No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2013

In re ROBERT GLEN JONES, Jr., *Petitioner*

PETITION FOR WRIT OF HABEAS CORPUS

CAPITAL CASE

EXECUTION DATE: OCTOBER 23, 2013

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October 22, 2013

CAPITAL CASE

QUESTION PRESENTED

The state was able to run out the clock on a *Brady* violation, forcing Robert Jones to move for authorization to file a second or successive habeas petition under *Schlup v. Delo*, 513 U.S. 298 (1995), or 28 U.S.C. § 2244(b)(2)(B)(ii), without adequate support to prove by a preponderance of the evidence or by clear and convincing evidence, respectively, that, but for constitutional error, no reasonable factfinder would have found him guilty of the underlying homicides. Jones and David and Scott Nordstrom were charged with two murders at the Moon Smoke shop and four at the Fire Fighters Union Hall in Tucson in 1996. In exchange for his testimony against Mr. Jones and his brother Scott, David Nordstrom pleaded guilty to armed robbery and had the two murder counts at the Moon Smoke Shop dismissed. Mr. Nordstrom admitted his complicity in those two murders, and the other murder counts were later dismissed.

David Nordstrom's alibi for the Fire Fighters Union Hall murders was that he was on an electronic monitoring system at the time of the four homicides, which was bolstered with testimony from his parole officer and computer printouts that purported to show he was not in violation of his parole curfew on the evening of the homicides. In response to a pretrial discovery request, the prosecutor stated that that two local parole officers monitored David Nordstrom's parole. In truth, however, and what was not learned until July 2013, was that Nordstrom's parole was also electronically monitored by the Colorado company that sold the monitoring equipment to the parole department in Arizona. Given inadequate notice, defense counsel had no basis for seeking information from the company that sold the monitoring equipment and monitored David Nordstrom's parole. As it turns out, the electronic monitoring manufacturer had experienced problems with its monitors in other jurisdictions, including one incident in which a young man is reported to have evaded detection of his curfew violation and killed his girlfriend.

The Court's admonishment in *Herrera v. Collins*, 506 U.S. 390, 411-12, 417 (1993), that late claims of actual innocence could be presented at clemency, due to the unavailability of a right of actual innocence in habeas, proved unavailing for Mr. Jones. The Arizona Board of Executive Clemency possesses no subpoena power.

The questions presented:

Whether Robert Jones is entitled to a remand to the district court, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), for discovery in order to prove a freestanding claim of innocence or, in the alternative, to meet the requirements for gaining second or successor habeas corpus status under *Schlup* or 28 U.S.C. § 2244(b)(2)(B), where he has not lacked diligence, due to the prosecution's violation of the duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and the suppressed evidence that was recently disclosed by Respondents could lead to evidence that would inculpate a suspect-turned-prosecution witness and exculpate Mr. Jones.

PARTIES TO THE PROCEEDINGS BELOW

Robert Glen Jones, Jr., an Arizona death row prisoner, was the Petitioner-Appellant in the habeas corpus proceedings below. Charles L. Ryan, the Director of the Arizona Department of Corrections, was the Respondent-Appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

FEDERAL STATUTES

FEDERAL RULES

PTEITION FOR WRIT OF HABEAS CORPUS

PRAYER

Petitioner Robert Glen Jones, Jr., respectfully request that the Court, by virtue of its authority under 28 U.S.C. § 2241(b) & § 1651(a), transfer his Petition for Writ of Habeas Corpus to the United States District Court for the District of Arizona so that he may request discovery and other appropriate evidentiary development to prove a freestanding claim of innocence under *Herrera v. Collins*, 506 U.S. 390, 417 (1993), and *House v. Bell*, 547 U.S. 518, 554 (2006). In the alternative, he requests the transfer to the district court to prove his entitlement to present a second or successive habeas corpus petition under *Schlup v. Delo*, 513 U.S. 298 (1995), or 28 U.S.C. § 2244(b)(2)(B)(ii), where he can demonstrate a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is attached as Appendix A. *Jones v. Ryan*, Ninth Cir. No. 13-73647 & 13-16928 (October 18, 2013).

JURISDICTION

The Opinion of the Ninth Circuit in which it denied Mr. Jones authorization to file a second or successive petition was filed on October 18, 2013. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 2241, 2254(a), 1651(a), an Article III of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law."

28 U.S.C. § 2244(b)(2):

A claim presented in a second or successive habeas application under section 2254 that was not presented in a prior application shall be dismissed – unless

***

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

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

28 U.S.C. § 2244(b)(3)

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

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(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

STATEMENT OF THE CASE

I. Introduction.

Robert Jones and David and Scott Nordstrom were indicted on six counts of first degree murder and related offenses for events that occurred in Tucson, Arizona. At Mr. Jones' trial, David Nordstrom testified he was indicted for two murders at the Moon Smoke Shop ("Moon") on May 30, 1996, and four at the Fire Fighters Union Hall ("Fire Fighters") on June 13, 1996. Mr. Nordstrom cut a deal in which he pleaded guilty to armed robbery at the Moon and agreed to testify against Mr. Jones and his brother, Scott Nordstrom, at their separate trials, in exchange for the dismissal of two first degree murder counts at the Moon. The four murder counts against Mr. Nordstrom that arose from offenses at the Fire Fighters were also dismissed. Mr. Jones and Scott Nordstrom were convicted of all six homicides and sentenced to death. *See State v. Jones*, 4 P.3d 345, 352 (2000); *State v. Nordstrom*, 25 P.3d 171 (2002). David Nordstrom served less than four years in prison.

II. Relevant trial facts.

A. David Nordstrom's testimony and purported electronic alibi.

The cases against Mr. Jones turned largely on the testimony of David Nordstrom, whom the Arizona Supreme Court characterized as the state's "key witness." *See Jones*, 4 P.3d at 351. David testified he was on a curfew as part of his parole after his release from prison on January 25, 1996. His curfew was monitored by the parole division of the Arizona Department of Corrections ("ADC") through an electronic monitoring system ("EMS"). His compliance with curfew was monitored by Fritz Ebenal, a parole officer with the ADC.

David testified to a narrative that included riding in Mr. Jones' pick-up truck on May 30, 1996. Mr. Jones suggested they rob the Moon after they had broken into a car at a Tucson hospital and obtained a 9 mm. handgun. David had already obtained a .380 handgun from a friend, and the .380 was already in the truck. Mr. Jones drove to a location behind the Moon, where he and Scott exited to commit the robbery and instructed David to drive the truck. Three witnesses who survived the Moon shooting testified to the shooting deaths of one customer and

one employee, but could not identify the two shooters. The bodies of a store patron and employee were found near the front door and in a back room, respectively. David testified that he heard shots, then Mr. Jones and Scott returned to the truck. David claimed to have received some of the proceeds from the robbery. Noel Engles, one of the Moon survivors, saw a light colored pick-up truck in the alley after the shooting but he saw only two persons in the truck. David drove in the direction of Interstate 10, entered the expressway, and drove home. The 9 mm. and .380 were never found, and no physical evidence connected Mr. Jones to either the Moon or Fire Fighters.

While David testified that the events at the Moon transpired before the time his curfew began on May 30, 1996, he testified he returned home a half hour before curfew on June 13, 1996, after working that day and being driven home by Scott Nordstrom. The Fire Fighters homicides occurred at 9 p.m., after his curfew. He testified he was awakened by Mr. Jones late that night, and Mr. Jones indicated that he and Scott had robbed the Fire Fighters and killed four people.

Ebenal testified that he was David's parole officer and that computer printouts showed David was not in violation of curfew on either May 30 or June 13, 1996. Rebecca Matthews testified she was a supervisor in ADC's parole division and that she conducted a test in 1997, the year after the homicides, on an EMS unit of the same type used to monitor Nordstrom, but she conceded she did not know whether the ankle bracelet she tested was actually the one worn by Nordstrom. She testified that the test she ran on a unit with Detective Brenda Woolridge was not run on the same telephone line that had been operative in the Nordstrom residence when David was on the EMS system.

B. Prosecution's violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

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

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

ER 846.[1]

The prosecution tendered the following response:

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

ER 852. Response Number 2 stated:

> S. Nordstrom's Statement: Previously disclosed. Will re-disclose.

Id.[2]

After the Ninth Circuit allowed the motion for association or substitution of prior counsel that was filed by Mr. Jones' former counsel, Daniel D. Maynard, on April 24, 2013, undersigned counsel entered appearances in the Ninth Circuit and this Court, filed a reply to Respondent's Brief in Opposition to the Petition for Writ of Certiorari from the denial of habeas relief, and informally sought records regarding the EMS records of Mr. Nordstrom. Requests were directed to the Pima County Attorney, the Arizona Department of Corrections ("ADC"), and the manufacturer of the EMS unit used on Mr. Nordstrom, Behavioral Intervention, Inc. ("BI"), of Boulder, Colorado. Specifically, Mr. Jones sought sales, maintenance and repair records on the BI Model 9000 used on Mr. Nordstrom and on all similar units sold to ADC in a time frame that went from Mr. Nordstrom's being placed on the EMS unit in January 1996, to the offenses at the Fire Fighters on June 13, 1996. BI did not respond, while the Pima County Attorney responded that it had no records and ADC responded that whatever records it possessed from its purchases

[1] Citations are to the Excerpts of Record filed with the appeal of the Rule 60(b) relief in the Ninth Circuit.

[2] The only statements of Scott Nordstrom in the disclosure made by the Pima County Attorney include: 1) a report by Pima County Attorney Investigator Steve Merrick, who wrote a report dated May 27, 1996, in which he stated he learned the name of Scott's probation officer, Debbie Hegedus, but included nothing about the identity of BI or anyone else monitoring David Nordstrom's curfew. Ms. Hegedus wrote a "Field Supervision Face Sheet" on April 29, 1996, in which she included information Scott reported to her, to wit, his height and weight; and, 2) a statement by Scott upon his arrest on January 26, 1997, in which he was told police had David in custody. Scott simply requested counsel, and interrogation ceased. At Jones' clemency hearing on October 16, 2013, Kellie Johnson, the head of the Criminal Division at the Pima County Attorney, stated she supposed the reference in discovery response #2 simply meant that the EMS records later identified by Mr. Ebenal at trial were disclosed.

of the BI units were no longer in its possession, likely due to a six-year records retention policy. Significantly, ADC also responded:

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

ER 235.

By naming only Mr. Ebenal, Ms. Matthews, and Scott Nordstrom's parole officer as possessors of data generated by David Nordstrom's EMS unit, Jones alleged in the later SOS application, the Pima County prosecutor violated the duty to disclose under *Brady*.[3] The Pima County Attorney's discovery response was, at a minimum, misleading. ADC was not the sole entity to possess records relevant to the functioning of David Nordstrom's EMS unit. BI possessed evidence that could prove the materiality prong of the test in *Strickler*. Mr. Jones claimed that he made out a *prima facie* violation of *Brady* and requested the Ninth Circuit to compel the production of evidence from BI upon which the claim rises or falls.

In the SOS application (App. B at 12), Mr. Jones cited, *inter alia*, this Court's decision in *In re Davis*, ___ U.S. ___, 130 S.Ct. 1 (2009), for the proposition that the matter should be remanded to the district court for evidentiary development of his claim of innocence so that he might support a request for an SOS application under either the Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995), or the more restrictive requirements of the AEDPA, where a petitioner is required to prove:

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

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

28 U.S.C. § 2244(b)(2)(B)(i) & (ii).

Mr. Jones made a prima facie showing of materiality of the *Brady* claim by demonstrating that BI's EMS units had been shown to malfunction elsewhere. For example, In November 1996, a 14-year-old girl was run over by her 16-year-old boyfriend as she walked down a road in Jupiter Farms, Florida. ER 245. Her boyfriend, who was charged with second degree murder, was monitored by a BI EMS system. BI was quoted as saying its EMS system functioned properly when it reported no violation for the offender that evening. *Id*. Yet, two jail inmates reported the offender confessed he killed the girl, and an acquaintance of the offender said he, too, was able to "leave his residence and go out of range [of the EMS] undetected for short periods of time." *Id*. When questioned by investigators, BI acknowledged that there was a "default feature" in the system that allowed for offenders to be out of range for a period of time it would not specify. ER 246. A Florida DOC spokesperson stated that the DOC was not even aware that BI built a reporting delay into the system until the inmates reported the confession. ER 248.

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

In a Security and Exchange Commission ("SEC") filing, BI reported that in April 1995, a lawsuit was filed in Cook County, Illinois, against BI, the county sheriff, the county corrections department, and parolee Gerald Hodges alleging wrongful death based on malfunction of a BI EMS system used to monitor Hodges. ER 259. The case involved the murder of Seke Willis by

Hodges in a gang-related incident. *See* Brief of Defendant-Appellant, *People v. Hodges*, No. 1-95-1093, 1996 WL 33651749 (Ill. App. 1st Dist. Jan. 25, 1996). The BI violation report showed Hodges was out of compliance with his curfew at 10:32 p.m., shortly before the shooting. *Id*. However, a prosecution witness testified that the offender was actually present at a party near the murder scene even prior to that time, although no violation report was generated. *Id*. at *13 n. 8. SEC documents fail to specify whether the civil case against BI was settled or dismissed. ER 259.

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

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

During the pendency of Mr. Jones' PCR proceedings, a 1999 Florida newspaper article reported that during a trial for the a rape and murder of a 19-year-old woman, an installer of BI EMS units in Charlotte County, Florida, described a type of pliers that could be bought at a

hardware store that could be used to remove an ankle bracelet without it transmitting a violation. ER 278.

Based on the foregoing, Jones acknowledged he could not yet prove *Brady* materiality. However, he argued he had shown enough that the matter should be remanded to the district court for evidentiary development, including discovery, an evidentiary hearing, and for the court to make factual findings.

III. Reasons for granting the writ.

The Court has jurisdiction to consider a petition for writ of habeas corpus under 28 U.S.C. § 1651(a), § 2241(a), or § 2254(a). Rule 20 of this Court requires a petitioner seeking a writ of habeas corpus to demonstrate "that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant exercise of the Court's jurisdiction, and that adequate relief cannot be obtained in any other form or from any other court." In essence, the Court has found that a petitioner "Must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court." *Felker v. Turpin*, 518 U.S. 651, 665 (1996). This Court's authority to grant relief is limited by 28 U.S.C. § 2254, and any considerations of a second petition must be "inform[ed] by 28 U.S.C. 2244(b). *Id*. at 662-63.

A. Relief is not available in another court.

On October 17, 2013, Jones filed in the Ninth Circuit the Application for Leave to File a Second or Successive Petition for Writ of Habeas Corpus. *Jones v. Ryan*, Ninth Cir. No. 13-73647, Dkt. 1. On October 18, 2013, the Ninth Circuit denied the SOS application as well as Mr. Jones Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b). App. A. Mr. Jones cannot return to the district court in the absence of authorization from the Ninth Circuit, which he did not receive. *See* 28 U.S.C. § 2244(b)(3)(a).

B. Exceptional circumstances warrant exercise of the Court's discretionary powers.

The Pima County Attorney violated the command of *Brady v. Maryland*, 373 U.S. 83 (1963), where it withheld evidence that almost certainly would prove to be material were the Court to transfer the case to the district court. The evidence has the potential to place suspect David Nordstrom in Mr. Jones' place in terms of responsibility for six homicides. The Arizona Attorney General, whose representation of the State's interest began in state post-conviction proceedings a decade ago, knows that Mr. Jones was concerned that unrecorded curfew violations were the key to vindicating his theory that it was David Nordstrom, and not he, who assisted Scott Nordstrom in committing the homicides. The Attorney General has not contacted BI. Only the fortuity of the FPD's appointment in 2013, and the serendipity of the ADC revealing the participation of BI in the electronic monitoring of David Nordstrom as part of a response to a public records request has shed light on BI's involvement. The Court should now transfer the matter with instructions that the district court could obtain the production of evidence that will shed light on whether there were, in fact, unrecorded curfew violations that would render David Nordstrom liable.

Mr. Jones' request for the Ninth Circuit's assistance went unheeded. In the portion of the opinion where the court denied the SOS application, it found that § 2244(b)(2)(B) "requires [Jones] to "make a prima facie showing to us that his claim (1) is based on newly discovered evidence and (2) established that he is actually innocent of the crimes alleged.' Op. at 35 (*quoting from King v. Trujillo*, 638 F.3d 726, 729-30 (9th Cir. 2011) (per curiam). Under this standard, the court ruled:

> [Mr. Jones] must first demonstrate that the evidence he puts forward is newly discovered – in other words that 'it could not have been discovered 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 the 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 v. Schriro*, 651 F.3d 1060, 1064 (9th Cir. 2011) (per curiam) (*quoting* 28 U.S.C. § 2244(b)(2)(B)(ii)).

Op. at 35.

1. The Ninth Circuit abused its discretion with respect to its finding that Mr. Jones lacked diligence.

The court ruled that Mr. Jones "could have discovered as early as 1997 that BI was aware of technical problems associated with its device." Op. at 37. The court further found:

> Indeed, Jones proffers evidence of BI's equipment from 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' (sic) parole supervisor, Rebecca Matthews, testified at Jones' 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.

Id.

Apart from confusing Mr. Jones for witness David Nordstrom (it was Nordstrom who was on the EMS monitor), the court's finding is flawed for the same reason this Court ruled the petitioner not to have lacked diligence in *Williams* (*Michael*) *v. Taylor*, 529 U.S. 362 (2000). The prosecution affirmatively misled the defense into believing two ADC personnel, and only those two personnel, monitored David Nordstrom's parole. For all the court's belaboring that somehow Mr. Jones could have divined the problems with BI's equipment and obtained the information undersigned counsel discovered in July 2013, Mr. Jones had no reason to be suspicious of BI because the Pima County attorney never disclosed that BI was doing any monitoring. It appeared at trial that ADC simply obtained EMS units, and all monitoring was performed "in house." In fact, BI's name never came out at trial. Even the court's reliance on Ms. Matthews' testimony that a computer in Phoenix initiated calls rings hollow because the calls in Phoenix came from an ADC office, not BI's offices or plant in Boulder, Colorado.

In *Williams*, 529 U.S. 420, a venireman gave sworn testimony that she was not related to any witness in the case, including a deputy sheriff to whom she had been married, and the prosecutor, who served as their divorce attorney, failed to correct the misleading testimony. The Court ruled that diligence, for purposes of obtaining an evidentiary hearing in federal habeas, did not require that defense counsel perform a courthouse search of public records in the off chance he may discover something that impeaches a venireman's voir dire testimony he had no reason to

believe was false. *Id*. at 441-43. Here, the defense was led into believing that only ADC had information relevant to the performance of the EMS unit used on Mr. Nordstrom. Mr. Jones did not lack diligence because his counsel trusted the prosecutor's discovery response.

2. Additional facts are required to prove actual innocence.

In a footnote, the court mocked Mr. Jones' assertion that, even if he were given discovery, "it may be that he will not prevail" and only that the evidence "could exculpate him." Op. at 28 n. 5. Mr. Jones concession came from the Court's landmark decision in *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) ("It may well be, as the Court of Appeals predicted, that the petitioner will be unable to obtain evidence sufficient to support a finding of actual judicial bias in the trial of his case, but we hold that he has made a sufficient showing, as required by Habeas Corpus Rule 6(a), to show "good cause" for discovery."). In *Bracy*, the Court noted that the discovery it ordered pursuant to Rule 6 was formerly permitted by reliance on the All Writs Act, 28 U.S.C. § 1651, which permits the Court to fashion modes of procedure, including discovery, to dispose of habeas petitions as law and justice require. *Id*. at 904.

Justice requires that the Court invoke the All Writs Act to transfer this matter to the district court for discovery and other evidentiary development. In *In re Davis*, 130 S.Ct. 1 (2009), the Court transferred the petitioner's original jurisdiction habeas petition to the district court for "hearing and determination" on his freestanding claim of actual innocence. Thus, the Court has at its disposal the tool necessary to further the ends of justice here. Besides seeking to prove a claim of innocence under *Herrera*, *supra*, and *House*, *supra*, Mr. Jones seeks to prove his entitlement to file a second or successive petition for writ of habeas corpus under the tests of *Schlup*, *supra*, or 28 U.S.C. § 2244(b)(2)(B)(ii).

Proof of David Nordstrom's guilt would completely reshape the calculus employed by the Ninth Circuit to conclude that Mr. Jones cannot reasonably prove his innocence for SOS purposes, whether the by-a-preponderance test in *Schlup* is employed, Op. at 35 n. 5, or the test of § 2254(b)(2)(B)(ii), which requires clear and convincing proof. Op. at 38-39. The circumstantial evidence upon which the Ninth Circuit relied is not sufficiently inculpatory that it

would bar SOS authorization under either test, but that calculation cannot even be made in the absence of the discovery Mr. Jones seeks to compel from BI.

For example, the shell casings found at the crime scenes only inculpate Mr. Jones because of Mr. Nordstrom's testimony. Contrary to the court's assessment, the Moon survivor did not accurately describe Mr. Jones' truck. *Compare* Tr. 6/19/98 at 54 (Noel Engles described truck as blue or gray) *with* Tr. 6/19/98 p.m. at 54 (real estate agent Vicki Ross testified Mr. Jones' truck is white). The other evidence is not necessarily inculpatory with respect to events at the Moon or Fire Fighters, especially if it is juxtaposed with evidence of David Nordstrom's involvement.

To the extent the prosecution's examination of witnesses and the use to which the evidence is put in closing argument is dispositive of the strength of the prosecution's case, it is clear the prosecutor here thought the testimony of Lana Irwin to be more compelling than the witnesses to which the Ninth Circuit referred. But Irwin was impeached with legal and illegal drug use and mental illness, and having made prior inconsistent statements. Finally, her former boyfriend, Stephen Coats, who did not testify at trial, averred in habeas that the conversations Ms. Irwin claimed to have overheard between Mr. Coats and Mr. Jones simply did not occur. Ninth Circuit Supplemental Excerpts of Record (SER) 881-888.

C. Clemency afforded no subpoena authority with which Mr. Jones could obtain BI's records.

The Court has admonished that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera*, 506 U.S. at 411-12. *Herrera* further noted that "[h]istory shows that the traditional remedy for claims of innocence based on evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Id*. at 417.

Mr. Jones proceeded down that route, but it was fairly closed because no subpoena authority resides with the Arizona Board of Executive clemency. The Board offered to call BI, and the following e-mail was sent by the Board chairman to Board counsel on October 11, 2013.

It was not passed on to undersigned counsel until October 16, 2013, minutes before the commencement of Mr. Jones' clemency hearing:

> I had a staff member contact BI Incorporated (303-218-1063) to see if we could get the information requested by the Federal Public Defender's Office. Contact was made with Anthony Shelton would (sic) advised the amount of material requested could not be made available within the time frames specified and further that some [of] the information is not available. Mr. Shelton stated he did not believe the company tracked such information and if they did the broad range of the time frame requested was prohibitive.

E-mail message from ABEC Chairman Brian Livingston to Arizona Assistant Attorney General Brian Luse, October 11, 2013. The e-mail failed to indicate that anyone at BI viewed the requested records.

This evasive non-denial denial would not escape scrutiny were the Court to transfer the matter with directions similar to those in *In re Davis* to "receive testimony and make findings of fact." 130 S.Ct. at 1. A subpoena is all that would compel BI's production of records relevant to whether David Nordstrom had unrecorded curfew violations.

CONCLUSION

Robert Glen Jones, Jr., has not lacked diligence in attempting to obtain BI's records and therefore meets the requirements of 28 U.S.C. § 2254(e)(2) for an evidentiary hearing He respectfully requests that the Court transfer this matter to the United States District Court for the District of Arizona for hearing and determination pursuant to 28 U.S.C. § 2241(b) and § 1651.

Respectfully submitted this 22nd day of October, 2013.

Jon M. Sands
Federal Public Defender
Timothy M. Gabrielsen
Assistant Federal Public Defender

By: /s/ Timothy M. Gabrielsen
Timothy M. Gabrielsen
Counsel for Petitioner

October 22, 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.
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> 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.
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> 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.
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> 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.

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