

No. \_\_\_\_\_

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SUPREME COURT OF THE UNITED STATES

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Josef Michael Jensen,  
Petitioner-Appellant,

v.

Raymond Madden, Warden,  
Respondent-Appellee.

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On Petition for Writ of Certiorari  
to the  
United States Court of Appeal  
for the  
Ninth Circuit

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PETITION for WRIT of CERTIORARI

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Josef Michael Jensen  
CDCR# P-70334  
CVSP/ A2-18-5L  
P.O. Box 2349  
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In pro se

Question Presented

1. Does an indigent pro se prisoner have a constitutional right to counsel and necessary financial assistance in an initial-review-collateral-proceeding where (1) the state has removed certain classes of claims beyond the reach of direct review, (2) he seeks to raise substantial, if factually undeveloped, federal questions concerning the integrity of his conviction, (3) the state has no 'alternative procedures' to allow him to develop the facts of his claims, (4) the state's habeas framework requires an initial showing of merits in order to pass through a gate-keeping mechanism, and (5) it is more likely than not that he will be unable to successfully run the gauntlet of the state's procedure without counsel?

### Parties to the Proceeding

All parties appear in the caption of the case on the cover page.

Petitioner, JOSEF MICHAEL JENSEN, is a California state prisoner sentenced to 46-years-to-life for the second-degree murder of his cell-mate at a California state prison while serving a sentence of life-without-the-possibility-of-parole (LWOP) for a prior conviction when he was eighteen years old.

Raymond Madden was the Warden of the prison where JENSEN was incarcerated at the time of filing.

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**Petition for Writ of Certiorari**

Petitioner, JOSEF MICHAEL JENSEN, respectfully petitions this Honorable Court for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit denying his appeal from the district court's denial of his writ of habeas corpus raising several substantial ineffective assistance of trial counsel claims.

**Opinions Below**

The opinion of the United States Court of Appeals for the Ninth Circuit appears as Appendix A, and is unpublished.

The opinion of the United States District Court for the Eastern District of California appears as Appendix B, and is unpublished.

The opinion of the California Supreme Court appears as Appendix C, and is unpublished.

The opinion of the California Court of Appeal appears as Appendix D, and is unpublished.

The opinion of the Superior Court of the County of Sacramento, California appears as Appendix E, and is unpublished.

### Jurisdiction

The date on which the United States Court of Appeal for the Ninth Circuit decided the case was Friday, March 30, 2018. No petition for rehearing was filed, and this petition has been filed within ninety (90) days of the order denying the appeal.

Prior to the denial by the Court of Appeal, petitioner filed a writ of habeas corpus raising several substantial, if undeveloped, federal claims in the United States District Court. The District Court determined the petition was untimely under the AEDPA, refused to entertain petitioner's assertion of an exception under this Court's Ruling in Martinez v. Ryan, (2012) 566 US 1, (Martinez), and the court denied the petition on procedural grounds while rejecting petitioner's direct assertion that he is factually innocent of the crime of second degree murder. The court did not reach the merits of petitioner's IAC claims.

### Argument Summary

Petitioner avers that California has, through the design and operation of its habeas framework, moved certain classes of claims—those relying on facts outside of the trial record—beyond the reach of the state's direct appeal process where counsel is guaranteed, See People V. Cunningham, (2001) 25 Cal.4th 926, (Cunningham), and the California Rules of Court 8.204(a), See also the state's habeas framework California Penal Code Section 1425 et seq.

As a result, the State's procedural scheme pushes substantial federal claims into the realm of initial-review-collateral-proceedings (IRCPs), where indigent pro se prisoners must successfully run the gauntlet of an initial merits determination, thus passing through the State's gate-keeping mechanism, before being appointed counsel and gaining access to claim critical fact-development.

While Coleman v. Thompson, (1991) 501 US 722, acknowledged the question being raised here, the Court specifically did not consider "whether the accused has a right to counsel in those cases in which the state collateral review is the first place that the accused can present a challenge to the accused's conviction," Coleman 755.

Instead, "Coleman suggested, though without holding, that the constitution may require states to provide counsel in initial-review-collateral-proceedings because 'in those cases ... state collateral review is the first place a prisoner can present a challenge to his conviction,'" (citation omitted)(Martinez 8-9), and in those cases IRCPs are the constitutional equivalent of a prisoner's "one and only appeal" as of right as to certain classes of claims.

This is true because under the state's own appellate and habeas procedures an IRCP is the first place the defendant can raise fact-intensive claims like Ineffective Assistance of Counsel which, by their nature rely on facts outside of the trial record, and for that reason the right to counsel and necessary financial assistance recognized in Douglas v. California, (1963) 372 US 352, applies.

Complicating matters, California lacks any 'alternative procedures' to allow defendants to develop the critical facts their claims rely upon prior to filing their first IRCP. This failure transforms the prisoner's "initial heavy burden" under People v. Duval, (1995) 9 Cal.4th 464 into an 'insurmountable burden by little more than the operation of the state's habeas scheme. This is true since, without counsel, the prisoner is in no position to develop the facts of his IAC claims, Martinez 12, before filing the one-and-only petition state law allows, In re Clark, (1993) 5 Cal.4th 750..

If the prisoner is unsuccessful, the state's procedural framework mandates dismissal of the petition (Duval), exposing the prisoner's claims to tougher second/successive petition rules, (Clark) and making it more likely than not the prisoner's substantial federal claims will ultimately escape review altogether.

The absence of either counsel or secondary fact-development procedures prior to filing their first and only habeas petition raising substantial IAC claims forces ill-equipped would-be petitioners to choose between two equally "bad options." They can (1) either file a factually undeveloped and unsupported petition which will be unable to pass through the state's gate-keeper as a mere formality to reaching the federal courts where the burden remains with the petitioner to demonstrate the errors of the state court's denials, or (2) "exhaustively attempt to find counsel" to aid them and thus likely run afoul of a variety of state and federal procedural rules like the AEDPA's statute of limitations—as petitioner has done.

Through this procedural scheme, California has rendered habeas an inadequate remedy for the resolution of substantial federal claims under federal standards.

#### Statement of the Case

The offense alleged here occurred in the early morning hours of January 12, 2002. Petitioner was indicted by a Sacramento County Grand Jury on April 15, 2004. A jury convicted him of the second-degree murder of his cellmate on August 01, 2006. The jury also found true the special circumstances allegation that he was serving a life sentence at the time of the offense.

Petitioner appealed on the sole ground the trial court had committed reversible error by removing a crucial element of the offense by deviating from the standard instruction on voluntary intoxication. The court's removal of the element of "malice" from the statutory instruction that allowed the jury to find petitioner's intoxication prevented him from forming malice in light of the uncontested intoxication evidence both lessened the prosecution's burden to prove he did in fact form malice in the commission of the crime, and deprived petitioner of the benefits of his defense under state law. The claim was rejected by the state court of appeal on direct review.

Petitioner, aware of at least one IAC claim involving the unreasonable delay of over two years in charging him with the offense and the resulting unavailability of two key defense witnesses, in the words of the District Court, "exhaustively sought counsel," Appendix B, pg. 4.

Realizing that counsel was not forthcoming, and based on sudden developments in the investigation of the facts of his prior conviction, petitioner began prosecuting both cases in pro se.

After unsuccessfully attempting to obtain the client-file from his trial counsel, petitioner filed a motion to compel the attorney to surrender the file in the California Court of Appeal. The motion was returned unfiled because California has no procedure for such a motion.

Frustrated by this development, petitioner filed a writ of habeas corpus in the California Supreme Court which was denied under Duval—the state's gatekeeper.

Next, he filed a substantively similar motion to the one described above, the trial court, mistakenly believing that because the ~~re~~ remittitur had been returned to the trial court, it had jurisdiction over the attorney and the case. However, the trial court returned the motion unfiled because the court lacked jurisdiction in the case.

Petitioner then filed a motion for appointment of counsel to develop his trial IAC claims because there was no alternative procedures to allow him to do so in pro se. The trial court denied the motion because there was not motion or petition pending, and no order to show cause had been issued giving petitioner the right to counsel under state law; Clark.

At his wits end, petitioner then filed a writ of habeas corpus in the trial court raising several substantial IAC claims and renewing his motion for the appointment of counsel under the First and Fourteenth Amendments citing both Coleman and Martinez in light

of the constitutional deficiencies of California's habeas framework.

The trial court issued a three-page constitutionally deficient opinion stating there was no right to counsel in an IRCP under the Sixth Amendment, and ignoring petitioner's arguments under the above cited authorities.

Following the denial, petitioner filed similar writs in both the court of appeal and the California Supreme Court with similar results. For practical purposes, his substantial, if undeveloped, federal claims attacking his conviction had escaped review in state court.

Petitioner filed his first federal writ on May 24, 2017. The writ was denied as untimely under the AEDPA without reaching the underlying merits of his constitutional claims.

Petitioner appealed, and the Ninth Circuit denied the appeal on March 30, 2018 by refusing to issue a certificate of appealability.

#### **Statement of the Pertinent Facts**

Petitioner seeks to raise five substantial, but undeveloped, IAC claims. California's habeas framework requires these claims be raised by means of a habeas corpus petition without the benefits of counsel prior to filing his one-and-only petition under state law. Furthermore California has no alternative procedure to allow him to develop the facts necessary to meet his pleading burden and successfully run the gauntlet of a preliminary merits determination in order to obtain the right to counsel under the framework's procedures. As a result, it is more likely than not a pro se petitioner's substantial federal claims will escape review as petitioner's have done.

**A. Petitioner Seeks to Raise Several Substantial, Yet Undeveloped, Federal Claims Challenging the Validity of His State Court Convictions.**

Petitioner seeks to raise five (5) substantial ineffective assistance of trial counsel (IAC) claims challenging the validity of his conviction for the second-degree murder of his William Murphy. These claims all raise serious federal questions about the integrity of his criminal trial.

**1. Petitioner's Trial Counsel Was Ineffective in Failing to Challenge the Delay of Over Two Years in Charging Him with the Offense.**

The offense alleged here occurred on February 12, 2002. Petitioner was in the custody of the California Department of Corrections and Rehabilitation (CDCR) from that date through and including April 15, 2004, when the Sacramento County District Attorney (DA) submitted the case to a grand jury of that county. This delay was not the result of an ongoing investigation by either the prison or other law enforcement agency.

The prison's investigation into the offense concluded mid-March 2002, when California State Prison at Sacramento (CSP-Sac) submitted the incident package containing all of the reports generated during that investigation to the DA.

That investigation revealed the existence of at least two (2) potential witnesses of interest to the defense: (1) Orlando Usher (Usher), and (2) Jeffery Tyson (Tyson). Both inmates were transferred from CSP-Sac during the delay in charging petitioner.

While a defense investigator did contact Usher and obtain a positive statement from him which petitioner has relied on to support his claim that he is factually innocent of the crimes of second-degree murder, nor one attempted to contact Tyson at all. That failure has deprived the record here of facts pertaining his potential testimony at trial.

Counsel did subpoena Tyson who refused to testify because he was as informant for prison officials at the time of the offense and of petitioner's trial and he feared that his cooperation could be revealed and thus put his life in danger if he did so.

While counsel did not subpoena him, Usher's testimony supported the defense theory of the case because Usher would have testified that:

- a. petitioner did not start the fight that resulted in Murphy's death,
- b. Murphy engaged in a sustained effort to start the fight and petitioner spent an equally sustained effort to avoid it,
- c. petitioner was timid and not prone to conflict with other prisoners,
- d. following the incident, petitioner did not even know Murphy was dead,
- e. Murphy was an aggressive alcoholic,
- f. both petitioner and Murphy were very intoxicated,
- g. when he realized Murphy wasn't breathing petitioner immediately began calling for help,
- h. he tried to revive Murphy, and
- i. when those efforts failed, he attempted extreme life-saving measures including CPR.

Usher's testimony, if it had been presented to the jury, would have rendered Murphy's death a non-crime under California law.

The two-year delay in charging petitioner, and trial counsel's mishandling of these two witnesses, rendered both of them unwilling to testify for the defense, and counsel should have challenged the delay for all of these reasons.

**2. The Prosecution Withheld Material Reports from the Defense and Trial Counsel was Ineffective for Failing to Notice or Challenge the Misconduct.**

This claim has two parts: (a) the taped interviews between prison officials and Tyson along with Tyson's hand-written notes created on the night of the incident recording events, and (2) a medical report recording the injuries sustained by petitioner in the altercation with Murphy.

The first part of the claim rests on the facts that Tyson was an informant in the housing unit where the incident occurred. Tyson apparently told investigators that petitioner called for assistance from prison staff and that prison staff delayed responding to his request for assistance for approximately forty-five (45) minutes.

Tyson's testimony at trial would have put this controversy front and center before the jury and would have forced them to reconcile the delay of staff response with petitioner's attempts at saving the victim's life. This fact, likely would have put Tyson's relationship with prison officials at risk.

A single two-page report written by the prison's investigatory staff exists in the client-file created by petitioner's counsel. The report mentions Tyson's "hand written notes" were attached to it. No such notes were in the client file.

It is likely, given normative investigative practices following the death of an inmate, that Tyson was interviewed multiple times as a part of the prison's investigation into Murphy's death, and the likely subsidiary investigation into staff's delay in responding to the call for assistance. It is also likely that those interviews were videotaped and audio recorded. No such recordings were present in the materials of the client file.

Defense counsel had cause to investigate those absences in the process of preparing the case for trial. Yet, nothing in the client-file or the record suggests he did so.

The second part of this claim involves two versions of the same medical report purporting to represent the injuries sustained by petitioner on the night of the incident. Two reports were completed. The first report, completed on February 12, 2002, indicated petitioner had suffered a stab wound to his left shoulder—implicating Murphy introduced a potentially lethal element into the altercation that ultimately caused his death—among other injuries consistent with the altercation.

The second report, created on February 13, 2002, omitted these injuries. Only the second report appears to have been provided to defense counsel, and appears in the client-file.

### **3. Petitioner's Trial Counsel was Ineffective for Failing to Challenge the Introduction of Petitioner's In-custody Statements at Trial.**

When petitioner was removed from the cell where the altercation occurred, he was 'extremely intoxicated.' He was placed in a holding cage in the rotunda of the housing unit where he stayed for several hours. When an officer told him Murphy had passed away, he broke

down sobbing. Petitioner had been awake for nearly twenty-four (24) hours.

Petitioner was videotaped the entire time he was in the holding cage.

Approximately an hour after he was removed from the cell where the altercation occurred, two (2) detectives from the DA's office arrived. They noted at that time that petitioner was 'very drunk' and was emotionally disturbed. Despite these facts, a statement was taken and videotaped. This statement was introduced at trial as evidence.

Petitioner alleges that the totality of the circumstances at the time the statement was taken renders his statement involuntary and that its admission into evidence was prejudicial. Since his trial counsel failed to object to the interview's introduction into evidence, counsel was ineffective in not seeking to challenge the state's use of the interview at trial.

#### **4. Petitioner's Trial Counsel was Ineffective for Failing to Challenge the Directed Jury Verdict.**

At trial, petitioner argued that his intoxication reduced his capacity to form the two critical mental states essential to the crime of murder, malice and intent, thus reducing the crime to manslaughter. Petitioner further argued that he was acting in self-defense.

The claim here focuses on a jury instruction provided to instruct the jury on the defense theory of the case. However, the court deviated from the standard instruction by removing the mental state of "malice" from those states that could be mitigated by

the overwhelming evidence of petitioner's intoxication. The court essentially directed the verdict to second-degree murder by removing the only pathway to the lesser included offense of voluntary manslaughter. When the court removed "malice" from the mental states that could be mitigated by petitioner's intoxication and then told the jury "voluntary intoxication" could not be considered "for any other purpose," it not only reduced the prosecution's burden to prove petitioner had in fact formed the required mental state of malice, but also neutralized the benefits of petitioner's defense; to mitigate malice. Doing so foreclosed the possibility of the jury finding that petitioner's intoxication mitigated the "implied malice" essential to the second-degree murder finding.

Trial counsel did not challenge the court's removal of malice in this way and the record includes no indication that he sought to challenge the directed verdict.

**5. Petitioner's Trial Counsel was Ineffective in Failing to Challenge the Use of Petitioner's Prior Conviction to Augment his Sentence.**

In California, a criminal defendant can move to strike priors for enhancement purposes. The burden is the relatively low preponderence of evidence standard.

Here, trial counsel made no effort to challenge the prior conviction's use, or investigate even the possibility of doing so despite the obvious advantages to both petitioner's sentencing exposure and his bargaining position in ongoing plea negotiations where the state was predisposed to offer a favorable plea of nine (9) years verses the 75-years-to-life petitioner was facing should he have been convicted of first-degree murder or the 45-years-to-life he actually received with his second-degree murder conviction.

Following statutory discovery proceedings in his controlling case, petitioner discovered evidence that implicates a key prosecution witness in the case committed perjury and the state not only was aware his testimony amounted to

perjury but the state did nothing to correct the perjured testimony.

Taken as true, the allegation would mean the prior conviction is unconstitutional at a hearing to strike, under the appropriate burden, it is likely the defense would have prevailed and dramatically reduced petitioner's sentencing exposure and his bargaining position by removing the enhancements for his prior conviction.

If the defense had been unsuccessful, at least the issue would have been preserved for appeal had it been raised in the trial court.

**B. California has Moved IAC Claims Beyond the Reach of the State's Direct Appeal Process.**

The California Supreme Court encourages appointed counsel on direct appeal to file IAC claims via habeas. In re Harris, (1993) 5 Cal.4th 813, 828 n. 7. In fact, this procedure rests on the long-standing notion that "habeas corpus has become the proper remedy in this state to collaterally attack a judgement of conviction which has been obtained in violation of fundamental rights," Id. at 830-831, citing In re Winchester, ( ) 53 Cal.2d 528, 531.

This is so because (1) direct appeal rests solely on the record made in the trial court, and reviewing courts will not look outside the record People v. Szeto, (1981) 29 Cal.3d 20, 35 (summary of facts on direct appeal limited to matters in the record); California Rules of Court (CRC) 8.203(a) (same); Cunningham, (when trial counsel's reasons for various acts and omissions are not discernible from the record, ineffective assistance claim cannot be sustained on direct appeal, but should be brought on habeas), and (2) habeas allows a petitioner to introduce evidence from outside the record to support her claim.

While some attorneys do file such a petition on behalf of indigent clients in conjunction with direct appeal, there is no duty to do so, or to investigate facts to support such a petition, Clark 783 n. 20.

Such a procedural scheme makes it "highly unlikely that in a typical case a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal," Trevino v. Thaler, (2012) 133 S. Ct. 1911, 1921 (Trevino). In fact, in California, unless the record makes trial counsel's inadequate performance so obvious as to render not raising it on direct appeal an example of ineffectiveness itself, IAC claims will not be raised by appointed counsel on direct appeal at all.

This procedure means that an indigent pro se prisoner must raise IAC claims on their own, without the extra-record facts used to support, in their one-and-only opportunity to file a habeas petition under state law, Clark 774-782, without counsel, and on an inadequate record to sustain the claim.

In real world terms, the procedural scheme not only pushes such claims into the state's habeas procedure but it renders that same procedure a procedural trap that catches the unsuspecting prisoner unaware since "ineffective assistance claims often depend on evidence outside the record," Martinez 9; evidence these petitioners do not have and are "in no position to develop," Id.

#### C. California Lacks Any 'Alternative Procedures' for Indigent Pro Se Prisoners to Develop the Critical Claim-Specific Facts Necessary to Comply with the State's Procedure.

There are no alternative procedures by which an indigent pro se prisoner may develop the facts of his IAC claim prior to filing his one and only habeas petition and facing the state's insurmountable pleading burden to plead facts he simply does not have and can not develop.

The only procedure that exists, California Penal Code Section 1241, allows appointed counsel on direct appeal to petition the court that made the appointment for funds to support an investigation into claims raised on direct appeal but which require particular fact development in order to adequately present the claim to the court.

This procedure is inadequate for several reasons. First, by its terms, it excludes pro se prisoners. Second, as discussed supra, California requires IAC claims be raised via habeas corpus and the procedure here applies only to claims raised on direct appeal. That requirement excludes IAC claims. For these reasons, the procedure is unavailable to petitioner and other pro se litigants.

**D. California has Created a Gate-Keeping Mechanism that Makes it More Likely than Not, IAC Claims will Escape Review.**

People v. Duval, (1995) 9 Cal.4th 464, does two things:

- (1) it requires prisoners to plead sufficient facts to warrant relief; and,
- (2) it requires courts to summarily deny petitions not satisfying this burden.

The problem this scheme sets up is the same problem California's other initial pleading burden presented this Court in Douglas.

In California v. Douglas, (1963) 372 US 352, this Court looked at an initial pleading burden borne by indigent pro se prisoners who had to "run the gauntlet of an initial merits determination" without the benefit of counsel in order to exercise the rights guaranteed under the first appeal following the defendant's conviction. For obvious reasons, the Court rejected such a procedure because it drew an unconstitutional line between rich and poor. Duval does the same thing.

Here, the initial pleading burden—to plead sufficient facts to warrant relief—is in effect the requirement the prisoner run the gauntlet of a merits determination before an order to show cause is issued and the prisoner gains the right to counsel under state law. Without an order to show cause, the right does not attach to the petition raising his IAC claims.

Duval acts as a gate-keeper through a simple mechanism that is the functional equivalent to the Douglas burden this Court rejected. If an indigent defendant can hire private counsel who can develop the extra record facts of the case and support his IAC claims, those claims will likely be allowed to pass by the gatekeeper and obtain the one adjudication on the merits due process promises. If not, the state court is mandated to deny the petition under Duval for failing to satisfy the pleading burden and the prisoner will be denied such an adjudication on the merits.

Since, such a prisoner is in no position to develop the facts of his claims without counsel, and the state's procedure denies him a meaningful opportunity to present his IAC claims on direct appeal the burden means pro se prisoner's IAC claims routinely escape review.

**E. Pro se Indigent Prisoners have a First and Fourteenth Amendment Right to Counsel in an IRCP Raising IAC Claims.**

Since California has removed IAC claims from direct appeal and forced them into the state's post-conviction procedure where counsel is not guaranteed, those IRCPs are the constitutional equivalent of the prisoner's one-and-only appeal as of right following her conviction. If that is true, the right to counsel and financial assistance recognized in Douglas applies.

### Reasons for Granting Review

Indigent pro se prisoners file the majority of habeas petitions in California. The inadequacies of the state's habeas procedure makes it more likely than not that substantial federal questions, many of them falling into the IAC rubric, like those petitioner seeks to have adjudicated, ultimately escape review. This class of prisoners has no way of satisfying the gate-keeper the state has set-up to guard the judicial process. The fact that the same gate-keeping mechanism requires state courts to summarily deny factually deficient petitions thereby exposing the unadjudicated federal claims to stiffer second/successive petition rules offends the basic principles of fairness that underly our expectation of due process as a matter of routine.

The state's lack of 'alternative procedures' to allow pro se prisoners the ability to satisfy the pleading burden of IRCPs in California when they seek to raise IAC claims for the first time coupled with the state's procedure itself creates the right to counsel just like the state's direct appeal process created that right in Douglas.

Following his conviction, petitioner sought counsel to review the case and raise the appropriate constitutional errors in an IRCP as mandated by the State's procedure.

Failing that, and under pressing circumstances, petitioner vigorously prosecuted his rights to counsel in order to develop the facts of his IAC claims in a very focused and narrow investigation.

The state's courts have ignored petitioner's claims under several different constitutional theories. The federal court's have had an opportunity to correct the errors of state procedure and law and afford petitioner his right to be heard as to the merits of his claims but failed to fulfill their duty to act as guardians of that right.

Without Certiorari review, petitioner's substantial IAC claims will certainly escape review and the due process guarantee of a single adjudication on the merits of those claims will be permanently foreclosed.

Worse, the inadequate habeas procedure California has devised will continue to shield substantial, if undeveloped, IAC claims from the lens of judicial scrutiny and suspend the writ as to those claims.

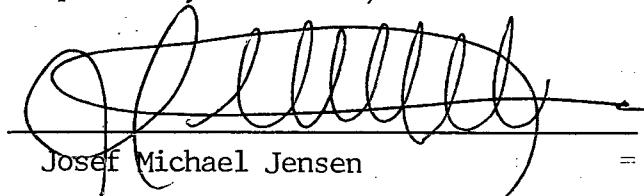
While Martinez may not have been the case to decide the question of a right to counsel under the narrow circumstances here, JENSEN v. MADDEN is that case.

#### Conclusion

For all of these reasons, review should be granted.

Date: June 08, 2018

Respectfully Submitted,



\_\_\_\_\_  
Josef Michael Jensen  
Petitioner

In pro se