 2.) The Court granted the motion and directed that Respondents arrange for the file review. (Dkt. 59.) Subsequently, Petitioner filed another motion to compel review of the prosecutor's file, asserting that the county attorney had provided access only to its file from his case and not that of co-defendant Nordstrom. (Dkt. 61.) The Court denied this request, finding no good cause for compelled access to Nordstrom's prosecution file because the requested discovery was unrelated to any of the claims pending in the amended petition and amounted to a fishing expedition. (Dkts. 64, 66.)

Although Petitioner's one-sentence request for an evidentiary hearing utterly fails to explain what facts need further development, the Court has considered, pursuant to Rule 8 of the Rules Governing Section 2254 Cases, whether an evidentiary hearing is necessary to resolve any of Petitioner's allegations. As discussed in this order, Petitioner has not alleged

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[12] During the pendency of the State Bar disciplinary proceedings, White became ill and subsequently died. The matter was closed, and no final report or findings issued.

any facts which, if proved, would entitle him to relief. *See Townsend v. Sain*, 372 U.S. 293, 312-13 (1963). Therefore, Petitioner's request for an evidentiary hearing is denied.

CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11 of the Rules Governing § 2254 Cases, the Court has evaluated the claims within the petition for suitability for the issuance of a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal is taken by a petitioner, the district judge who rendered the judgment "shall" either issue a COA or state the reasons why such a certificate should not issue. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right and whether the court's procedural ruling was correct. *Id.*

The Court finds that reasonable jurists could debate its resolution of Claim 1-A. The Court therefore grants a certificate of appealability as to this claim. For the reasons stated in this Order, the Court declines to issue a certificate of appealability for Petitioner's remaining claims and procedural issues.

Based on the foregoing,

IT IS ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 27) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the stay of execution entered by the Court on September 22, 2003 (Dkt. 4) is **VACATED**.

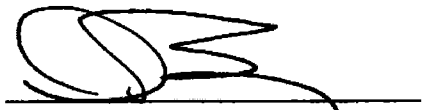
IT IS FURTHER ORDERED that a Certificate of Appealability is **GRANTED** as

to the following issue:

> Whether Petitioner has established cause to overcome the procedural default of Claim 1-A, which alleges that the prosecutor suborned perjury from detectives to bolster the credibility of Lana Irwin.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Rachelle M. Resnick, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 28th day of January, 2010.



David C. Bury
United States District Judge

copy to R. Resnick, Clerk, Arizona Supreme Court on 1/29/10 by cjs

Appendix E

Opinion, *Jones v. Ryan*, 691 F.3d 1093 (9th Cir. 2012)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT GLEN JONES, Jr., *Petitioner-Appellant,* v. CHARLES RYAN, *Respondent-Appellee.*	No. 10-99006 D.C. No. 4:03-CV-00478-DCB OPINION

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Argued and Submitted
June 14, 2012—San Francisco, California

Filed August 16, 2012

Before: Ronald M. Gould, Richard C. Tallman, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Gould

COUNSEL

Daniel D. Maynard (argued) and Jennifer Reiter, Maynard Cronin Erickson Curran & Sparks, PLC, Phoenix, Arizona, for petitioner-appellant Robert Jones.

Lacey Stover Gard (argued) and Jeffrey A. Zick, Arizona Attorney General's Office, Tucson, Arizona, for respondent-appellee Charles Ryan.

OPINION

GOULD, Circuit Judge:

Petitioner-Appellant Robert Jones ("Jones") appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Jones was convicted of six murders in Arizona state court and was sentenced to death in 1998. He

was also convicted of first-degree attempted murder, aggravated assault, armed robbery, and first-degree burglary. The district court granted a certificate of appealability ("COA") on Jones's prosecutorial misconduct claim. We expand the COA to include the ineffective assistance of counsel allegations related to Jones's prosecutorial misconduct claim. We have jurisdiction under 28 U.S.C. § 2253, and we affirm the district court's denial of Jones's habeas corpus petition.

I[1]

In 1996, six people were killed during two armed robberies in Tucson, Arizona. On May 30, the Moon Smoke Shop was robbed, where two victims were killed and a third was wounded by gunfire. On June 13, the Fire Fighters Union Hall was robbed, and four persons there were killed.

The Moon Smoke Shop robbery began when two robbers followed a customer, Chip O'Dell, into the store and at once shot him in the back of the head. Four employees were in the store: Noel Engles, Steve Vetter, and Mark Naiman were behind one counter concentrating on the stock, and Tom Hardman was behind another. After hearing the gunshot, Engles and Naiman looked up to see a robber in a long-sleeved shirt, dark sunglasses, and a dark cowboy hat wave a gun at them and yell to get down. Naiman recognized the gun as a 9mm. Engles dropped to his knees and pushed an alarm button.

Engles noticed a second robber move toward the back room and heard someone shout, "Get the f*** out of there!" The

[1]We draw our factual statement from the findings of fact made in the state court proceedings. For the Arizona Supreme Court's more detailed description of events, *see State v. Jones*, 197 Ariz. 290, 297 -98 (2000). Jones may not rebut the factual findings made in his state court proceedings absent clear and convincing evidence. *Gonzalez v. Pliler*, 341 F.3d 897, 903 (9th Cir. 2003) (citing 28 U.S.C. § 2254(e)(1)). This he has not done and we accept the factual findings of the state court proceedings.

gunman at the counter told Naiman to open the cash register. After Naiman did so, the gunman reached over the counter and began firing at the others on the floor. Thinking that the others were dead, Naiman ran out of the store and called 911 at a pay phone. On the floor behind the counter, Engles heard shots from the back room and then, realizing the gunmen had left the store, also ran out of the store, by the back door. Running up the alley to get help, Engles saw a light-colored pickup truck with two people in it accelerate and turn on a street into heavy traffic.

Naiman and Engles survived. Vetter also survived, although shot in the arm and face. O'Dell and Hardman were both killed by close range shots to the head, O'Dell at the entrance to the store and Hardman in the back room. Three 9mm shell casings were found in the store, one beside O'Dell and two near the cash register. Two .380 shells were found near Hardman's body. Two weeks after the robbery, Naiman met with a police sketch artist who used his description of the gunmen to create sketches of the suspects. These sketches were released to the media in an effort to catch the perpetrators. At trial, two acquaintances of Jones testified that when they saw the police sketches their first thought was that they looked like Jones.

The Fire Fighters Union Hall was robbed two weeks later. There were no survivors of the violence that befell those present there. Nathan Alicata discovered the robbery at 9:20 p.m. when he arrived at the Union Hall and discovered the bodies of Maribeth Munn (Alicata's girlfriend), Carol Lynn Noel (the bartender), and a couple, Judy and Arthur Bell. The police investigation turned up three 9mm shell casings, two live 9mm shells, and two .380 shell casings. About $1300 had been taken from the open cash register, but the robbers were unable to open the safe. The coroner, who examined the bodies at the scene, concluded that the bartender had been shot twice, and that the other three victims were shot through the head at close range as their heads lay on the bar. The bar-

tender's body had a laceration on her mouth consistent with having been kicked in the face, and Arthur Bell's body had a contusion on the right side of his head showing he was struck with a blunt object, possibly a pistol.

In 1998, petitioner Robert Jones was convicted of these ghastly crimes of multiple murder and sentenced to death. His co-defendant, Scott Nordstrom, had been convicted in a separate proceeding six months earlier. *See State v. Nordstrom*, 200 Ariz. 229 (2001). Jones's theory of the case at trial and on appeal was that Scott Nordstrom and his brother David Nordstrom committed these murders, while he was not involved. While there was no physical evidence or positive eyewitness identifications conclusively linking Jones to the crimes, both he and his truck matched descriptions given by survivors of the Moon Smoke Shop robbery. The prosecution's case against Jones was based in large part on David Nordstrom's testimony. David Nordstrom gave a detailed account of his role as a getaway driver in the Moon Smoke Shop robbery, and identified Jones as a robber and shooter, as well as the guns he carried. But that was not all of the testimony against Jones. Lana Irwin, an acquaintance of Jones, also testified that she overheard Jones talking about details of these murders that the police had not released to the general public. Jones's friend David Evans gave additional implicating testimony.

A. David Nordstrom's Testimony

At Jones's trial, David Nordstrom gave extensive testimony about the events surrounding the two robberies. In January 1996, David Nordstrom was released from prison after a conviction for theft, and began living at his father's home in Tucson, Arizona. At the time of the offenses in this case, David Nordstrom was under "home arrest" (requiring him to be home by a certain time every evening) and monitored by an ankle monitor. David Nordstrom re-established his friendship with Jones and began working construction jobs. Before April

1996, David Nordstrom obtained a .380 semiautomatic pistol from a friend, Cindy Inman, which he gave to Jones after Jones requested it for protection. Cindy Inman testified at trial that David Nordstrom took this pistol without her permission and that when she asked for it back several months later, he told her he had dropped it in the bottom of a lake.

On May 30, 1996, Scott Nordstrom and Jones picked up David Nordstrom in Jones's truck, an old white Ford pickup. Jones was wearing his usual attire: a long-sleeved western shirt, Levi's, boots, sunglasses, and a black cowboy hat. In a parking lot near the Tucson Medical Center, Jones broke into a VW station wagon that he aimed to steal. He could not start it, but he found a 9mm pistol. The owner of the VW testified that his car had been broken into and his gun stolen on May 30. Jones kept the 9mm and gave Scott Nordstrom the .380 pistol he had obtained from David Nordstrom.

As the three continued driving, they discussed the possibility of a robbery, and Jones suggested that they rob the Moon Smoke Shop. He parked behind the store, telling David Nordstrom that Jones and Scott Nordstrom would go in, rob the store, and be right out. David Nordstrom, while waiting in the pickup truck, then heard gunfire from inside. According to David Nordstrom's testimony, after returning to the truck, Jones said, "I shot two people," and Scott Nordstrom said, "I shot one." David Nordstrom also testified that Jones and Scott Nordstrom were mad at him for unnecessarily driving the truck past the front of the shop during the getaway. Jones, Scott Nordstrom, and David Nordstrom split the money from the Moon Smoke Shop robbery.

On the day of the Union Hall murders, Scott Nordstrom gave David Nordstrom a ride home. David Nordstrom's parole officer produced records at trial verifying that David Nordstrom's ankle-monitoring unit indicated that he had not left his father's home on the night of the murders. Late that evening, according to David Nordstrom, Jones entered David

Nordstrom's father's house and told David Nordstrom that he and Scott Nordstrom had robbed the Union Hall. David Nordstrom's stepmother Terri Nordstrom also testified that she remembered Jones showing up at her house late at night looking for David Nordstrom at some point in June 1996, which was unusual.

Again per the testimonial story told by David Nordstrom, Jones told David Nordstrom that because the bartender could not open the safe, Scott Nordstrom kicked her and shot her. Jones said that he then shot the three other witnesses in the back of the head. Jones, Scott Nordstrom, and David Nordstrom later disposed of the guns by throwing them into a pond south of Tucson, and Scott Nordstrom and David Nordstrom burned Arthur Bell's wallet at another location. David Nordstrom kept the secrets of the murders until he saw an appeal on television for information. He testified that his conscience was getting to him, so he told his girlfriend, Toni Hurley, what he knew. Hurley later made an anonymous 88-CRIME call, which led to David Nordstrom's contact with the police, and the ultimate release of the information.

B. Lana Irwin's Testimony

David Nordstrom's testimony was key to the prosecution, but he was not the only important witness for the prosecution. Jones was also linked to the crime by Lana Irwin, who testified that she overheard him discuss details of the murders at her home in Phoenix with a mutual acquaintance on several occasions in the summer of 1996. Irwin also testified that she colored Jones's hair from red to brown because "he was hiding from someone." Irwin testified that she overheard the following bits of information from Jones:

- Jones said that he had two partners, brothers, that one was inside and one was in the truck, and that he was mad at the one in the truck.

- Jones said that he had killed four or five people in Tucson by shooting them in the head, and that his partner had killed two.

- One of the people Jones shot was a man by a door (which the prosecutor equated with Chip O'Dell).

- "They ran to the back room. [Jones's] partner chased them and they were shot." The prosecutor argued that this described the murder of Tom Hardman.

- "One door was open and one had to be kicked in," which the prosecutor argued described the kicked in door in the back of the Moon Smoke Shop next to which Tom Hardman was killed. The prosecutor further argued that this door was kicked in by the intruders to get at Tom Hardman. The door was actually kicked in by police when they were securing the scene. This inconsistency forms the basis of Jones's Claim 1-A.

- Some women were killed at a "bar or maybe a restaurant," "a red room, everything was red." This description matches the Union Hall.

- There were three women who "weren't supposed to be there so they had to be shut up so they didn't run their necks." Irwin's daughter also testified that she had overheard Jones saying that "the bitches weren't supposed to be there," and that she overheard Jones talk about a smoke shop.

- Jones shot an older man sitting in a chair with his head back in the same red room, who the prosecutor argued was Arthur Bell. Jones claims these

statements are inconsistent with other evidence of the position of Arthur Bell's Body in Claim 1-B.

- Jones "pistol whipped" the older man in the head with a gun. He said it "sounded like a baseball swing."

- Jones said that he didn't get enough money. The prosecutor argued this was because Jones and Scott Nordstrom couldn't break into the safe at the Union Hall.

Irwin testified that she first described these details to police as a dream about a red room because she didn't want to tell the police what she knew out of fear for her safety. On cross-examination, Jones's counsel attacked her credibility by bringing out several details of this "dream" that did not match what had happened at the robbery. However, the prosecutor argued that Irwin could only have learned the facts that corresponded to the robberies from Jones because Irwin had never been to Tucson and many of the corresponding facts had not been released to the general public.

C. David Evans' Testimony

In addition to David Nordstrom and Irwin's testimony, the prosecution also presented the incriminating testimony of David Evans. David Evans, a friend of Jones, testified that he was present on several occasions when Jones had conversations about the sketches of the Moon Smoke Shop robbery suspects that had been published in the newspaper. In the first conversation, Jones's roommate Chris Lee asked Jones if he was part of the killings, and Jones responded "[i]f I told you, I'd have to kill you." Although this possibly overworked witticism might be viewed as a joke, a jury could also rationally view it as an admission by Jones. In the second conversation, Evans was giving Jones a hard time about his similarity to the sketches, and Jones said that "if he told [Evans], he would

have to kill [him]," and that "you don't leave witnesses." A jury could also view this as an admission of a deadly *modus operandi*. Evans also testified that Jones went to Phoenix twice in 1996, and that on the second occasion he said that he couldn't stay in Tucson because "he thought some people would be looking for him because he had killed somebody." If believed by the jury, these statements could easily be viewed as an admission of culpability.

D. Subsequent Procedural History

Jones's conviction was automatically appealed directly to the Arizona Supreme Court, which affirmed the conviction on June 15, 2000. *Jones*, 197 Ariz. 290. The United States Supreme Court denied certiorari on April 16, 2001. *Jones v. Arizona*, 532 U.S. 978 (2001). Jones then returned to Arizona Superior Court to file his Petition for Post-Conviction Relief ("PCR") on February 15, 2002. In his PCR petition, Jones alleged the various instances of prosecutorial misconduct that make up Claim 1 of his habeas corpus petition for the first time. Jones also alleged that his appellate counsel was ineffective for not raising these issues on direct appeal.

The Arizona PCR court denied relief on September 18, 2002, holding that Jones's allegations of prosecutorial misconduct were precluded under Arizona Rule of Criminal Procedure 32.2(a)(3). In the alternative, it also considered and denied each claim on its merits. It dismissed Jones's ineffective assistance of appellate counsel claims, holding that because the precluded prosecutorial misconduct claims "were also dismissed based on substantive grounds, [Jones] cannot establish that he suffered prejudice because of the ineffective performance of his appellate counsel." The Arizona Supreme Court summarily denied review on September 9, 2003, after which Jones filed his habeas corpus petition in the district court on September 18, 2003. The district court denied the habeas corpus petition. Jones now presents us with his appeal of the district court's decision.

II

A prisoner appealing the district court's final order in a habeas corpus proceeding must first obtain a certificate of appealability ("COA") by making "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). This language codifies the standard set forth in *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983): "a petitioner must 'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.' " *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Thus not every issue raised in a habeas corpus petition earns an automatic right to appeal, an appeal may lie only for issues that are worthy of fair debate by reasonable judges. The district court granted a COA on one issue:

> Whether Petitioner has established cause and prejudice to overcome the procedural default of Claim 1, which alleges various instances of prosecutorial misconduct.

Jones asks us to expand the COA to include thirteen allegations of ineffective assistance of counsel and nine additional claims, all of which were rejected by the district court. After carefully considering these claims, on which we required the government to submit responsive briefing, we conclude that most issues raised do not surmount the barrier to review posed by the COA requirements of AEDPA. We hold that the only additional issue that reasonable jurists could debate concern Jones's allegations of ineffective assistance of trial counsel related to trial counsel's failure to discover and use the inconsistencies in the testimony regarding the kicked-in door in Jones's trial, the testimony at Scott Nordstrom's trial, and several police reports. We expand the COA to include the following issue:

> Whether Petitioner's trial counsel rendered constitutionally deficient performance by failing to discover and utilize the inconsistencies in the testimony concerning the kicked-in door at Petitioner's trial, the testimony at Scott Nordstrom's trial, and various police reports.

We deny Jones's request to further expand the COA.

III

We review the district court's denial of a petition for writ of habeas corpus *de novo*. *Lopez v. Thompson*, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court cannot grant habeas relief based on a claim that was adjudicated on the merits in state court proceedings unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Jones's federal habeas petition was filed after 1996 and must be reviewed under the strict standards of AEDPA. We review the last reasoned state decision regarding the claims, here the Arizona PCR court's 2002 decision. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005).

A claim in a federal habeas petition may be procedurally defaulted if it was actually raised in state court but found to be defaulted on an adequate and independent state procedural ground. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Arizona Rule of Criminal Procedure 32.2(a)(3) is independent of federal law and has been regularly and consistently applied, so it is adequate to bar federal review of a claim. *Oritz v. Stewart*, 149 F.3d 923, 931 -32 (9th Cir. 1998). But we will consider the merits of the claim if the petitioner can demonstrate either (1) "cause for the default and actual prejudice as

a result of the alleged violation of federal law," or (2) "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

The district court held that Jones's prosecutorial misconduct claim was procedurally defaulted because the PCR court had invoked Arizona Rule of Criminal Procedure 32.2(a)(3) to find it procedurally barred. To address whether ineffective assistance of appellate counsel was sufficient cause to excuse the procedural default, the district court addressed the merits of each of Jones's prosecutorial misconduct allegations, applying AEDPA deference to the PCR court's merits determination.[2] The district court determined that the allegations lacked merit, and therefore "appellate counsel was not ineffective for failing to raise them on appeal" and "appellate [counsel's] ineffectiveness does not constitute cause to excuse [Jones's] default."

We examine the merits of Claim 1 in the next Section, and like the district court decide that it is without merit. It should be obvious that the failure of an attorney to raise a meritless claim is not prejudicial, *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985), so the PCR court's rejection of Jones's ineffective assistance of appellate counsel claim is not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We hold that the alleged ineffectiveness of

[2]We have not yet determined whether federal courts should give AEDPA deference to the state court determination on an ineffective assistance of counsel claim when deciding whether that claim constitutes cause for procedural default. *Compare, e.g.*, *Fischetti v. Johnson*, 384 F.3d 140, 154 -55 (3d Cir. 2004) (holding that "AEDPA does not establish a statutory high hurdle for the issue of cause" to overcome procedural default), *with Powell v. Kelly*, 531 F. Supp. 2d 695, 724 (E.D. Va. 2008) (holding that an ineffective assistance claim alleged as cause is subject to AEDPA principles). We need not and do not decide that issue here. For even if no AEDPA deference applies to the assessment of cause and prejudice, we would hold that the PCR court's merits determinations are correct even under *de novo* review.

Jones's appellate counsel for not presenting these claims to the Arizona Supreme Court does not constitute cause to excuse Jones's procedural default of these claims. *See Sexton v. Cozner*, 679 F.3d 1150, 1161 (9th Cir. 2012). Jones's alternative contentions that the procedural default doctrine does not apply to these claims are all without merit.

IV

Jones alleges that his due process and fair trial rights under the Fifth and Fourteenth Amendments were violated by repeated misconduct by Prosecutor David White. He first challenges two crime-scene details that Lana Irwin testified she overheard from Jones, but which Jones claims were caused by the police after the perpetrators left. First, Jones points to White's argument that the intruders had kicked in the office door in the back room of the Moon Smoke Shop, while police reports establish that this door was kicked in by police after the intruders left (Claim 1-A). Second, Jones claims that Arthur Bell was found slumped over the bar at the Union Hall, but that "his head was moved back over his chair" at some point after the police arrived but before photos were taken (Claim 1-B). From these alleged inconsistencies, Jones asks us to infer that the police or prosecution showed Irwin pictures of the crime scene before trial to bolster her testimony. He contends that White suborned perjury and unlawfully manipulated evidence to make Irwin's testimony seem consistent with the facts.

Jones also alleges that Prosecutor White improperly tried to deflect suspicion from David Nordstrom by eliciting misleading testimony that implied only one of the two police sketches looked like a Nordstrom brother (Claim 1-C) and making a false avowal to give a foundation for the test of David Nordstrom's electronic monitoring system to support an alibi for the Union Hall murders (Claim 1-D). His final allegation is that the prosecution suppressed exculpatory evidence (Claim 1-E).

[1] Review for prosecutorial misconduct claims on a writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). For Jones to gain habeas relief, the alleged misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 181 (quoting *Donnelly*, 416 U.S. at 642). A prosecutor's knowing use of false testimony to get a conviction violates due process. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). To prevail on a due process claim based on the presentation of false evidence, a petitioner must show "that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) . . . the false testimony was material." *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc) (quoting *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003)). False testimony is material such that the conviction must be set aside if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). The question is not "whether the defendant would more likely than not have received a different verdict" if the false testimony had not been presented, but whether the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

[2] An allegation that the prosecution failed to disclose material evidence is governed by *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Under *Brady*, "[t]he government violates its constitutional duty to disclose material exculpatory evidence where (1) the evidence in question is favorable to the accused in that it is exculpatory or impeachment evidence, (2) the government willfully or inadvertently suppresses this evidence, and (3) prejudice ensues from the suppression (i.e., the evidence is 'material')." *Silva v. Brown*, 416 F.3d 980, 985 (9th Cir. 2005).

A. The Kicked-in Door

There were two doors side by side in the back room of the Moon Smoke Shop leading to two smaller rooms, a bathroom and an office. Police reports from the officers first on the scene show that the office door was kicked in by police when they were securing the premises. Detective Salgado testified that "the rest room door was damaged" in grand jury proceedings. Pictures of the bathroom door taken at the crime scene show a mark on the outside panel about two feet off the floor.

Jones argues that Detectives Brenda Woolridge and Joseph Godoy perjured themselves by testifying that the office door was kicked in by the robbers, and that Prosecutor White knowingly used this false testimony to strengthen the testimony of Lana Irwin. At Scott Nordstrom's trial, which White also prosecuted, Godoy had testified that the police had kicked in the office door. Yet at Jones's trial eight months later, when White elicited testimony from him to lay the foundation for the photograph of the damaged office door, Godoy failed to mention that the police kicked in this door:

> Q Let me show you two other photographs. Did you find any damage to one of the doors in the back area?
>
> A Yes.
>
> Q Showing you what has been marked State's 15 and 16, do those represent a door that you saw that was damaged?
>
> A Yes.

The next day, Lana Irwin testified about various things she had overheard Jones say, including a statement about a kicked in door:

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 door had to be kicked in.*

Q I'm sorry. One had to be kicked in?

A Yes. One was kicked in, one was open.

On the final day of trial, Detective Woolridge testified about her interview with Lana Irwin and the kicked-in door:

Q Were you present at the first trial?

A Yes, I was.

Q Did you sit there every day of the testimony?

A Yes, I did.

Q Just like you have been here?

A Yes.

Q Did Lana Irwin tell you something about a door being kicked in?

A Yes, she did.

Q Was there a door kicked in, in one of these cases?

A Yes, in the back room at the Moon Smoke Shop.

Q As shown in State's 50.

A Yes, it is.

Q The fact that a door was kicked in, was that ever mentioned at the first trial in this case?

A No, it was not.

Q Lana Irwin, did you ever see her in the audience at the first trial?

A No.

The bathroom door was not discussed at Jones's trial.

Prosecutor White argued that the intruders kicked in a door during both his opening statement and closing argument. During his opening statement he said:

> And there's doors here. This is the bathroom and there is a closet. One of these doors has been kicked in. Apparently the shooter kicked in the door, ordered Tom Hardman to come out and lie on the ground and executed him, two shots.

During his closing argument he emphasized that Lana Irwin could "describe in graphic detail the crime that [Jones and Scott] commit[ed]," discussing the many similarities between Irwin's testimony and the crime, including the kicked-in door:

> She overhears the defendant saying one door had to be kicked in. Remember that? And we have a door kicked in. We have a photograph, one of these doors, this one right here, 58, was kicked in.
>
> Now, ladies and gentlemen, that particular fact wasn't even brought out at the trial of the other guy, Scott Nordstrom. That didn't come out at the trial, and yet Lana Irwin tells you she overhears this

> defendant telling Coats the one door had to be kicked in. And sure enough.

Prosecutor White's statements, supported by Detectives Godoy's and Woolridge's testimony, were false for two reasons: (1) the office door shown in the pictures was kicked in by police, not by the intruders, and (2) the kicked-in door was testified about by Detective Godoy in Scott Nordstrom's trial. The State argues that this was "an innocent mistake," that the police and prosecutor mixed up the bathroom and office doors when preparing for trial, and the evidence shows that "Scott Nordstrom 'kicked or pounded on' the bathroom door," which was damaged as a result. The PCR court accepted the State's explanation. We hold it was not unreasonable to do so.

The PCR court was "troubled by the contradiction" between the testimony at the two trials, but held that the testimony concerning the kicked-in door was not material given the overall context of the evidence presented at trial. The PCR court stressed that "the kicked-in door was but one of the many correlations between Jones's statements overheard by Irwin and the facts of the crime," such that Jones would likely have been convicted "even if Irwin had not testified about the kicked-in door."

[3] We agree that the testimony about the kicked-in door was not material. The kicked-in door was only relevant because it was thought to be one of the details of the crime that Lana Irwin had learned from Jones. But this was only a small part of the mosaic of trial testimony presented by Lana Irwin. That this detail is inconsistent would not have done much to undermine Irwin's credibility, given that she was only testifying that she heard Jones say one door had to be kicked in. There are many ways this information could have been distorted: Scott Nordstrom (who pursued and killed Hardman) could have exaggerated or misstated his account of what happened in the back room when discussing the crime with Jones; Jones could have assumed a door had been kicked

in based on noises he heard when Scott Nordstrom went into the back room; or Jones could have exaggerated what had happened when talking about it with his friend in Lana Irwin's apartment; or Lana Irwin, who based her testimony on what she overheard Jones tell a friend, might have misheard or misunderstood that detail.

[4] We are not persuaded that the prosecution and police would so jeopardize both their case and their reputations by intentionally putting on false testimony regarding such a minor detail. After all, Lana Irwin was able to accurately testify about many other details she overheard from Jones that match details of the crime and David Nordstrom's account. For example, she testified: that Jones had two partners, brothers, one was inside and one in the truck, and Jones was mad at the one in the truck; that Jones killed four or five people in Tucson by shooting them in the head, and his partner killed two; that one man was shot standing by a door, and that another was chased by Jones's partner to a back room and shot; that women were killed at a bar or restaurant where everything was red; that an older man was pistol whipped and shot in the head while sitting in a chair with his head leaning back in that same red room; and that Jones didn't get enough money. We hold that the PCR court was not unreasonable in accepting the State's explanation for this discrepancy, and further hold that the incorrect testimony and argument regarding the kicked-in door was not material.[3]

[3]Jones contends the above misconduct was "compounded" by the prosecution's failure to disclose the police reports which illustrated that the detectives' statements were false. The reports are among 2209 pages of disclosure stamped "FIRST DISCLOSURE July 28, 1997." The PCR court determined that this was "part of an orderly and seemingly reliable, long-standing institutional process" that "creates a rebuttable presumption that the documents were disclosed," and found that the affidavits from Jones's trial attorneys that they do not remember seeing the report were insufficient to rebut that presumption. We hold that the PCR court's determination was reasonable.

B. Arthur Bell's Body

Another corroborating detail that Prosecutor White emphasized between Irwin's testimony and the facts of the crimes was that Arthur Bell had been shot in the head and left in a chair with his head leaning back. Jones contends that Bell's body was initially lying with his head down on the bar and was moved sometime after police arrived, but before pictures were taken. If this were true, then Irwin's ability to accurately describe the body's position could show that the prosecution or police showed her pictures from the crime scene.

Jones bases his argument on three police reports: the first two describe Bell as "slouched over another bar stool," and "slumped over sitting at the bar," and the third recounts the statement of the witness who discovered the victims at the Union Hall robbery, Nathan Alicata, that "he saw Arthur sitting on a bar stool slumped over the bar." In a subsequent interview with detectives, Alicata described Bell as "slumped on the chair on the bar sort of sideways." Jones claims this is inconsistent with the reports of other officers who arrived on scene later, which described Bell as "in a chair at the bar. His head was leaning back," and "in a bar stool up by the front of the bar. He was leaning back in the stool with his head leaning back also."

[5] The PCR court found that there was sufficient evidence to "support a reasonable conclusion that, when the intruders departed [the Union Hall], Arthur Bell's body was slouched in a chair at the bar with his head leaning back." This determination was not unreasonable. None of the police reports mention Bell's body being moved, and the pictures introduced at trial, which show Bell slumped sideways across a barstool with his head leaning back, are not inconsistent with the descriptions pointed to by Jones.[4]

[4]We also reject Jones's allegation that detectives lied when they said that information about the Union Hall being red had not been released to the media. The fact that a newspaper ran a color photo of the celebration in the Union Hall after Scott Nordstrom's conviction in 1997 does not mean that police released information.

C. Misconstrual of Police Sketches (Claim 1-C)

A police artist made two composite sketches of the perpetrators of the Moon Smoke Shop robbery, one with a hat and one without a hat, based on the recollections of witness Mark Naiman. Mike Kapp, an associate of the Nordstrom brothers, told Detective Edward Salgado in a "free talk" interview (and later testified at Scott Nordstrom's trial) that these sketches resembled the Nordstrom brothers (specifically, the hatless sketch was David Nordstrom and the one with a hat was Scott Nordstrom).

[6] Jones contends that Detective Salgado and Prosecutor White misled the jury at Jones's trial by suggesting that the hatless sketch resembled both Nordstrom brothers while "the suspect with a hat was always clearly identified as Jones." After Salgado agreed on cross-examination that "other people had come forward identifying other people other than Jones from those composites," White asked Salgado on redirect how he would describe one of the sketches:

> A Slim, slim face, narrow face, long face.
>
> Q Do either one of the Nordstroms have a long face?
>
> A They both have long faces.
>
> Q Is that the similarity that people were telling you about?
>
> A Yes.

The PCR court found that this was "a reasonable line of questioning given Jones's connection with the Nordstroms and the fact that the police identified the brothers as initial suspects in the investigation." The district court held that this testimony was not material because the "overwhelming evidence of guilt

unrelated to the sketches renders any alleged 'false impression' inconsequential." We agree, and hold that White's questioning of Salgado did not deny Jones a fair trial or undermine confidence in the verdict. *See Hayes*, 399 F.3d at 984.

D. False Avowal About David Nordstrom's Stepmother's Phone (Claim 1-D)

As a condition of his parole, David Nordstrom had an electronic monitoring device attached to his ankle paired with a unit hooked up to the phone at his parents' house. If David Nordstrom left the house when he wasn't supposed to do so, the electronic monitoring system would record the curfew violation. To demonstrate that the system could not be circumvented, Prosecutor White introduced evidence of a test performed at the Nordstroms' home eighteen months after the murders. To establish foundation to allow the test results to be admitted, White avowed that Terri Nordstrom (David Nordstrom and Scott Nordstrom's stepmother) would later testify that the phone used in the test was the same one as the one in use at the time of the murders. But Terri Nordstrom was not asked about this at Jones's trial, and at Scott Nordstrom's trial she had testified that the phone used for the test was not the same as the phone that was in use the night of the Union Hall robbery.

Jones argues that "White made this false avowal in order to force this key document into evidence without foundation." The PCR court denied this claim because it found that the expert testimony of Jones's parole supervisor "settled any question concerning the relevancy of the computer printout showing the results of the experiment." This determination was not unreasonable, given the expert testimony at trial "that the kind of phone used had no impact on the functioning of the monitoring system other than to cause an occasional busy signal."

[7] "[T]he touchstone of due process in cases of alleged prosecutorial misconduct is the fairness of the trial, not the

culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Prosecutor White's erroneous avowal was not wholly insubstantial, but it did not impact the fairness of Jones's trial. Because the evidence would have been admissible without the avowal, we hold that the allegedly false avowal was not material.

E. Delayed Disclosure of Jones's Hat and Boots (Claim 1-E)

The police obtained Jones's hat and boots on March 18, 1998. They were submitted to the Tucson Police Department's Crime Lab and tested negative for the presence of blood. The state disclosed that it had Jones's hat and boots on April 23. Trial was originally supposed to begin on May 4, but was continued until June 16 due to numerous last minute disclosures by the prosecution, including this one. The hat and boots were admitted into evidence at trial and the negative blood test results stipulated to the jury.

Jones argues that Prosecutor White and Detectives Salgado and Woolridge deliberately hid this exculpatory evidence on April 20, three days before the hat and boots were disclosed, by giving Jones's attorneys "highly evasive and incomplete" answers as to whether the police had Jones's hat and boots during a pre-trial conference.[5] Jones contends that the fact that the information was turned over to defense counsel before

[5]When the existence of the hat and boots were disclosed on April 23, the defense moved to preclude the evidence due to its late disclosure. In his response to the motion to preclude, Prosecutor White explained that the State gave these answers because it "could not 'link' the hat and boots to the Defendant" on April 20. But White "reasoned that while the State could not prove the boots belonged to Defendant, the Defendant might be able to prove that link," and disclosed the hat and boots because the negative blood test results may be exculpatory. The judge neither granted nor denied the motion to preclude, and instead granted a motion to continue trial for six weeks so defense counsel could investigate the new disclosures.

trial "does not excuse the blatant lying by the police and prosecutor to defense counsel." The PCR court rejected this claim, finding that the "disclosure of the hat, boots, and lab results was not accomplished in as timely a manner as [Jones] would have preferred," but that there was "adequate time for [Jones's] counsel to prepare for trial."

[8] The district court examined this claim under *Brady*, rejecting it because there was no suppression: "despite the evasiveness of the detectives . . . the evidence was disclosed to the defense nearly two months prior to trial." We agree with both the PCR and district courts that this delayed disclosure did not affect the fairness of the trial. A three day delay in disclosure, even if unwarranted and not the product of lack of knowledge or confusion, is not tantamount to a non-disclosure where Jones's lawyers had the information two months before trial and only days after it was first requested.

V

Jones alleges that his right to counsel under the Sixth and Fourteenth Amendments were violated because his counsel rendered ineffective assistance by not discovering and using the conflicted testimony on the kicked-in door at issue in Claim 1-A, discussed in Part IV.A, *supra*. Jones argues that his counsel should have reviewed Detectives Woolridge and Godoy's testimony at Scott Nordstrom's trial, and that if they had done so they would have been able to cross-examine and impeach the detectives with their prior inconsistent statements. Jones asserts that this would have changed the verdict by undermining the credibility of the detectives and of Lana Irwin.

To demonstrate ineffective assistance of counsel, a petitioner must show that (1) his counsel's performance was deficient and (2) such deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. *Strickland*'s second prong requires the petitioner to "show that there is a reason-

able probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The court may "dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice" without addressing whether counsel's performance was deficient. *Id.* at 699.

[9] The PCR court dismissed this issue for the same reasons it dismissed Claim 1-A: the testimony regarding the kicked-in door was "but one of the dozen or so correlations with the facts of the crime that were adduced from the testimony of Lana Irwin." We agree. As discussed above, challenging this fact would not have undermined Irwin's testimony regarding the many other facts that did match up, especially because Irwin was testifying as to what Jones said Scott Nordstrom did, some of it out of sight of Jones, with plenty of opportunity for exaggeration, misinterpretation, or mistake on Jones's part, or for mishearing by Irwin. We hold that Jones was not prejudiced by his counsel's failure to discover and utilize the inconsistencies regarding the kicked-in door.

VI

On the prosecutorial misconduct issues initially certified for appeal, our task is to determine whether Jones's due process rights were violated, and "the aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.' " *Smith*, 455 U.S. at 219 (quoting *Brady*, 373 U.S. at 87). On all contentions of prosecutorial misconduct, we agree with the state courts that there was no fundamental unfairness to Jones and no due process violation. On the related ineffective assistance of counsel claims on which we expanded the scope of the certificate of appealability, we conclude that the prejudice prong of *Strickland* is not satisfied. We hold that Jones received a fair trial leading to his jury conviction of multiple murders beyond a reasonable doubt and it was not objectively unreasonable for the Arizona courts to deny habeas relief.

AFFIRMED.

Appendix F

Order Dismissing Motion for Relief from Judgment, *Jones v. Ryan*, No. CV-03-00478-TUC-DCB (September 24, 2013)

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert Glen Jones, Jr., Petitioner, v. Charles L. Ryan, et al., Respondents.	No. CV-03-00478-TUC-DCB DEATH PENALTY CASE **ORDER DISMISSING MOTION FOR RELIEF FROM JUDGMENT**

Before the Court is Petitioner's motion for relief from judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.[1] (Doc. 106.) The motion seeks relief based on the Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that ineffective assistance of postconviction counsel may serve as cause to excuse the procedural default of a claim alleging ineffective assistance of trial counsel. The motion also seeks relief for an alleged *Brady* violation during habeas proceedings. Respondents oppose the motion. (Doc. 110.) The Court concludes that, because Petitioner's Rule 60(b) motion seeks to raise new claims, it constitutes a second or successive petition that may not be considered by this Court absent authorization from the Court of Appeals for the Ninth Circuit.

[1] Petitioner's motion initially relied on both Rule 60(b)(6) and subsection (b)(3) (providing for relief from judgment based on fraud), but the latter allegation was withdrawn in his reply brief. (Doc. 114 at 16-17.)

BACKGROUND

In 1998, a jury convicted Petitioner on six counts of first-degree murder for killings that occurred two years earlier during robberies of the Moon Smoke Shop and the Fire Fighters Union Hall in Tucson. The trial court sentenced him to death. Petitioner was also convicted of first-degree attempted murder, aggravated assault, armed robbery, and first-degree burglary. Details of the crimes are set forth in the Arizona Supreme Court's opinion upholding Petitioner's convictions and sentences. *State v. Jones*, 197 Ariz. 290, 297–98, 4 P.3d 345, 352–53 (2000), *cert. denied*, 532 U.S. 978 (2001).

In 2003, following unsuccessful state postconviction proceedings, Petitioner sought federal habeas relief. At his request, the Court appointed as counsel Daniel Maynard and Jennifer Reiter (née Sparks), who had also represented Petitioner during state postconviction proceedings. (Docs. 2, 5.) The amended habeas petition raised numerous claims, including twelve allegations of ineffective assistance of trial counsel. (Doc. 27.) In their Answer, Respondents conceded that each ineffectiveness claim had been properly exhausted in state court. (Doc. 34 at 33.) In January 2010, the Court denied habeas relief in an order and memorandum of decision that addressed on the merits all of Petitioner's allegations concerning trial counsel's representation. (Doc. 79 at 29-46.)

On appeal, the Ninth Circuit affirmed. *Jones v. Ryan*, 691 F.3d 1093 (9th Cir. 2012). On April 11, 2013, Petitioner filed a certiorari petition in the United States Supreme Court. One week later, Maynard moved the Ninth Circuit for association or substitution of the Federal Public Defender as counsel, citing that office's "many more resources" to conduct further investigation into Petitioner's alleged innocence and potentially litigate additional claims or execution-related issues. Motion for the Association or Substitution of Counsel at 4, *Jones v. Ryan*, No. 10-99006 (9th Cir. Apr. 19, 2013), ECF No. 56. On April 24, 2013, the Ninth Circuit relieved Maynard as counsel of record and substituted the Federal Public Defender.

The United States Supreme Court denied certiorari on June 17, 2013. *Jones v. Ryan*, 133 S. Ct. 2831 (2013). The State of Arizona then moved the Arizona Supreme Court to

issue a warrant of execution. On August 21, 2013, Petitioner filed the instant motion for relief from judgment, and this Court set a briefing schedule. (Docs. 105, 106.) On August 27, the Arizona Supreme Court set Petitioner's execution for October 23, 2013. Thereafter, Respondents filed an opposition to the instant motion, and Petitioner filed a reply. (Docs. 110, 114.)

DISCUSSION

Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from judgment on several grounds, including the catch-all category "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). A motion under subsection (b)(6) must be brought "within a reasonable time," Fed. R. Civ. P. 60(c)(1), and requires a showing of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

For habeas petitioners, a Rule 60(b) motion may not be used to avoid the requirements for second or successive petitions set forth in 28 U.S.C. § 2244(b). *Gonzalez*, 545 U.S. at 530–31. This statute has three relevant provisions: First, § 2244(b)(1) requires dismissal of any claim that has already been adjudicated in a previous habeas petition. Second, § 2244(b)(2) requires dismissal of any claim not previously adjudicated unless the claim relies on either a new and retroactive rule of constitutional law or on new facts demonstrating actual innocence of the underlying offense. Third, § 2244(b)(3) requires prior authorization from the court of appeals before a district court may entertain a second or successive petition under § 2244(b)(2). Absent such authorization, a district court lacks jurisdiction to consider the merits of a second or successive petition. *United States v. Washington*, 653 F.3d 1057, 1065 (9th Cir. 2011); *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001).

In *Gonzalez*, the Court held that a Rule 60(b) motion constitutes a second or successive habeas petition when it advances a new ground for relief or "attacks the federal court's previous resolution of a claim *on the merits*." 545 U.S. at 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at 532 n.4. The Court further

explained that a legitimate Rule 60(b) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 532; *accord United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011) (observing that a defect in the integrity of a habeas proceeding requires a showing that something happened during that proceeding "that rendered its outcome suspect"). For example, a Rule 60(b) motion does *not* constitute a second or successive petition when the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar"—or contends that the habeas proceeding was flawed due to fraud on the court. *Id.* at 532 nn.4–5; *see, e.g.*, *Butz v. Mendoza-Powers*, 474 F.3d 1193 (9th Cir. 2007) (finding a Rule 60(b) motion not to be the equivalent of a second or successive petition where district court dismissed first petition for failure to pay filing fee or comply with court orders and did not reach merits of claims). The Court reasoned that if "neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction," there is no basis for treating it like a habeas application. *Gonzalez*, 545 U.S. at 533.

On the other hand, if a Rule 60(b) motion "presents a 'claim,' i.e., 'an asserted federal basis for relief from a . . . judgment of conviction,' then it is, in substance, a new request for relief on the merits and should be treated as a disguised" habeas application. *Washington*, 653 F.3d at 1063 (quoting *Gonzalez*, 545 U.S. at 530). Interpreting *Gonzalez*, the court in *Washington* identified numerous examples of such "claims," including:

> a motion asserting that owing to "excusable neglect," the movant's habeas petition had omitted a claim of constitutional error; a motion to present "newly discovered evidence" in support of a claim previously denied; a contention that a subsequent change in substantive law is a reason justifying relief from the previous denial of a claim; a motion that seeks to add a new ground for relief; a motion that attacks the federal court's previous resolution of a claim on the merits; a motion that otherwise challenges the federal court's determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief; and finally, an attack based on the movant's own conduct, or his habeas counsel's omissions.

Id. (internal quotations and citations omitted). If a Rule 60(b) motion includes such claims,

it is not a challenge "to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5.

I. *Martinez* Issue

Petitioner seeks relief under Rule 60(b) to reopen these habeas proceedings to raise three newly-identified claims of trial counsel ineffectiveness that were neither presented in state court nor included in his federal habeas petition.[2] Respondents argue that because the motion does not challenge a "defect in the integrity of the federal habeas proceedings," but instead asserts that Petitioner is entitled to habeas relief for substantive reasons, it must be treated as a second or successive petition. (Doc. 110 at 4.) Petitioner counters that he did not get a "fair shot" at raising ineffective-assistance-of-trial-counsel (IATC) claims because, as a result of having represented him in state postconviction-relief (PCR) proceedings, original habeas counsel Maynard and Reiter operated under a conflict of interest that prevented them from objectively assessing the IATC claims they raised in the state PCR petition. (Doc. 114 at 3.) Petitioner's argument is based on the change in procedural law resulting from the Supreme Court's decision in *Martinez v. Ryan.*

In *Martinez*, the Court created a narrow exception to the well-established rule in *Coleman v. Thompson*, 501 U.S. 722, 731 (1991), that ineffective assistance of counsel during state PCR proceedings cannot serve as cause to excuse the procedural default of an IATC claim. The Court held that in states like Arizona, which require prisoners to raise IATC claims in PCR proceedings in lieu of direct appeal, the ineffectiveness of PCR counsel may serve as cause. *Martinez*, 132 S. Ct. at 1315. From this, Petitioner asserts that Maynard and Reiter raised in the federal habeas petition the exact same claims raised in the state PCR petition because they had a "strong disincentive" to identify new IATC claims for which,

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[2] 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. (Doc. 106 at 14-37.)

under *Martinez*, they would then have had to assert their own ineffectiveness as cause. (Doc. 106 at 11.)

The Court assumes, for purposes of the instant motion, that under certain circumstances a conflict of interest by habeas counsel may form the basis for claiming a defect in the integrity of proceedings for Rule 60(b) purposes. *See, e.g.*, *Brooks v. Bobby*, 660 F.3d 959, 963 (6th Cir.), *cert. denied*, 132 S. Ct. 607 (2011) (observing that a conflict of interest "could under sufficiently egregious conditions haunt the integrity of a first federal habeas proceeding"). Here, however, Petitioner's allegation of a conflict does not rise to that level because at the time of counsel's representation before this Court, there could have been no "disincentive" to raise every identifiable IATC claim, and in fact counsel pursued twelve such allegations. The proceedings in this Court concluded more than two years before *Martinez* was decided. Throughout their representation of Petitioner in district court, it was settled law that the ineffective assistance of PCR counsel could serve as neither an independent constitutional claim for habeas relief, *see* 28 U.S.C. § 2254(I), nor, pursuant to *Coleman*, as cause to excuse the procedural default of other constitutional claims. Therefore, the Court is unpersuaded that the integrity of Petitioner's federal habeas proceeding was undermined as a result of state PCR counsel's continued representation of him from state to federal court.

Moreover, the underlying premise of the conflict of interest alleged here is that Maynard and Reiter acted ineffectively by not identifying additional IATC claims for inclusion in Petitioner's federal habeas petition. *See generally Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980) (characterizing a conflict-of-interest claim as one alleging ineffective assistance of counsel). In *Gonzalez*, the Court specifically noted that "an attack based on the movant's own conduct, *or his habeas counsel's omissions* . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Id.* at 532 n.5 (emphasis added). Similarly, the Sixth Circuit, in ruling that a petitioner's Rule 60(b) motion was actually a second or successive habeas petition, explained:

> It makes no difference that the motion itself does not attack the district court's substantive analysis of those claims but, instead, purports to raise a defect in the integrity of the habeas proceedings, namely his counsel's failure—after obtaining leave to pursue discovery—actually to undertake that discovery; all that matters is that Post is "seek[ing] vindication of" or "advanc[ing]" a claim by taking steps that lead inexorably to a merits-based attack on the prior dismissal of his habeas petition.

Post v. Bradshaw, 422 F.3d 419, 424–25 (6th Cir. 2005) (quoting *Gonzalez*, 545 U.S. at 530–31). Likewise, in *Gray v. Mullin*, 171 Fed.Appx. 741, 742 (10th Cir. 2006), where habeas counsel failed to provide the full state court record to the district court, the Tenth Circuit rejected the petitioner's argument that counsel's negligence undermined integrity of the habeas proceeding and concluded that his Rule 60(b) motion was successive because it reasserted a claim already addressed on the merits. *Id.* at 743–44; *see also Gurry v. McDaniel*, 149 Fed.Appx. 593, 596 (9th Cir. 2005) (barring Rule 60(b) motion as successive petition because based on alleged ineffective assistance provided by previous habeas counsel).

Here, Petitioner has asserted that habeas counsel failed to identify and raise three IATC claims. Such failure does not demonstrate a defect in the integrity of the federal habeas proceeding. Rather, Petitioner is attempting, under the guise of a Rule 60(b) motion, to gain a second opportunity to pursue federal habeas relief on new grounds. As the Supreme Court made clear in *Gonzalez*, "[u]sing Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." 545 U.S. at 531. Because this aspect of Petitioner's motion is in substance a second or successive petition, the Court lacks jurisdiction to consider the new IATC claims raised therein absent authorization from the court of appeals.

II. *Brady* Issue

Petitioner also asserts that Rule 60(b) relief is warranted because Respondents suppressed exculpatory evidence during these federal habeas proceedings in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This evidence, according to Petitioner, would have

supported one of the newly-identified IATC claims he argues in the instant motion should have been pursued in state court by PCR counsel—trial counsel's failure to challenge the admissibility, under Arizona's standards for the admission of scientific evidence, records generated by an electronic monitoring system (EMS) that indicated suspect-turned-informant David Nordstrom was at home the night of the Union Hall murders. Petitioner asserts this "alibi" evidence was used by the prosecution to bolster Nordstrom's credibility and that the prosecution was aware of deficiencies in the EMS system utilized by the Arizona Department of Corrections (ADC) to monitor Nordstrom.

To support his contention that Respondents committed a *Brady* violation, and thus undermined the integrity of these habeas proceedings, Petitioner asserts that Respondents were on notice that the functioning of the EMS system was at issue because his habeas petition alleged ineffective assistance of trial counsel for failing to (1) effectively challenge the testimony of Nordstrom's probation officer and ADC's EMS supervisor concerning the system used to monitor Nordstrom, and (2) call witnesses that could have testified Nordstrom was sometimes out past curfew. Based on the notice from these habeas claims, Petitioner asserts that Respondents had a duty to seek information from the EMS system's manufacturer relative to the operation and functioning of the equipment used to monitor Nordstrom and to disclose that information during these habeas proceedings. The Court disagrees.

First, it is highly questionable whether the type of evidence Petitioner alleges Respondents should have procured and disclosed has any relevancy to the IATC claims raised in his federal habeas petition. The state court adjudicated these claims on the merits and thus habeas review under § 2254(d) is limited to the record before the state court. *See Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). Additionally, information concerning the operation and functioning of the type of unit used to monitor Nordstrom has no bearing on whether trial counsel effectively cross-examined the personnel who monitored the EMS system. Such information may be relevant to a claim that trial counsel should have challenged the admissibility of records generated by the EMS system, but that separate claim was not presented in the habeas petition.

Second, Respondents were under no duty to disclose the allegedly exculpatory material during these federal habeas proceedings.[3] In *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68–69 (2009), the Court held that the *Brady* right of pretrial disclosure does not extend to the postconviction context because once convicted a criminal defendant has only a limited liberty interest. In so holding, the Court reversed the Ninth Circuit's contrary conclusion, which was based primarily on its decision in *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992), relied on by Petitioner here.[4] *See Osborne v. Dist. Attorney's Office for Third Judicial Dist.*, 521 F.3d 1118, 1128–29 (9th Cir. 2008). Because there was no duty of disclosure in these proceedings, any failure by Respondents to comply with *Brady* did not undermine the integrity of the proceedings.

In sum, Petitioner has not shown that Respondents' failure to obtain and disclose information regarding reliability of the EMS system used to monitor Nordstrom undermined the integrity of the proceedings relevant to the claims actually raised in his § 2254 petition. Rather, he seeks leave through a Rule 60(b) motion to pursue a new claim for habeas relief based on trial counsel's alleged ineffectiveness in not challenging the admissibility of records generated by the EMS system. A Rule 60(b) motion that in substance raises new claims for habeas relief must be treated as a second or successive petition, subject to the statutory requirements for filing such petitions. *Gonzalez*, 545 U.S. at 531; 28 U.S.C. § 2254(b). Because Petitioner has not obtained authorization from the court of appeals, the Court may

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[3] The Court notes that Petitioner does not actually identify any specific evidence from the EMS system's manufacturer that should have been disclosed, let alone material exculpatory evidence. Instead, he seeks leave to conduct discovery to support his newly-identified IATC claim.

[4] Petitioner's reliance on *In re Pickard*, 681 F.3d 1201 (10th Cir. 2012), is similarly unavailing. There, the prisoner alleged fraud as the basis for his Rule 60(b) motion, not a postconviction duty of disclosure. *Id.* at 1206. The court found that a false statement by the prosecutor during § 2255 proceedings deceived the district court into denying discovery that would have supported the § 2255 petitioner's unsuccessful *Brady* claim. *Id.* at 1207. Because this fraud undermined the integrity of the § 2255 proceeding, the Rule 60(b) motion was not improper.

not consider his new IATC claim.

CONCLUSION

Petitioner's Rule 60(b) motion does not demonstrate any defect in the integrity of these habeas proceedings but instead seeks to raise several new substantive claims of ineffectiveness against trial counsel. It is therefore a second or successive petition, and this Court lacks jurisdiction to consider it absent authorization from the court of appeals pursuant to § 2244(b)(3).

Accordingly,

IT IS ORDERED that Petitioner's Motion for Relief from Judgment (Doc. 106) is dismissed as an unauthorized second or successive petition.

DATED this 23rd day of September, 2013.

David C. Bury
United States District Judge

Appendix G

Opinion, *Jones v. Ryan*, Ninth Cir. No. 13-16928 (Oct. 18, 2013)

FILED

OCT 18 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT GLEN JONES, Jr., Petitioner - Appellant, v. CHARLES RYAN, Respondent - Appellee.	No. 13-16928 D.C. No. 4:03-cv-00478-DCB OPINION

ROBERT GLEN JONES, Jr., Petitioner, v. CHARLES RYAN, Respondent.	No. 13-73647

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Submitted October 10, 2013*

* The panel unanimously concludes this case is suitable for decision without

(continued...)

San Francisco, California

Before: Ronald M. Gould, Richard C. Tallman, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Gould

GOULD, Circuit Judge:

We confront issues concerning whether and how the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), affects the standards for when a Federal Rule of Civil Procedure 60(b) ("Rule 60(b)") motion may be filed, and for when a second or successive 28 U.S.C. § 2254 habeas corpus petition may be filed.

Arizona death row prisoner Robert Glen Jones, Jr., appeals from the district court's order dismissing his motion for relief from judgment filed under Rule 60(b). The district court concluded that Jones's Rule 60(b) motion sought to raise new claims such that it actually constituted a second or successive 28 U.S.C. § 2254 habeas corpus petition that the district court could not consider absent authorization from our court. *See Jones v. Ryan*, No. CV-03-00478, 2013 WL 5348294, at *1, *5 (D. Ariz. Sept. 24, 2013) ("Petitioner is attempting, under the guise of a Rule 60(b) motion, to gain a second opportunity to pursue federal habeas

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[*](...continued)
oral argument. *See* Fed. R. App. P. 34(a)(2).

relief on new grounds."); *see also* 28 U.S.C. § 2244(b)(3). In No. 13-16928, we grant Jones a certificate of appealability ("COA"), permitting our review of this appeal, and affirm the judgment of the district court. In No. 13-73647, we deny Jones's application to file a second or successive habeas corpus petition.

Because of the expedited nature of this appeal and its death penalty consequences, however, we also evaluate Jones's Rule 60(b) motion on the merits and deny him relief from judgment because he has not satisfied the standards permitting relief on those grounds. We then construe Jones's appeal as a request for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court pursuant to 28 U.S.C. § 2244(b)(3)(A). *See* Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice."); *see also United States v. Washington*, 653 F.3d 1057, 1065 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1609 (2012).[1] Also, in footnote 5, we address Jones's application in No. 13-73647 for leave to file a second or successive petition for writ of habeas corpus. Because we conclude that Jones has not met the requirements contained in 28 U.S.C.

[1] While *United States v. Washington* addressed a 28 U.S.C. § 2255 habeas corpus petition, 28 U.S.C. § 2255 "was intended to mirror § 2254 in operative effect," *Reed v. Farley*, 512 U.S. 339, 353 (1994) (internal quotation marks omitted), so our analysis of those statutes is largely the same.

§ 2244(b), for filing a second or successive habeas corpus petition, we deny his separate request.

We have jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253.

I

Jones was convicted of six murders in Arizona state court and was sentenced to death in 1998. He was also convicted of first-degree attempted murder, aggravated assault, armed robbery, and first-degree burglary. Our opinion of August 16, 2012, affirming the district court's denial of Jones's first 28 U.S.C. § 2254 federal habeas corpus petition, details the circumstances of Jones's crimes and the evidence presented at his trial:

> In 1996, six people were killed during two armed robberies in Tucson, Arizona. On May 30, the Moon Smoke Shop was robbed, where two victims were killed and a third was wounded by gunfire. On June 13, the Fire Fighters Union Hall was robbed, and four persons there were killed.
>
> The Moon Smoke Shop robbery began when two robbers followed a customer, Chip O'Dell, into the store and at once shot him in the back of the head. Four employees were in the store: Noel Engles, Steve Vetter, and Mark Naiman were behind one counter concentrating on the stock, and Tom Hardman was behind another. After hearing the gunshot, Engles and Naiman looked up to see a robber in a long-sleeved shirt, dark sunglasses, and a dark cowboy hat wave a gun at them and yell to get down. Naiman recognized the gun as a 9mm. Engles dropped to his knees and pushed an alarm button.
>
> Engles noticed a second robber move toward the back room and heard

someone shout, "Get the f* * * out of there!" The gunman at the counter told Naiman to open the cash register. After Naiman did so, the gunman reached over the counter and began firing at the others on the floor. Thinking that the others were dead, Naiman ran out of the store and called 911 at a pay phone. On the floor behind the counter, Engles heard shots from the back room and then, realizing the gunmen had left the store, also ran out of the store, by the back door. Running up the alley to get help, Engles saw a light-colored pickup truck with two people in it accelerate and turn on a street into heavy traffic.

Naiman and Engles survived. Vetter also survived, although shot in the arm and face. O'Dell and Hardman were both killed by close range shots to the head, O'Dell at the entrance to the store and Hardman in the back room. Three 9mm shell casings were found in the store, one beside O'Dell and two near the cash register. Two .380 shells were found near Hardman's body. Two weeks after the robbery, Naiman met with a police sketch artist who used his description of the gunmen to create sketches of the suspects. These sketches were released to the media in an effort to catch the perpetrators. At trial, two acquaintances of Jones testified that when they saw the police sketches their first thought was that they looked like Jones.

The Fire Fighters Union Hall was robbed two weeks later. There were no survivors of the violence that befell those present there. Nathan Alicata discovered the robbery at 9:20 p.m. when he arrived at the Union Hall and discovered the bodies of Maribeth Munn (Alicata's girlfriend), Carol Lynn Noel (the bartender), and a couple, Judy and Arthur Bell. The police investigation turned up three 9mm shell casings, two live 9mm shells, and two .380 shell casings. About $1300 had been taken from the open cash register, but the robbers were unable to open the safe. The coroner, who examined the bodies at the scene, concluded that the bartender had been shot twice, and that the other three victims were shot through the head at close range as their heads lay on the bar. The bartender's body had a laceration on her mouth consistent with having been kicked in the face, and Arthur Bell's body had a contusion on the right side of his head showing he

> was struck with a blunt object, possibly a pistol.
>
> In 1998, petitioner Robert Jones was convicted of these ghastly crimes of multiple murder and sentenced to death. His co-defendant, Scott Nordstrom, had been convicted in a separate proceeding six months earlier. Jones's theory of the case at trial and on appeal was that Scott Nordstrom and his brother David Nordstrom committed these murders, while he was not involved. While there was no physical evidence or positive eyewitness identifications conclusively linking Jones to the crimes, both he and his truck matched descriptions given by survivors of the Moon Smoke Shop robbery. The prosecution's case against Jones was based in large part on David Nordstrom's testimony. David Nordstrom gave a detailed account of his role as a getaway driver in the Moon Smoke Shop robbery, and identified Jones as a robber and shooter, as well as the guns he carried. But that was not all of the testimony against Jones. Lana Irwin, an acquaintance of Jones, also testified that she overheard Jones talking about details of these murders that the police had not released to the general public. Jones's friend David Evans gave additional implicating testimony.

Jones v. Ryan, 691 F.3d 1093, 1096-97 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2831 (2013).[2]

Jones's convictions and sentence were upheld on direct review, and on state collateral review and federal habeas corpus review, culminating in our opinion in *Jones v. Ryan*, 691 F.3d 1093 (9th Cir. 2012). Jones filed a petition for a writ of certiorari at the United States Supreme Court, which declined review. *Jones v.*

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[2] More details of the crimes and the evidence presented at Jones's trial are set forth in our earlier opinion and in the Arizona Supreme Court's opinion upholding Jones's convictions and sentence. *See State v. Jones*, 4 P.3d 345, 352-55 (Ariz. 2000), *cert. denied*, 532 U.S. 978 (2001).

Ryan, 133 S. Ct. 2831 (2013). The Supreme Court decided *Martinez* on March 20, 2012, holding that, in some circumstances, the ineffective assistance of state post-conviction relief counsel can serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim. 132 S. Ct. at 1315. Thereafter, on August 21, 2013, Jones filed a motion in the district court seeking relief from judgment pursuant to Rule 60(b)(6). Jones sought to assert three new ineffective-assistance-of-trial-counsel claims based on *Martinez*, and to assert a new claim for an alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963), during habeas corpus proceedings.

The State of Arizona ("the State") moved to dismiss Jones's self-styled Rule 60(b) motion as an unauthorized second or successive 28 U.S.C. § 2254 habeas corpus petition. *See* 28 U.S.C. § 2244(b)(2). The district court agreed with the State that Jones could not use Rule 60(b) as a vehicle to assert new claims and dismissed Jones's appeal for lack of jurisdiction absent authorization from the Court of Appeals for the Ninth Circuit. *Jones*, 2013 WL 5348294, at *1. The district court neither granted nor explicitly denied a COA. This appeal followed. Jones's execution has been set for October 23, 2013. As noted above, in No. 13-

16928 we grant Jones a COA, which is necessary to permit our review of this appeal.[3]

II

We review the district court's decision to dismiss Jones's Rule 60(b) motion as an unauthorized second or successive 28 U.S.C. § 2254 habeas corpus petition

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[3] Were Jones appealing the denial or dismissal of a valid Rule 60(b) motion, he may have had no need for a COA. *See Harbison v. Bell*, 556 U.S. 180, 183 (2009) ("[28 U.S.C. §] 2253(c)(1)(A) . . . governs final orders that dispose of the merits of a habeas corpus proceeding—a proceeding challenging the lawfulness of the petitioner's detention."). Because we affirm the district court's ruling that Jones's purported Rule 60(b) motion was in fact an unauthorized second or successive 28 U.S.C. § 2254 habeas corpus petition, however, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, "governs the conditions of [Jones's] appeal, and so he was required to seek a COA to obtain appellate review of the dismissal of his habeas petition." *Slack v. McDaniel*, 529 U.S. 473, 482 (2000). We treat Jones's notice of appeal, filed on September 24, 2013, as an application for a COA. *See* Fed. R. App. P. 22(b); *Slack*, 529 U.S. at 483.

When the district court denies a habeas corpus petition on procedural grounds and fails to reach the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Reviewing Jones's motion, we conclude that he has satisfied AEDPA's requirements for a COA by making "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and by showing that jurists of reason could debate whether the district court properly dismissed Jones's Rule 60(b) motion as a disguised (and unauthorized) second or successive 28 U.S.C. § 2254 habeas corpus petition. We grant Jones a COA, though this of course is not the same as authorizing him to file a second or successive 28 U.S.C. § 2254 habeas corpus petition based on the standard in 28 U.S.C. § 2244(b).

de novo. *See Henderson v. Lampert*, 396 F.3d 1049, 1052 (9th Cir. 2005); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc).

Rule 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b)(6), the provision under which Jones brought his motion, permits reopening for "any . . . reason that justifies relief" other than the more specific reasons set out in Rule 60(b)(1)-(5). Fed. R. Civ. P. 60(b)(6); *see Gonzalez*, 545 U.S. at 528-29. A movant seeking relief under Rule 60(b)(6) must show "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). Such circumstances "rarely occur in the habeas context." *Id.*

While the habeas restrictions established by AEDPA "did not expressly circumscribe the operation of Rule 60(b)," they "are made indirectly relevant . . . by the fact that Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings . . . only to the extent that [it is] not inconsistent with applicable federal statutory provisions and rules." *Id.* at 529 (alteration in original) (footnote omitted) (internal quotation marks omitted). Habeas corpus petitioners cannot "utilize a Rule 60(b) motion to make an end-run around the requirements of AEDPA" or to otherwise circumvent that statute's restrictions on second or

successive habeas corpus petitions. *Calderon v. Thompson*, 523 U.S. 538, 547 (1998) (internal quotation marks omitted); *see also United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011) (per curiam) ("[A] state prisoner may not rely on Rule 60(b) to raise a new claim in federal habeas proceedings that would otherwise be barred as second or successive under § 2254."), *cert. denied*, 132 S. Ct. 342 (2011).

AEDPA generally limits a petitioner to one federal habeas corpus motion and precludes "second or successive" habeas corpus petitions unless the petitioner meets certain narrow requirements. *See* 28 U.S.C. § 2244(b). The statute provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless" it "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or on newly discovered facts that show a high probability of actual innocence. *Id.* § 2244(b)(2)(A)-(B); *see also Gonzalez*, 545 U.S. at 529-30.

Because of the difficulty of meeting this standard, habeas corpus petitioners at times have characterized their second or successive habeas corpus petitions as Rule 60(b) motions. But "[w]hen a Rule 60(b) motion is actually a disguised second or successive § 225[4] motion, it must meet the criteria set forth in" 28

U.S.C. § 2244(b)(2). *See Washington*, 653 F.3d at 1059-60 (discussing a second or successive 28 U.S.C. § 2255 petition); *see also Gonzalez*, 545 U.S. at 528.

Our analysis of whether Jones's motion is a valid Rule 60(b) motion or a disguised 28 U.S.C. § 2254 habeas corpus petition is informed by the Supreme Court's decision in *Gonzalez v. Crosby*. *See Washington*, 653 F.3d at 1062. Neither *Gonzalez* nor any other Supreme Court case has "adopted a bright-line rule for distinguishing between a bona fide Rule 60(b) motion and a disguised second or successive [§ 2254] motion." *Id.* at 1060. Rather, *Gonzalez* held that a legitimate Rule 60(b) motion "attacks . . . some defect in the integrity of the federal habeas proceedings," while a second or successive habeas corpus petition "is a filing that contains one or more 'claims,'" defined as "asserted federal bas[e]s for relief from a state court's judgment of conviction." 545 U.S. at 530, 532. Put another way, a motion that does not attack "the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably" raises a claim that takes it outside the bounds of Rule 60(b) and within the scope of AEDPA's limitations on second or successive habeas corpus petitions. *Id.* at 532 n.5.

Proper Rule 60(b) motions include those alleging fraud on the federal habeas corpus court, as well as those in which the movant "asserts that a previous ruling

which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 nn.4 & 5.

By contrast, Rule 60(b) motions presenting "claims" such that they constitute, in effect, new requests for relief on the merits include motions to present "newly discovered evidence . . . in support of a claim previously denied," as well as motions contending that "a subsequent change in substantive law is a reason justifying relief . . . from the previous denial of a claim." *Id.* at 531 (citations omitted) (internal quotation marks omitted). Further, "an attack based on . . . habeas counsel's omissions" generally does not go to the integrity of the proceedings; rather, it is a disguised second or successive 28 U.S.C. § 2254 habeas corpus petition masquerading as a Rule 60(b) motion. *Id.* at 532 n.5. Such a motion, "although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." *Id.* at 531.

In light of these principles, we must determine whether Jones's motion alleges a "defect in the integrity of the federal habeas proceedings" and thus presents a legitimate Rule 60(b) motion, or whether, as the district court ruled, it raises "claims" and, "although labeled a Rule 60(b) motion, is in substance a successive habeas petition [that] should be treated accordingly." *Id.* at 531, 532.

"In conducting this analysis, we consider separately each of the contentions that are on appeal." *Washington*, 653 F.3d at 1064. We consider here Jones's three ineffective-assistance-of-trial-counsel claims raised under *Martinez* and his one *Brady* claim.

A

Seeking to reopen his federal habeas corpus proceedings under Rule 60(b), Jones alleges three ineffective-assistance-of-trial-counsel claims that were neither presented in state post-conviction proceedings nor included in his initial federal habeas corpus petition. First, Jones argues, his trial counsel did not challenge the admissibility of evidence generated by the electronic monitoring system that was used to track a prosecution witness. Second, Jones contends that his trial counsel did not call a key rebuttal witness whose testimony, Jones alleges, would have undercut that of one of the prosecution's witnesses. Third, Jones argues that his trial counsel did not object to the state sentencing court's alleged application of an unconstitutional causal nexus test, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Jones contends that he did not have a "fair shot" at raising these ineffective-assistance-of-trial-counsel claims in his first habeas corpus proceeding because his habeas corpus counsel, Daniel Maynard, was also his state post-conviction relief

counsel. As a result, Jones's argument proceeds as follows: Maynard operated under a *per se* conflict of interest during Jones's habeas corpus proceeding that precluded him from objectively evaluating the thoroughness of the ineffective-assistance-of-trial-counsel claims he brought at the state level. In other words, Jones argues, for Maynard to have brought, at Jones's first federal habeas corpus proceeding, the three ineffective-assistance-of-trial-counsel claims that Jones now seeks to raise in his purported Rule 60(b) motion, Maynard in effect would have had to allege his own ineffective assistance in not bringing such claims at the state post-conviction relief stage.

Jones's argument is premised on the Supreme Court's decision in *Martinez*, which by its terms created a "narrow exception," 132 S. Ct. at 1315, to the well-established rule in *Coleman v. Thompson*, 501 U.S. 722 (1991), that state post-conviction relief counsel's ineffective assistance cannot serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim. *Martinez* held that, in some circumstances, the ineffective assistance of state post-conviction relief counsel can serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim. 132 S. Ct. at 1315. In light of *Martinez*, Jones contends that Maynard limited the claims of ineffective assistance of trial counsel raised on habeas review because he had a "strong disincentive" to raise those that

would have required him to assert his own ineffectiveness during state post-conviction relief proceedings.

We reject Jones's argument for three reasons. First, the Supreme Court in *Gonzalez* said that "an attack based on . . . habeas counsel's omissions . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." 545 U.S. at 532 n.5. The Court in *Gonzalez* was careful to explain how Rule 60(b) could not be used to get a second chance to assert new claims.

Second, even if habeas corpus counsel's conflict of interest could, in some circumstances, be a defect in the integrity of the proceedings assailable under Rule 60(b), Maynard's alleged conflict in Jones's case does not constitute such a defect. Jones filed his first petition for habeas corpus relief nearly eight years before *Martinez* was decided. The district court denied the petition more than two years before the rule in *Martinez* was announced. At all times during Maynard's representation of Jones in the first habeas corpus proceeding, *Coleman*'s rule that state post-conviction relief counsel's ineffective assistance could not serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim was settled law. As a result, it cannot be argued that the integrity of Jones's first habeas corpus proceeding is in doubt, because a proceeding is not without integrity

when in accord with law. We reject Jones's argument that Maynard was ineffective at Jones's first habeas corpus proceeding for not trying to make Jones's case *Martinez* long before the Supreme Court granted certiorari in *Martinez*.

Third, the rule announced in *Gonzalez*, that a valid Rule 60(b) motion "attacks . . . some defect in the integrity of the federal habeas proceedings," *id.* at 532, must be understood in context generally to mean the integrity of the prior proceeding with regard to the claims that were actually asserted in that proceeding. "That [Jones] did not raise in his first [habeas] proceeding the claim[s] he wants to raise here does not render the adjudication of the claims that he *did* raise suspect." *Buenrostro*, 638 F.3d at 722. Rule 60(b) does not permit a petitioner to assert entirely new claims, i.e. "asserted federal bas[e]s for relief from a state court's judgment of conviction," *Gonzalez*, 545 U.S. at 530, that the petitioner contends were required to ensure those proceedings' integrity. *Martinez*, then, did not change the rule in *Gonzalez* that Rule 60(b) cannot be used as a vehicle to bring new claims. *Martinez* did not purport to overrule *Gonzalez*, nor is its language irreconcilable with that case's central holding. *Gonzalez* firmly stands for the principle that new claims cannot be asserted under the format of a Rule 60(b) motion, and instead Rule 60(b) is properly applied when there is some problem

going to the integrity of the court process on the claims that were previously asserted.

None of Jones's arguments amounts to an allegation of a "defect in the integrity of the federal habeas proceedings" that constitutes grounds for a legitimate Rule 60(b) motion. *Id.* at 532. Rather, Jones is in essence arguing that he deserves "a second chance to have the merits determined favorably" in the context of a second or successive 28 U.S.C. § 2254 habeas corpus petition. *Id.* at 532 n.5. But the new claims asserted by Jones are "precisely the sort of attack on the 'federal court's previous resolution of a claim on the merits' . . . that *Gonzalez* characterized as a 'claim' which is outside the scope of Rule 60(b)." *Washington*, 653 F.3d at 1064 (citation omitted) (quoting *Gonzalez*, 545 U.S. at 532).

B

Jones also alleges that the State, during his federal habeas corpus proceedings, violated *Brady* by suppressing exculpatory evidence related to the electronic monitoring system used to track key prosecution witness David Nordstrom, who Jones says committed the murders for which he was convicted. Jones asserts that the State was on notice, based on two of his initial habeas corpus claims, of the possible malfunction of the monitoring system and further that the

State had a duty to investigate his claims and to disclose the results of its investigation to Jones.

There are three problems with Jones's argument. First, as the trial court noted, "it is highly questionable whether the type of evidence [Jones] alleges [the State] should have procured and disclosed has any relevancy to the [ineffective-assistance-of-trial-counsel] claims raised in [Jones's] federal habeas petition." *Jones*, 2013 WL 5348294, at *5. Under *Brady*, the prosecution may not suppress, but rather must disclose, "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment." 373 U.S. at 85. Evidence 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." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (internal quotation marks omitted). "A 'reasonable probability' of a different result [exists] when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (internal quotation marks omitted). Here, where the relevant evidence is not in possession of the police or the prosecution, and where Jones has failed to make a showing that the evidence would in fact impeach David Nordstrom's testimony, we cannot say that the evidence is "material" for *Brady* purposes. Because "second-in-time *Brady* claims that do not

establish materiality of the suppressed evidence are subject to dismissal under" 28 U.S.C. § 2244(b), *United States v. Lopez*, 577 F.3d 1053, 1066 (9th Cir. 2009), our inquiry could end here.

Second, even if the evidence Jones seeks were assumed to be material, the *Brady* right of pretrial disclosure available to defendants at trial does not extend to habeas corpus petitioners seeking post-conviction relief. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68-69 (2009) (noting that upon conviction, a criminal defendant "does not have the same liberty interests as a free man" and "has only a limited interest in postconviction relief"). In *District Attorney's Office for the Third Judicial District v. Osborne*, the Supreme Court stated that, "*Brady* is the wrong framework" for evaluating a convicted defendant's due process rights in post-conviction relief proceedings. *Id.* at 69. The State had no duty to disclose evidence, exculpatory or otherwise, in Jones's initial federal habeas corpus proceeding.

Third, even if the alleged evidence were material and even if Jones, as a habeas corpus petitioner seeking post-conviction relief, were entitled to the protections of *Brady*, he would still not be entitled to the evidence he seeks because that evidence was not in possession of the State, and hence cannot be said to have been suppressed by the State. To comply with *Brady*, a prosecutor "has a

duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Strickler*, 527 U.S. at 281 (internal quotation marks omitted). Here, Behavioral Intervention, Inc. ("BI"), which manufactured the electronic monitoring device used to track David Nordstrom, was not "acting on the government's behalf in this case." Rather, BI was merely in a contract with the state to provide monitoring equipment for parolees and other persons in Pima County released to home confinement as a condition of their supervision by the Arizona Department of Corrections. Jones alleges that BI knew its device had problems, not that the State knew of those problems. "The prosecution is under no obligation to turn over materials not under its control." *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991). Jones had equal access to information regarding BI's alleged problems as did the State, as evidenced by his attaching to his Rule 60(b) motion news stories from 1997 and 1998 documenting such problems. Jones cannot now complain that the State violated *Brady* at the habeas corpus stage "by not bringing the evidence to [his] attention." *See Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (internal quotation marks omitted).

To sum up, it is speculative whether the evidence Jones seeks from BI would have been favorable to Jones, there is no *Brady* obligation during habeas corpus

proceedings under *Osborne*, and there is no way the information can be considered to have been suppressed by the State. There was no *Brady* violation.

Pursuant to the Supreme Court's instructions in *Gonzalez*, we have examined each claim in Jones's Rule 60(b) motion to determine whether it alleges a defect in the integrity of the prior federal habeas corpus proceeding or instead presents "claims" constituting a renewed request for relief on the merits. *See Washington*, 653 F.3d at 1066. Because we have determined that Jones's purported Rule 60(b) motion is in fact a disguised 28 U.S.C. § 2254 habeas corpus petition, we affirm the district court's dismissal of the motion in light of Jones's failure to comply with the "stringent standard for presenting a second or successive" 28 U.S.C. § 2254 habeas corpus petition laid out in 28 U.S.C. § 2244(b). *Id.* at 1065. Before he brought his disguised Rule 60(b) motion, Jones did not move in this court for an order "authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). Because we have not yet authorized Jones to file such a petition, we hold that the district court was without jurisdiction to entertain Jones's "successive (albeit disguised)" 28 U.S.C. § 2254 habeas corpus petition. *See Washington*, 653 F.3d at 1065.

III

Assuming for the sake of argument that Jones's motion is permissible under Rule 60(b) as a challenge to a defect in the integrity of his prior habeas corpus proceedings under *Gonzalez*, an assumption we are willing to make to expedite and promote a full review in this death penalty context, we address whether Jones has satisfied the standards for relief from judgment under that Rule. While it is ordinarily a district court that conducts this inquiry in the first instance, "appellate courts may, in their discretion, decide the merits of a Rule 60(b) motion in the first instance on appeal." *Phelps v. Alameida*, 569 F.3d 1120, 1134-35 (9th Cir. 2009) (citing *Gonzalez*, 545 U.S. at 536-38). Exercising that discretion now, again with the purpose to expedite, we hold alternatively that Jones has not met the standard for relief under Rule 60(b), in light of the relevant factors identified in *Phelps v. Alameida*, and we deny him relief.

As outlined above, Rule 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez*, 545 U.S. at 528. Rule 60(b)(6), the provision under which Jones brought his motion, permits reopening for "any . . . reason that justifies relief" other than the more specific reasons set out in Rule 60(b)(1)-(5). Fed. R. Civ. P. 60(b); *see Gonzalez*, 545 U.S. at 528-29. A movant seeking relief under Rule 60(b)(6) must show "'extraordinary circumstances' justifying the reopening of a

final judgment." *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann*, 340 U.S. at 199). Such circumstances "rarely occur in the habeas context." *Id.* Our decision in *Phelps* identified six factors to guide our determination regarding when a petitioner seeking relief under Rule 60(b) demonstrates such "extraordinary circumstances." 569 F.3d at 1135. These factors are particularly useful when, as here, we are asked to apply Rule 60(b)(6) to a rejected petition for habeas corpus. *Id.* at 1135 n.19.

Jones contends that *Martinez* created a change in the law that constituted "extraordinary circumstances" such that Rule 60(b) relief is warranted. We have held that "the proper course when analyzing a Rule 60(b)(6) motion predicated on an intervening change in the law is to evaluate the circumstances surrounding the specific motion before the court." *Id.* at 1133. A decision to grant Rule 60(b)(6) relief, then, is a "case-by-case inquiry" that requires us to balance numerous factors, but it is clear that "a change in the law will not *always* provide the truly extraordinary circumstances necessary to reopen a case." *Id.* (internal quotation marks omitted). We evaluate Jones's argument in light of the six factors articulated in *Phelps.*

The first factor is a change in the law. *Id.* at 1135-36. Jones argues that *Martinez* was a "sea change in the Supreme Court's procedural jurisprudence that requires relief from judgment in this captial habeas corpus case." But in *Lopez v.*

Ryan, 678 F.3d 1131 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 55 (2012), we stated that *Martinez* was a "remarkable—if 'limited'—development in the Court's equitable jurisprudence" that "weigh[s] slightly in favor of reopening [the petitioner's] habeas case." *Id.* at 1136 (quoting *Martinez*, 132 S. Ct. at 1319). This factor weighs slightly in Jones's favor.

The second factor is the petitioner's exercise of diligence in pursuing his claim for relief. *Phelps*, 569 F.3d at 1136. Jones filed his Rule 60(b) motion on August 21, 2013, more than 17 months after the Supreme Court decided *Martinez* on March 20, 2012. Jones contended in his motion that 17 months "is not significant in the history of a capital case," and that the delay was attributable to his prior, allegedly conflicted counsel Maynard who had a "disincentive to re-evaluate the record and the claims he earlier brought . . . or to perform any additional investigation." Jones now argues that his "delay has not been unreasonable" because "newly-appointed, non-conflicted counsel" filed the Rule 60(b) motion less than four months after appointment. This factor has little weight in either direction.

The third factor is whether granting the Rule 60(b) motion to reopen the case would upset "the parties' reliance interest in the finality of the case." *Id.* at 1137. Jones, noting that "[t]here is no such thing as a partial execution," argues that

because he has not been executed, the State cannot claim a reliance interest on any already executed judgments. But this is not so. Jones's execution warrant, which set his execution date, issued on August 27, 2013, and as we held in *Lopez*, "[t]he State's and the victim[s'] interests in finality, especially after a warrant of execution has been obtained and an execution date set, weigh against granting post-judgment relief." 678 F.3d at 1136. This factor weighs strongly against Jones.[4]

The fourth factor "examines the delay between the finality of the judgment and the motion for Rule 60(b)(6) relief." *Phelps*, 569 F.3d at 1138 (internal quotation marks omitted). This factor stands for the "principle that a change in the law should not indefinitely render preexisting judgments subject to potential challenge." *Id.* The Supreme Court denied certiorari on Jones's initial habeas corpus petition on June 17, 2013, and Jones filed his Rule 60(b) motion in the district court on August 21, 2013. This two-month gap was not a long "delay." This factor weighs slightly in Jones's favor.

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[4] An Arizona execution warrant expires 24 hours from the date it sets for the execution. Ariz. R. Crim. P. 31.17(c)(3). Jones's warrant sets his execution for October 23, 2013, and therefore expires the next day. Because it would take far longer than that to reopen and adjudicate the claims Jones now wishes to pursue, the State would be forced to obtain a new warrant if Jones is allowed to proceed but then loses. Thus, the likely need to restart the entire execution process must be considered in weighing the State's interest in finality.

The fifth factor looks to the closeness of the relationship between the decision resulting in the original judgment and the subsequent decision that represents a change in the law. *Id.* at 1138-39. Jones argues that "*Martinez* confers an equitable remedy to excuse" his habeas corpus counsel's alleged *per se* conflict of interest and that he should be restored to the *status quo ante*. *Martinez*, however, says nothing about conflicts of interest, nor does it overrule the proposition in *Gonzalez* that "an attack based on . . . habeas counsel's omissions . . . ordinarily does not go to the integrity of the proceedings." 545 U.S. at 532 n.5. This factor weighs heavily against Jones.

The sixth factor concerns comity. *Phelps*, 569 F.3d at 1139. In *Phelps*, we said that "we need not be concerned about upsetting the comity principle when a petitioner seeks reconsideration not of a judgment on the *merits* of his *habeas* petition, but rather of an *erroneous* judgment that prevented the court from ever *reaching* the merits of that petition." *Id.* Phelps was appealing the dismissal of his habeas corpus petition as untimely; granting his Rule 60(b) motion would not have upset principles of comity. Here, though, Jones seeks to bring merits claims disguised as a Rule 60(b) motion because his initial habeas corpus petition was already fully adjudicated on the merits and denied. Granting his motion would upset principles of comity. This factor weighs strongly against Jones.

The equitable factors described above give little support for reopening Jones's case. On balance, the Supreme Court's decision in *Martinez* does not constitute such an "extraordinary circumstance" as to warrant reopening of Jones's case under Rule 60(b)(6), even were we to disregard that Jones's assertion of new claims takes him outside of Rule 60(b). *See Gonzalez*, 545 U.S. at 536 ("It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation.").

IV

Given the expedited nature of this appeal and its death penalty context, we now construe Jones's appeal as a request for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court pursuant to 28 U.S.C. § 2244(b)(3)(A). *See, e.g.*, *Washington*, 653 F.3d at 1065 (doing the same); *Cooper v. Calderon*, 274 F.3d 1270, 1274-75 (9th Cir. 2001) (per curiam) (doing the same); *Thompson*, 151 F.3d at 922 ("Certainly, if at all possible, a decision upon whether a successive application should be granted . . . should be decided on the merits rather [than] having a person executed because of time constraints and procedural niceties."); *cf. Libby v. Magnusson*, 177 F.3d 43, 46 (1st Cir. 1999) ("[N]o useful purpose would be served by forcing the petitioner to retreat to square one and wend his way anew through the jurisdictional maze. We

have the power, in the exercise of our informed discretion, to treat this appeal as if it were . . . a motion for authority to proceed under section 2244(b)(3)(A) . . . and we will do so." (citations omitted)).[5]

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[5] So construed, we reject Jones's application for the reasons stated in the opinion. Jones also filed yesterday, in No. 13-73647, a separate application for leave to file a second or successive habeas corpus petition. In his application, Jones seeks permission to pursue a freestanding claim of actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995), and a claim that the State violated his due process rights by withholding potentially exculpatory evidence under *Brady*. *Schlup* requires a habeas petitioner pursuing a claim of actual innocence to show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence" before he will be granted relief. *Id.* at 327. Jones argues that it is an open question whether it is this test or AEDPA's more restrictive standard for filing a second or successive petition, *see* 28 U.S.C. § 2244(b)(2)(B), that applies to freestanding claims of actual innocence. *See Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (en banc).

Without deciding that question here, we conclude that even if the *Schlup* standard applies to Jones's actual innocence claim, its requirements have not been satisfied. Jones has not shown that the evidence he seeks would exonerate him. Indeed, Jones concedes that, "[i]t may be that [he] will not prevail" even if he obtains discovery, and he can only state that the evidence he seeks "could" exculpate him. Such speculative theories do not show "that it is more likely than not that no reasonable juror would have convicted [Jones] in the light of the new evidence." *Schlup*, 513 U.S. at 327. *Schlup* exists to protect petitioners with legitimate claims of actual innocence, not to permit exploratory proceedings in a second or successive habeas corpus petition, by a petitioner who has arrayed against him strong evidence of guilt.

This result is informed by and consistent with our analysis of Jones's similar *Brady* claim that he brought as part of his Rule 60(b) motion. Both claims rely on the theory that the electronic monitoring records would erode David Nordstrom's credibility. The Rule 60(b) version of this claim failed the 28 U.S.C. § 2244(b)(2)(B) standard for largely the same reason that this version fails the *Schlup* standard: even if the electronic monitoring evidence shows what Jones

(continued...)

Construing Jones's appeal as a belated request for authorization to file a second or successive habeas corpus petition in the district court, we deny his request to do so for failure to comply with the "stringent standard for presenting a second or successive" 28 U.S.C. § 2254 habeas corpus petition laid out in 28 U.S.C. § 2244(b)(2). *Washington*, 653 F.3d at 1065.

Before AEDPA was enacted in 1996, "a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions" known as the abuse-of-the-writ doctrine guided federal courts in their consideration of second or successive habeas corpus petitions. *McCleskey v. Zant*, 499 U.S. 467, 489 (1991); *see also Lopez*, 577 F.3d at 1059. AEDPA codified the judicially established principles of the abuse-of-the-writ doctrine and "greatly restrict[ed] the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." *Tyler v. Cain*, 533 U.S. 656, 661 (2001); *see also Lopez*, 577 F.3d at 1060-61. Indeed, a petitioner is generally limited to one federal habeas corpus motion, and AEDPA permits second or successive motions "only in limited circumstances." *Dodd v.*

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[5](...continued)
wants it to show, it is not sufficiently exculpatory.

United States, 545 U.S. 353, 359 (2005). Those limited circumstances are set forth in 28 U.S.C. § 2244(b), which provides:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed;
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (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). Because Jones filed his motion after April 24, 1996, the effective date of AEDPA, his case is governed by that statute's stringent standards.

"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) (per curiam). Before a petitioner may file a second or successive habeas corpus petition in the district court, he must

seek authorization from the relevant court of appeals. 28 U.S.C. § 2244(b)(3)(A). Construing Jones's appeal as a request for such authorization, we may not grant Jones what he seeks unless we determine that he has made a prima facie showing that his application satisfies the requirements outlined above. *Id.* § 2244(b)(3)(C); *see also Pizzuto v. Blades*, 673 F.3d 1003, 1007 (9th Cir. 2012). We consider now whether he has made such a showing.

It is undisputed that none of the claims Jones raises in his pending motion were included in his first federal habeas corpus petition. Whether he may bring these claims now, then, rests on whether Jones has satisfied one of the two "narrow exceptions" codified in 28 U.S.C. § 2244(b)(2)—namely whether he has shown that (1) his claims rely on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court; or (2) new facts, previously undiscoverable, if proven, would establish his actual innocence by clear and convincing evidence. *See Gonzalez*, 545 U.S. at 530.

A

AEDPA permits second or successive review of a claim that "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). This provision sets forth three prerequisites for a permissible second or successive

petition: (1) the claim must rely on a "new rule of constitutional law"; (2) the rule must have been "made retroactive to cases on collateral review by the Supreme Court"; and (3) the claim must have been "previously unavailable." *See Tyler*, 533 U.S. at 662. "[T]he Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive," and it only does so "through a holding." *Id.* at 663 (alteration in original).

Jones's *Brady* claim certainly does not rely on a new rule of constitutional law. His ineffective-assistance-of-trial-counsel claims, however, rely on the Supreme Court's decision in *Martinez*, which held that, in some circumstances, the ineffective assistance of state post-conviction relief counsel can serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim. 132 S. Ct. at 1315. To present his claims under this prong of the 28 U.S.C. § 2244(b)(2) test, Jones must show that *Martinez* set forth a new, retroactively applicable rule of constitutional law that was not previously available. While "there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision," *Graham v. Collins*, 506 U.S. 461, 467 (1993), *Martinez* did not expressly overrule any prior decision, including *Coleman*. Rather, *Martinez* "qualifie[d] *Coleman* by recognizing a narrow exception" to that case's rule that state post-conviction relief counsel's ineffective assistance cannot serve as

cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim. 132 S. Ct. at 1315. Perhaps more importantly, the Supreme Court characterized its decision in *Martinez* as an "equitable ruling," and not a "constitutional" one. *Id.* at 1319. That spells the end of the new-rule exception for a second or successive petition in Jones's case because the rule of *Martinez*, while new, is not a rule of constitutional law. Further, we have consistently recognized that *Martinez* was not a constitutional decision. *See, e.g.*, *Detrich v. Ryan*, No. 08-99001, 2013 WL 4712729, at *3 (9th Cir. Sept. 3, 2013) (en banc) ("[T]he Court established an equitable rule . . . ."); *Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir. 2012) (published order) ("*Martinez* did not decide a new rule of constitutional law . . . .").

Because *Martinez* did not decide a new rule of constitutional law, it cannot underpin a second or successive habeas corpus petition under 28 U.S.C. § 2244(b)(2)(A). *See Buenrostro*, 697 F.3d at 1139 ("*Martinez* cannot form the basis for an application for a second or successive motion because it did not announce a new rule of constitutional law."). Other circuits have agreed. *See, e.g.*, *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013) (describing the exception established in *Martinez* as an "equitable—as opposed to constitutional—exception" (internal quotation marks omitted)); *Adams v. Thaler*,

679 F.3d 312, 322 n.6 (5th Cir. 2012) ("*Martinez* does not provide a basis for authorization under § 2244(b)(2)(A), as the Court's decision was an 'equitable ruling' that did not establish 'a new rule of constitutional law.'" (quoting *Martinez*, 132 S. Ct. at 1319)). Because *Martinez* was not a constitutional ruling, Jones's ineffective-assistance-of-trial-counsel claims presented here cannot be said to "rel[y] 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).[6]

Congress, when it passed AEDPA, set forth a "stringent standard for presenting a second or successive" 28 U.S.C. § 2254 habeas corpus petition. *Washington*, 653 F.3d at 1065. So while the Supreme Court used *Martinez* to establish a new (equitable) rule regarding what may serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim, the suggestion that *Martinez*'s equitable holding modifies AEDPA's statutory language is wrong and flies in the face of normal juristic principles. Equity may

[6] Having determined that *Martinez* did not set forth a new rule of constitutional law, we need not, and do not, reach the question of whether the Supreme Court has made its holding in *Martinez* retroactively applicable to cases on collateral review.

inform our interpretation of statutory language, but it cannot supplant specific statutory standards or rewrite the statutory text.

B

Because Jones cannot show that his claims rely on a new rule of constitutional law, his only avenue for authorization to file a second or successive petition is 28 U.S.C. § 2244(b)(2)(B), which requires him to "make a prima facie showing to us that his claim (1) is based on newly discovered evidence and (2) establishes that he is actually innocent of the crimes alleged." *King v. Trujillo*, 638 F.3d 726, 729-30 (9th Cir. 2011) (per curiam) (noting that "[f]ew applications to file second or successive petitions . . . survive these substantive and procedural barriers" (alteration and ellipsis in original) (internal quotation marks omitted)). Under this standard, Jones must first demonstrate that the evidence he puts forward now is newly discovered—in other words that it "could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). And even if Jones could show that his evidence is newly discovered, we would still be compelled to deny his application unless that evidence "would be sufficient to establish by clear and convincing evidence that . . . no reasonable fact-finder would have found [Jones] guilty of the underlying offense." *Bible*, 651 F.3d at 1064 (quoting 28 U.S.C. § 2244(b)(2)(B)(ii)).

Jones's claims fail on both prongs of this analysis. First, Jones has offered no indication that the factual predicate for his current claims could not have been discovered previously through the exercise of due diligence. The factual predicate underlying each of Jones's three ineffective-assistance-of-trial-counsel claims, of course, occurred more than fifteen years ago at Jones's trial and sentencing. Moreover, the nature of the evidence Jones now proffers was known to him either at trial or sentencing and could have been raised then. For example, trial counsel could have discovered the potential problems associated with Nordstrom's electronic monitoring device at least as early as 1997 or 1998, when reports of such devices' failures made the news. Jones also gives no reason why trial counsel could not have investigated Stephen Coats. Jones has presented no evidence indicating that Coats refused to talk to Jones's investigator or his attorney, and no evidence that Coats was unable to speak with the investigator. And trial counsel's failure to make an *Eddings* claim for the alleged use of an unconstitutional causal nexus test was known to Jones in 1998, at the time of his sentencing. Jones has not explained why, with the exercise of due diligence, he could not have discovered this evidence previously.

The factual predicate behind Jones's *Brady* claim, meanwhile, could also have been discovered years before the filing of the current motion. Jones could

have discovered as early as 1997 that BI was aware of technical problems associated with its device. Indeed, Jones proffers as evidence of BI's equipment problems news stories from 1997 and 1998; surely these accounts could have been discovered through the exercise of due diligence long before August 21, 2013. Further, Jones's parole supervisor, Rebecca Matthews, testified at Jones's trial that the monitoring device occasionally generated "some static" or a "busy signal" when activated by a call from the computer in Phoenix. Jones was on notice in the late 1990s of the facts underlying his current claims.

Even if Jones's claims did rest on newly discovered evidence, however, he would be unable to show that the facts supporting those claims establish his actual innocence by clear and convincing evidence. On this point, we are bound by AEDPA's requirements for presenting a second or successive habeas corpus petition. Under these requirements, the relevant question is not whether Jones's jury would have acquitted him, but whether "in light of the evidence as a whole . . . no reasonable factfinder would have found [him] guilty of the underlying offense[s]." 28 U.S.C. § 2244(b)(2)(B)(ii). Jones's causal nexus claim is not at all related to actual innocence, while his remaining two ineffective-assistance-of-trial-counsel claims and his *Brady* claim, even if the facts were true, would not establish

by clear and convincing evidence that Jones did not commit the crimes for which he was sentenced to death.

This is so in large part due to the strength of the other evidence against Jones. Included among this evidence were bullets and shell casings found at the crime scenes and an autopsy of the victims matching the calibers of the weapons Jones and his accomplices carried; descriptions from survivors of the Moon Smoke Shop robbery that matched both Jones and his truck; testimony from two witnesses at trial that their first thought upon seeing the police sketches of the Moon Smoke Shop robbery suspects was that one of them was Jones; testimony that Jones told multiple people who asked if he was involved in the crimes, "[i]f I told you, I'd have to kill you," *Jones*, 691 F.3d at 1099 (alteration in original); and testimony from David Evans. Evans testified that Jones changed his appearance by cutting and dyeing his hair and beard from red to black after the murders; that he was told by Jones, "you don't leave witnesses" after "giving Jones a hard time about his similarity to the sketches"; and that Jones went to Phoenix twice in 1996, on one occasion explaining his trip by saying he could not stay in Tucson because "he thought some people would be looking for him because he had killed somebody." Considering the weight of this other evidence, we conclude that Jones has failed to show by clear and convincing evidence that no reasonable factfinder would have

found him guilty of the offenses for which he was convicted, even if he could prove that the evidence he puts forward now is true. *See* 28 U.S.C. § 2244(b)(2)(B)(ii).

C

"Section 2244(b)(2) applies not only to the underlying conviction but also to the imposition of the death penalty." *Pizzuto*, 673 F.3d at 1010. Jones, to succeed, must establish "by clear and convincing evidence that . . . no reasonable factfinder would have found [him] guilty" of the aggravating factors used to justify his death sentence. 28 U.S.C. § 2244(b)(2)(B)(ii). "A claim of actual innocence of the death penalty would require a showing that one of the statutory aggravators or other requirements for the imposition of the death penalty had not been met." *Beaty v. Schriro*, 554 F.3d 780, 784 (9th Cir. 2009) (published order). Mitigating factors are not considered in this context. *See Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) ("If federal habeas review of capital sentences is to be at all rational, petitioner must show something more in order for a court to reach the merits of his claims on a successive habeas petition than he would have had to show to obtain relief on his first habeas petition.").

Under Arizona law at the time of Jones's sentencing, the sentencing judge was required to impose a sentence of death if the judge found one or more of ten

statutory aggravating circumstances to have been established beyond a reasonable doubt and that "there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. § 13-703 (1993). The trial court, Judge Leonardo, found the existence of five statutory aggravating factors beyond a reasonable doubt: (1) Jones had been convicted of another offense for which, under Arizona law, a sentence of life imprisonment or death could be imposed; (2) Jones was previously convicted of a serious offense; (3) Jones committed the offense in expectation of the receipt of pecuniary value; (4) Jones committed the offense while on authorized release from the state department of corrections; and (5) Jones was convicted of one or more other homicides committed during the commission of the offense. *See id.*; *Jones*, 4 P.3d at 364-65.

At the very least, Jones cannot overcome the last of these statutory aggravating factors—that he committed multiple murders during the commission of the two robberies. As discussed above, Jones has not shown by clear and convincing evidence that he is actually innocent of any of the murders for which he was convicted. It follows that he cannot show that imposition of the death penalty is legally unwarranted because any one of the aggravating factors was individually enough to support his death sentence. *See Pizzuto*, 673 F.3d at 1010.

We conclude that Jones has not presented a prima facie showing that his application satisfies the requirements of 28 U.S.C. § 2244(b). "[T]he second or successive bar marks the end point of litigation even where compelling new evidence of a constitutional violation is discovered . . . . The only prisoner who will not reach that point is the one who obtains new evidence that could clearly and convincingly prove his innocence or who has the benefit of a new, retroactive rule of constitutional law." *Buenrostro*, 638 F.3d at 726 (citation omitted). Jones is not that prisoner.

V

Death penalty cases are exceedingly difficult, testing the skills of advocates and the judgment of judges to a degree not found in more ordinary cases, because of the ultimate penalty that the criminal defendant-appellant is at risk of paying. *Cf. Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice."). In these cases, we are fortunate to have the skilled advocacy of both defense counsel and counsel for the State, arguing for their respective sides of the appeal. We are also faced with a complex legal system of sometimes-conflicting precedent and with the heightened emotions that inevitably arise under these cases. Still, even the pressures of death penalty litigation do not permit us to depart from

established jurisprudence, and that is what we would do here if we allowed Jones to assert new claims under the guise of a Rule 60(b) motion when such claims should not be permitted unless they satisfy the rigorous standard of 28 U.S.C. § 2244. Applying that standard here, we conclude that Jones may not file a second or successive habeas corpus petition in the district court.

In No. 13-16928, the district court's dismissal of Jones's Rule 60(b) motion is **AFFIRMED**. In the alternative, Jones's motion to seek relief from judgment under Rule 60(b) is **DENIED**. Pursuant to 28 U.S.C. § 2244(b)(3)(A), Jones's as-construed application in No. 13-16928 and his separate application in No. 13-73647 to file a second or successive habeas corpus petition in the district court are **DENIED**.

Each party shall bear its own costs.

Counsel

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