No. _____

October Term, 2018

In the
Supreme Court of the United States

Robert C. Jones,

Petitioner,

v.

Jack Palmer, et al.

Respondent.

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

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether Jones received ineffective assistance of counsel when his trial counsel advised him to stipulate to a sentence of life without the possibility of parole based on the attorney's assurance that Jones would "most likely" be released after serving 15 to 18 years

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert C. Jones respectfully prays that a writ of certiorari issue to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit. *See* Appendix A.

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Ninth Circuit affirming the denial of Jone's petition for a writ of habeas corpus, issued on October 17, 2018, is unpublished. *See* Appendix A.

JURISDICTION

The United States District Court for the District of Nevada had original jurisdiction over this case, pursuant to 28 U.S.C. § 2254. The district court granted a Certificate of Appealability. *See* Appendix B. The Ninth Circuit affirmed the district court's decision on October 17, 2018. This Court has jurisdiction pursuant to

28 U.S.C. § 1254. See also Sup. Ct. R. 13(1).

STATEMENT OF THE CASE

Jones Get Sentenced to Death

In an information, Robert Jones was charged with open murder based on allegations that on September 29, 1978, he killed Rayfield Brown after an argument in the Chy Inn Bar in Las Vegas. The State sought the death penalty.

After a jury convicted him of first-degree murder, a penalty phase hearing was held. The only aggravating circumstance was that Jones had prior convictions for violence. During the hearing, the State presented evidence that Jones had three prior violent felony convictions, including an assault conviction from Mississippi.

The defense called several mitigating witnesses. Three correctional officers provided testimony in support of Jones, describing him as non-violent. One of the officers went so far as describing him as a "good man."

Jones' mother, Alberta Jones, indicated Jones had a low I.Q. and did not go far in school, completing only up to the fourth grade. She explained that what he "would learn one day, he would forget it the next." He could not read or write.

Regarding the conviction in Mississippi, Alberta explained that Jones committed the assault when he was attempting to escape from a car that police officers had set on fire. Because Covington County, Mississippi was a dry county, people went to Charles County to drink at a bar. The police would wait on the other side of the bridge for people to come back over into Covington. Jones and some friends went over to Charles County to drink. On their way back, some white police officers

stopped them and told them they were under arrest and would be taken to jail.

Instead of taking them to the jail, the police officers took them to the graveyard. According to Alberta, the police took people to the graveyard to "whoop 'em or beat 'em." The police officers told Jones and his companions to get out of the police car, but Jones refused. One of the police officers said, "I'll get him out," and threw something on the car, setting it on fire. Trapped in the back seat, Jones broke through the plastic separating the front from the back and climbed out the front. After he escaped from the car, he knocked down the police officers to get away from them. Due to the fire, Jones received serious burns, requiring hospitalization. Prior to this incident he had never been in trouble.

The jury sentenced Jones to death, finding an aggravating circumstance and no mitigating circumstances sufficient to outweigh the aggravating circumstance.

Nevada Supreme Court Vacates the Death Sentence

On October 17, 1985, the Nevada Supreme Court affirmed the conviction but vacated the death sentence based on prosecutorial misconduct during the penalty phase as the prosecutor misstated the powers of the pardons board. In concluding that the prosecutorial misconduct affected the jury's decision whether to impose the death sentence, the court stated the death penalty had never been imposed in Nevada in circumstances like those present in this case:

> Our examination of all cases reported since 1977 reveals that the State of Nevada has not imposed a sentence of death in a first degree murder case similar to the one at hand, but reserves capital sentencing for cases which exhibit a high degree of premeditation coupled with aggravating circumstances, such as brutality, torture or depravity. In contrast,

> Jones' victim died almost immediately from a single shot to the head. Jones did not enter the bar intending to kill Brown; only after becoming antagonized did Jones leave to obtain the murder weapon. Given the barroom-confrontation setting of this crime, it is possible that the jury's sentencing decision was influenced by improper factors. We conclude that the prosecutor's misstatement of the powers of the pardons board may have convinced the jury that the only way to keep Jones off the street was to kill him. If the jury did consider the possibility of pardon or commutation in its deliberations, it is possible that their mistaken belief that death sentences were unreviewable influenced their decision. We cannot say that the jury would have imposed the death sentence if the prosecutor had not implied that death sentences were not commutable.

Jones v. State, 707 P.2d 1128, 1135 (Nev. 1985).

The court did not conduct a proportionality review stating, "We decline to do so now because we conclude that an objective, reasonable jury, supplied with accurate, not misleading, information, may well decide not to impose a death sentence under the facts presented here." *Id.* at 1135. Also in the opinion, the court upheld the trial court's admission into evidence of detailed testimony about Jones' prior convictions. However, the court noted that such evidence could work to the defendant's advantage, such as the Mississippi assault conviction in Jones' case. *Id.* at 1132, 1132 n.2.

Jones Agrees to Stipulated Sentence of Life Without the Possibility of Parole Based on Counsel's Advice that He Would "Most Likely" Be Released from Prison in 15 to 18 years.

On remand, the State filed another notice of intent to seek the death penalty. The defense was prepared to present the same mitigating evidence that had been presented at the first hearing as well as additional evidence. For example, the defense intended to subpoena William Burris, who would provide attenuating

evidence as to one of Jones' prior convictions. The defense also obtained a support letter from a state prison officer.

In a letter dated March 2, 1987, counsel advised Jones he believed that a life without parole was an "appropriate resolution" to the case. He stated, "Until last Friday, I could not get the District Attorney to come off the death penalty nor yourself from considering a negotiation to the life without." Counsel reported that the District Attorney's Office had now offered a life without parole sentence and advised Jones to take it and waive his right to a penalty phase hearing before a jury.

To support his advice, counsel stated that someone sentenced to life without parole on average served between 15 to 18 years in prison. The sentence would mean that Jones would "most likely" be released at some point. Counsel's letter stated in pertinent part:

> I have spoken to as many sources as available and have come to the conclusion of which I informed you earlier. The statistics available to us show that a life without will normally have an appearance before the Pardons Board after they have ten years in custody. You have nine years and therefore would appear before the Pardons Board in another year if you are sentenced to a life without. This was verified by the secretary to the board, Nikki. While I cannot tell you precisely what the board would do, I can advise you that your case occurred before November 24, 1982 which means that the life without can be pardoned to a life with the possibility of parole. ***I have been informed that the average time that a man has served on a life without in this state is 15-18 years.*** This figure is not one which we can rely on because such a decision depends on each case, each composition of a pardons board and a parole board, how a person has done in the prison facility, etc. At the very least your offense occurred prior to the constitutional change which now says a life without is life without. It appears that due to the time your act occurred, ***you would most likely be able to have a life outside at some point*** particularly in consideration that you already

> have nine years in prison and that to all the correction officers you have been a model prisoner rather than a problem inmate.

At the "Change of Plea Proceedings" held on March 23, 1987, Jones agreed to a stipulated sentence of life without the possibility of parole and waived his right to a penalty phase hearing. The court asked the attorneys to place "the negotiations" on the record. Defense counsel stated Jones was agreeing to this sentence "to avoid the death penalty or any possibility of getting the death penalty." When asked if he adopted counsel's statements as his own, Jones answered "yes." The court then asked Jones whether he understood that he would have "the opportunity to come in and show mitigating circumstances to overcome any aggravating circumstances; do you understand that?" Jones responded, "Yes, I do."

Jones also agreed that neither his attorneys nor anyone else "made any promises to you that your life without possibility of parole sentence will be reduced to life with the possibility of parole." He agreed with the court that his sentence could conceivably mean he would spend the rest of his natural life in prison. The court sentenced Jones to life without the possibility of parole.

In a 2016 declaration, Jones stated that the only reason he agreed to the stipulated sentence and to waive his right to a penalty phase hearing was his attorney's assurances that defendants with sentences of life without the possibility had served on "average" 15 to 18 years in prison and that he would most likely be released from prison. Prior to receiving that advice, Jones was not willing to agree to a sentence of life without the possibility of parole. If he had not received that

advice, he intended to exercise his right to proceed with a penalty phase hearing and be sentenced by a jury.

Initial state and federal post-conviction proceedings

In 1988, Jones filed a pro-se state post-conviction petition, but he did not raise the ineffectiveness claim concerning his attorney's advice about agreeing to the stipulation sentence. The court denied relief and Jones did not appeal.

On April 22, 1997, Jones filed a pro se § 2254 petition, but it was ultimately dismissed without prejudice for being totally unexhausted. Jones did not appeal the dismissal.

On August 10, 2010, Jones filed a pro se petition in state court raising the ineffectiveness ground concerning the stipulated sentence. The state district court dismissed the petition and the Nevada Supreme Court affirmed the denial.

On June 26, 2011, Jones mailed a pro se § 2254 petition to federal court. In November 2011, the district court issued an order to show cause as to why the petition should not be dismissed as untimely. The court eventually appointed the Federal Defender's Office as counsel.

On June 20, 2013, Jones, through counsel, filed a response to the order to show cause. He argued that he was entitled to equitable tolling based on: (1) the district court erroneously dismissing his first timely-filed federal petition; and (2) his cognitive limitations prevented him from filing a timely petition.

In support of his grounds for equitable tolling, Jones presented an expert report from Dr. Susan Kotler. In her report, she stated that, on April 19, 2013, and

May 5, 2013, she conducted a neuropsychological evaluation of Jones. She concluded Jones' full scale IQ score was 65, which placed him in the mild Mental Retardation ("MR") range. Dr. Kotler opined that Jones' cognitive limitations also include illiteracy, limited education, and most likely a learning disability. His scores on "most of the tests of neurocognitive functioning administered during the evaluation are below average, within the range of Borderline to Mild Mental Retardation."

At the time he was evaluated, Jones was 66 years old. Dr. Kotler found that his comprehension of written material was in the mild MR range, equivalent to a 1.9 grade level. On a test to measure his ability to define words of increasing complexity and abstraction, he was in the borderline MR range. Dr. Kotler further found that Jones' ability to remember narrative information (e.g. short stories) and his expressive vocabulary was in the mild MR range.

Jones scored in the mild MR range on a test that measures comprehension of orally-presented statements, such as conversations and stories. In fact, his score was so low that it was "approximately equivalent to the average score for a kindergarten student."

During their interviews, Jones' overall manner of verbal expression indicated "simple, unsophisticated thought processes." Jones' test results on reading and auditory comprehension, as well as mental sequencing and logical thinking, were extremely low.

Overall, Dr. Kotler opined that the cognitive limitations would have prevented Jones from being able to understand his legal matters when someone explained them

to him, either orally or in writing. She opined that these cognitive limitations rendered him unable to file a habeas petition on his own or understand the need to file a timely one.

On January 5, 2015, the district court made "an initial finding that petitioner appears to be entitled to equitable tolling." The court ordered Jones to file an amended petition.

Jones filed the First Amended Petition on June 16, 2015. He argued he received ineffective assistance of counsel based on counsel's advice that he would most likely be released if he agreed to a stipulated sentence of life without parole.

Respondents subsequently moved to dismiss this ground as procedurally defaulted. However, the district court found the default was excused under *Martinez v. Ryan*, 566 U.S. 1 (2012). Following Respondents' Answer and Jones' Reply, the district court denied Jones' petition, but granted a certificate of appealability on this ground. The Ninth Circuit affirmed the denial of the petition, concluding that counsel was simply being overly optimistic about Jones' ability to get his sentence commuted. App. A.

REASONS FOR GRANTING THE PETITION

I. Jones Received Ineffective Assistance of Counsel When His Counsel Advised Him to Accept a Sentence of Life without the Possibility of Parole Based on the Attorney's Assurance That Jones Would "Most Likely" Be Released after Serving 15 to 18 years

A. The Hill v. Lockhart Prejudice Standard Should Apply Here

Under the Sixth and Fourteenth Amendments to the United States Constitution, a defendant has the right to the effective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, a petitioner must show: (1) that the counsel's performance was professionally unreasonable; and (2) there "is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

In the guilty plea context, the prejudice prong for ineffectiveness claims is different. The standard is set forth in *Hill v. Lockhart*, 474 U.S. 52 (1984). To establish prejudice under *Hill*, a defendant must show that the attorney's performance "affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 58.

An initial question here is whether the ineffectiveness claim should be reviewed under the regular *Strickland* standard or whether the *Hill* standard applies. Under the circumstances here, the *Hill* standard should govern. Jones

should only have to show that, absent the deficient performance, there is a reasonable probability he would have gone forward with the penalty hearing.

The situation here was equivalent to a guilty plea. This Court has indicated that a capital sentencing hearing is "sufficiently like a trial" in its adversarial format and in the existence of standard for decision. *Strickland*, 466 U.S. at 686. The rights that Jones were waiving were the same rights that Jones would be waiving at a guilty plea proceeding, most importantly the right to a jury trial.

The facts here show that the waiver here was equivalent to a guilty plea. There were negotiations, a deal, and then a full colloquy to determine the voluntariness of the waiver. Notably, the proceedings at which the stipulated sentence was imposed were entitled "Change of Plea Proceedings." At that proceedings, the court engaged in the exact same colloquy that would have occurred if there had been a guilty plea.

Thus, the ineffectiveness claim should be analyzed under the *Hill* prejudice standard used for determining whether an attorney was ineffective during plea proceedings.

Hill does not require that a defendant prove that he would have won after trial, only that he would have gone to trial. Rather, under *Hill*, Jones needs to show that, absent his attorney's deficient conduct, there is a reasonable probability he would have proceeded to the penalty phase hearing. In any event, even if Jones has to show that, but for counsel's deficient performance, the outcome of the proceedings would have been different, he can establish that type of prejudice as well.

Counsel's Advice To Jones To Agree To The Stipulated Sentence Constituted Deficient Performance.

Counsel falsely assured Jones that a sentence of life without parole meant that he would "most likely" be released from prison someday. According to counsel, the average time someone with a life without parole sentence served was 15 to 18 years.

These statements were indubitably unreasonable. It was a gross mischaracterization of a life without parole sentence. Counsel failed to properly convey to Jones that a life sentence without the possibility of parole is just that—life in prison without a chance for release. Counsel did nothing to qualify his assurance of a release. It was simply wrong to tell Jones his sentence would most likely get commuted. There is no way of knowing how an unknown future Governor will perform a discretionary act of grace. Indeed, counsel did not even explain that the potential for release depended solely on such a discretionary action.

Counsel's misleading advice had a deleterious effect on the voluntariness of Jones' actions here. The only realistic chance Jones had at a future release would be to go through a penalty phase hearing and receive a sentence of life with the possibility of parole from the jury. But counsel misled him to believe there was another way. Counsel told him he didn't need to go through a hearing because the stipulated sentence of life without parole would get him out. This inappropriate advice altered the calculus as to the ways in which Jones could get out. He was led to believe this deal would lead to his release someday.

Thus, it is not surprising that Jones told the court he accepted the risks of taking the life without parole sentence. His counsel had told him he had nothing to worry about. This was such grossly erroneous advice it represented deficient performance. *See Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) (gross mischaracterization of likely outcome combined with erroneous advice represents deficient performance); *see also Czere v. Butler*, 833 F.2d 59, 63 n. 6 (5th Cir.1987): *O'Tuel v. Osborne*, 706 F.2d 498, 500-01 (4th Cir.1983); *Cepulonis v. Ponte*, 699 F.2d 573, 577 (1st Cir.1983); *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) (petitioner may be entitled to habeas relief if counsel provides parole eligibility information that proves to be grossly erroneous and defendant can show that he would not have pled guilty in absence of erroneous information).

Even more problematic here was that Jones suffers with an intellectual disability. He simply did not have the mental capability to figure these legal issues out on his own. He was dependent upon counsel to provide him reliable advice about the true implications of a life without the possibility of parole sentence. His attorney did not do that. Rather, he falsely led Jones to believe that a life without the possibility of parole sentence meant that he would most likely be released. That was demonstrably untrue, but Jones was not capable of understanding that. And he is now been in prison for over 40 years as a result of this false advice that he would serve, at most, 18 years.

Jones Suffered Prejudice As A Result of Counsel's Misleading Advice.

Counsel's inaccurate and misleading advice had a tremendous effect on Jones' ability to make a voluntary and intelligent decision here. Jones' IQ of 65 places him in the mild MR range and he suffers from profound cognitive limitations. *See generally Atkins v. Virginia*, 536 U.S. 304, 318-20 (2002) (individuals with mental retardation have, among other things, (i) subaverage intellectual functioning, (ii) significant limitations in adaptive skills such as communication, and (iii) diminished cognitive capacity to understand and process information, to communicate, to abstract from mistakes and learn from mistakes, and to engage in logical reasoning). This Court has indicated this factor is relevant in determining whether a defendant acted voluntarily and intelligently. *See generally Henderson v. Morgan*, 426 U.S. 637, 647 (1976).

Although the court attempted to explain the law to Jones at the stipulated sentencing proceeding, Jones was incapable of understanding the complexity of the change in law or the true consequences of a sentence of life without the possibility of parole.

Jones has explicitly alleged in a declaration that the misleading advice of counsel was the decisive factor in his decision to stipulate to a sentence of life without the possibility of parole. And the record supports his statement. From counsel's 1987 letter, it is clear that Jones was not interested in a life without parole sentence. See Counsel specifically acknowledged that Jones had indicated that he would not consider agreeing to that sentence. To change Jones' mind, counsel falsely advised

him that he would "most likely" be getting out after 18 years. That was obviously the reason Jones changed his mind to agree to the stipulated sentence. Under *Hill*, counsel's deficient performance prejudiced Jones.

To the extent that Jones needs to show there is a reasonable probability the actual sentence he would have received would have been different, Jones can establish this prejudice as well. Had counsel not advised Jones to accept the life without parole sentence, Jones would have been in a highly favorable position to convince the sentencing jury that the appropriate sentence was life with the possibility of parole. The record supported the imposition of such a sentence. Jones had compelling factors in his favor. He was intellectually disabled. As the Nevada Supreme Court indicated, the facts of the case clearly did not support a death sentence. Four correctional officers intended to testify on his behalf, one of them would have gone so far as describing Jones as a "good man." Such compelling testimony to support an inmate is highly unusual from correctional officers and would have had a tremendous impact on the jury.

In addition, Jones faced extreme racial intolerance, and as the Nevada Supreme Court indicated, the horrifying facts of when the police officer tried to set him on fire minimized the impact of his prior criminal conviction. It also appeared to be the turning point in Jones' life after which he got in trouble.

Based on the evidence that would have been presented at the sentencing proceeding, there was a reasonable probability that Jones would have received a sentence of life with the possibility of parole.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated January 15, 2019.

Respectfully submitted,

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