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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

ROBERT CHARLES JONES, Petitioner-Appellant, v. JACK PALMER; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 17-15575 D.C. No. 3:11-cv-00467-MMD-WGC MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, District Judge, Presiding

Argued and Submitted October 9, 2018
San Francisco, California

Before: D.W. NELSON, W. FLETCHER, and BYBEE, Circuit Judges.

Robert Jones appeals the dismissal of his federal habeas petition. We have jurisdiction under 28 U.S.C. §§ 1291, 2253. We review the district court's order de novo. *Dickens v. Ryan*, 740 F.3d 1302, 1309 (9th Cir. 2014) (en banc). We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Jones was convicted of first-degree murder for the 1978 murder of Rayfield Brown. At the penalty phase, Jones was sentenced to death. On October 17, 1985, the Nevada Supreme Court affirmed Jones's conviction but vacated his death sentence, finding that the prosecutor had misstated the powers of the pardon board. On remand, the state filed notice of intent to seek the death penalty again. On March 2, 1987, Jones's counsel wrote a letter to Jones advising him to accept an offer from the District Attorney's Office to stipulate to a sentence of life without parole. Citing available statistics and qualifying his prediction throughout the letter, Jones's counsel concluded that Jones "would most likely be able to have a life outside at some point" even if Jones agreed to a stipulated life sentence. On March 23, 1987, Jones agreed to a stipulated sentence of life without the possibility of parole and waived his right to a penalty hearing.

Jones's amended petition for writ of habeas corpus raised two grounds: (1) a claim under *Carter v. Kentucky*, 450 U.S. 288 (1981)[1] and (2) an ineffective assistance of counsel claim based on his counsel's advice that he agree to a stipulated life-without-parole sentence. The district court denied Jones's petition and granted a certificate of appealability on the ineffectiveness ground.

[1] The district court did not issue a certificate of appealability with respect to this claim, and we decline to expand the certificate to reach this issue. *Mardesich v. Cate*, 668 F.3d 1164, 1169 n.4 (9th Cir. 2012).

An ineffective assistance of counsel claim involves a two-prong inquiry. "First, the defendant must show that counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Second, the defendant must show that the deficient performance prejudiced the defense." *Id*. With respect to erroneous sentencing advice and deficient performance, "a mere inaccurate prediction, standing alone, [does] not constitute ineffective assistance[.]" *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) (citing *McMann v. Richardson*, 397 U.S. 759, 770 (1970) and *Wellnitz v. Page*, 420 F.2d 935, 936 (10th Cir. 1970) (per curiam)). Rather, "erroneous predictions regarding a sentence are deficient only if they constitute 'gross mischaracterization of the likely outcome' of a plea bargain 'combined with . . . erroneous advice on the probable effects of going to trial.'" *United States v. Keller*, 902 F.2d 1391, 1394 (9th Cir. 1990) (quoting *Iaea*, 800 F.2d at 865).

Jones argues that his counsel's prediction that he would "most likely" be released at some point after stipulating to a life without parole sentence constituted deficient performance. But read as a whole, counsel's letter urging Jones to agree to the stipulated sentence did not grossly mischaracterize the likely outcome of his agreement to the stipulation, and counsel did not give erroneous advice on the probable effects of going to trial. Jones's counsel consulted the available information about the likelihood that Jones might eventually receive a pardon. Though he may

have been overly optimistic in his assessment of Jones's chances of being released from prison, Jones's counsel qualified his prediction significantly in the letter and accurately described the likely outcome of a resentencing proceeding.

AFFIRMED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ROBERT CHARLES JONES, Petitioner, v. JACK PALMER, *et al.,* Respondents.	Case No. 3:11-cv-00467-MMD-WGC ORDER

Before the Court for decision is a habeas corpus petition under 28 U.S.C. § 2254 brought by Robert Charles Jones, a Nevada prisoner.

I. BACKGROUND[1]

Jones challenges his Nevada state conviction for the first-degree murder of Rayfield Brown on September 29, 1978. The Nevada Supreme Court recounted the circumstances of the crime and the guilt phase of Jones' trial as follows:

> In the early morning hours of September 29, 1978, an argument erupted in the Chy Inn Bar between Jones and Rayfield Brown. Another bar patron, Bobby Lee Robinson, testified that he tried to put an end to the argument by buying everybody a drink. Jones picked up the bottle of vodka Robinson had purchased for him, drank the contents, and then handed the bottle to Robinson. Robinson put the bottle back on the bar counter and moved away to play some records. Approximately three minutes later Jones walked out of the bar, returned with a handgun, pointed it to Brown's head and fired the gun. Brown died shortly thereafter of the gunshot wound to the head.

[1]Except where noted, this background is derived from the exhibits provided by the petitioner (ECF Nos. 34-41) and this Court's own docket.

> Jones left the bar before police arrived. He returned to his uncle's house, where he resided, and told a cousin that he had shot a man at a bar. Jones attempted to flee to Massachusetts by bus but was arrested enroute [sic] in Vail, Colorado.
>
> The degree of Jones' intoxication was disputed during the trial. Defense counsel argued that Jones could not be guilty of first degree murder because he was severely intoxicated at the time of the shooting. Jones' uncle testified that Jones was intoxicated at 12:30 a.m., several hours before the confrontation at the bar. Another defense witness testified that Jones was stumbling over shrubbery and appeared to be drunk at about 6:00 a.m., approximately one to two hours after the shooting. Eyewitnesses to the murder testified that Jones' gait and speech were normal, and that he did not appear drunk. The evidence also indicated that Jones managed to bury the gun and walk home via an inconspicuous route, indicating that Jones was capable of premeditating the murder.

Jones v. State, 707 P.2d 1128, 1129-30 (Nev. 1985).

The case was pursued by the State as a capital murder case. After a first trial ended in a mistrial, Jones was convicted of first-degree murder in a second trial and sentenced to death pursuant to the jury's penalty phase verdict. On October 17, 1985, the Nevada Supreme Court issued a decision that affirmed Jones' first degree murder conviction, but set aside his death sentence based on a finding that the jury was misled into thinking that death sentences could not be commuted.

On remand to the state district court, the State sought the death penalty, and a penalty hearing was set for March 23, 1987. At that hearing, the parties informed the court that Jones had agreed to stipulate to a sentence of life without possibility of parole. The court canvassed Jones and, on April 10, 1987, entered a judgment of conviction with the agreed upon sentence.

In 1988, Jones, proceeding pro se, initiated a state post-conviction proceeding in state district court. The court denied relief. Jones did not appeal.

In April 1997, Jones filed a habeas proceeding in this Court that was assigned case number CV-S-97-00600-JBR-RJJ. In December 1998, the Court dismissed the action because the pleadings before the Court presented only unexhausted claims. Jones' motion for reconsideration was denied on February 9, 1999. Jones did not appeal the dismissal.

On November 28, 2000, Jones filed a second state post-conviction petition in the state district court. Then, on January 30, 2001, he filed a motion to withdraw guilty plea. The state district court denied relief, and the Supreme Court of Nevada affirmed in consolidated appeals. Between 2008 and 2010, Jones filed numerous additional state court challenges to his conviction and sentence, all unsuccessful.

Jones initiated this proceeding in June 2011. On November 23, 2011, this Court entered an order directing Jones to show cause why his petition should not be denied as untimely under 28 U.S.C. § 2244(d). The Court subsequently appointed counsel for Jones and issued another order to show cause. On January 5, 2015, the Court made an initial finding that Jones may be entitled to equitable tolling and directed him to file an amended petition.

The amended petition was filed on June 16, 2015. In response to the petition, respondents filed a motion to dismiss, which was denied. The parties have now fully briefed the petition on the merits.

II. STANDARDS OF REVIEW

This action is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court

has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id*. at 409. "[A] federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id*. at 411.

For any habeas claim that has not been adjudicated on the merits by the state court, the federal court reviews the claim *de novo* without the deference usually accorded state courts under 28 U.S.C. § 2254(d)(1). *Chaker v. Crogan*, 428 F.3d 1215, 1221 (9th Cir. 2005); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). *See also James v. Schriro*, 659 F.3d 855, 876 (9th Cir. 2011) (noting that federal court review is *de novo* where a state court does not reach the merits, but instead denies relief based on a procedural bar later held inadequate to foreclose federal habeas review).

"[A] federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004); *see also Miller-El*, 537 U.S. at 340 ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)."). Because *de novo* review is more favorable to the petitioner, federal courts can deny writs of habeas corpus under § 2254 by engaging in *de novo* review rather than applying the deferential AEDPA standard. *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

III. DISCUSSION

A. Ground One

In Ground One, Jones alleges that he was deprived of his protection against self-incrimination under the Fifth and Fourteenth Amendments because the state trial court failed to instruct the jury that they could not draw an adverse inference from his failure

to testify. Jones presented the same claim to the Nevada Supreme Court on direct appeal.

The Nevada Supreme Court held as follows:

> Jones first contends that the district court prejudicially erred in not giving a cautionary instruction that no inference could be drawn from his failure to testify. State trial courts have a constitutional obligation to give a cautionary instruction, upon proper request, "to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Carter v. Kentucky*, 450 U.S. 288, 305, 101 S.Ct. 1112, 1121, 67 L.Ed.2d 241 (1981). Jones did not request a cautionary instruction, nor did he request a related instruction authorized by NRS 175.181(1).
>
> Jones argues that a *Carter* violation occurred at his trial despite his failure to request the cautionary instruction. He contends that he was prevented from requesting a cautionary instruction by NRS 175.181(1) which the trial judge read to him while advising him of his right not to testify. NRS 175.181(1) provides:
>
> > No instruction shall be given relative to the failure of the person charged with the commission of crime or offense to testify, except, upon the request of the person so charged, the court shall instruct the jury that, in accordance with a right guaranteed by the constitution, no person can be compelled, in a criminal action, to be a witness against himself.
>
> We have previously recognized the futility of objecting to an instruction whose validity has been consistently upheld. *See St. Pierre v. State*, 96 Nev. 887, 620 P.2d 1240 (1980). In *St. Pierre* we cited with approval federal authority which excused the failure to request jury instructions "which, at the time of . . . trial, would have been inconsistent with the law as it then existed." *See United States v. Wanger*, 426 F.2d 1360 (9th Cir.1970); *St. Pierre*, 96 Nev. at 892, 620 P.2d 1240. We therefore proceed to analyze this issue under St. Pierre's two prong analysis focusing on (1) whether Jones had good cause for failing to request the cautionary instruction and (2) whether Jones has suffered prejudice to his substantial rights.
>
> Jones has demonstrated good cause for his failure to request the instruction. Until *Carter* compelled state courts to give a cautionary instruction, if requested, we consistently held that an instruction elaborating on the language of NRS 175.181 was properly rejected. *See Theriault v. State*, 92 Nev. 185, 547 P.2d 668 (1976); *McNeeley v. State*, 81 Nev. 663, 409 P.2d 135 (1965). Jones' failure to request the instruction was therefore "caused" by firmly established caselaw which suggested the futility of such a request. As we stated in *St. Pierre*, "[t]here is no requirement that a defendant or his trial counsel be clairvoyant." 96 Nev. at 892, 620 P.2d 1240.
>
> Although Jones had good cause for failing to request a *Carter* instruction, we conclude that the absence of the instruction has not prejudiced his substantial rights. A *Carter* error is evaluated under the harmless error standard of *Chapman v. California*, 386 U.S. 18, 87 S.Ct.

> 824, 17 L.Ed.2d 705 (1967). *See Franklin v. State*, 98 Nev. 266, 270, 646 P.2d 543 (1982). In *Chapman* the High Court determined that a violation of a defendant's Fifth Amendment privilege would not mandate automatic reversal: "[T]here may be some constitutional errors which . . . are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U.S. at 22, 87 S.Ct. at 827.
>
> After reviewing the evidence of Jones' guilt under this standard, we conclude that any prejudice to Jones resulting from the failure to give the cautionary instruction was harmless beyond a reasonable doubt. Evidence of Jones' guilt is overwhelming. Several eyewitnesses identified Jones as the killer. His counsel admitted in closing argument that Jones was the man who killed Brown. The only real dispute centered on the degree of Jones' intoxication. The jury was adequately instructed on this issue, and there was substantial evidence to support a finding that Jones was capable of premeditation. Given the overwhelming evidence of Jones' guilt, we conclude that the absence of a *Carter* instruction did not have any measurable impact on the jury's deliberations.

Jones, 707 P.2d at 1130–31.

Respondents do not dispute that the trial court's failure to issue a no-adverse-inference instruction violated Jones' constitutional rights under *Carter*. This Court sees no reason to conclude otherwise. The question then, is whether Jones can show that the error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) ("In sum, a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA."). In other words, habeas relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Ayala*, 135 S.Ct. at 2197-98 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). "Mere speculation that the defendant was prejudiced by trial error" is not sufficient to meet the *Brecht* standard. *Id*.

Jones' defense at trial was that he was too intoxicated to form the specific intent necessary for first degree murder, which, under Nevada law, required premeditation and deliberation. With respect to whether the *Carter* error was harmless, Jones contends that, because specific intent was the pivotal factual question in his case, the jury would have placed significant weight on his failure to testify.

Even so, it would not have been enough weight to tip the scales in Jones' favor. It is important to note that, to establish reasonable doubt on this point, evidence of mere impairment is not sufficient. Jones had to present evidence showing that his level of intoxication was so extreme that he was incapable of premeditation and deliberation. *See Nevius v. State*, 699 P.2d 1053, 1060 (Nev. 1985) ("[T]o obtain an instruction on voluntary intoxication as negating specific intent, the evidence must show not only the defendant's consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings.").

The strongest evidence presented in support of the defense theory of intoxication came from Jones' uncle, Archie Pope, who testified that he had been drinking with Jones the night of the murder. According to Pope's testimony, he and Jones and a man named Jackson drank some whiskey and several half-pint bottles of vodka between the time Jones got off work that evening and about 12:30 a.m.[2] (ECF No. 65-2 at 60-62 and 110-17.)[3] Pope also testified that Jones was "pretty well intoxicated" when Jones came home between 6:00 and 7:00 a.m.[4] (*Id*. at 59-60.)

Jones also presented the testimony of Andrew Hamm, who lived in the vicinity and saw a man matching Jones' general description walking in an undeveloped area behind his house at about 6:00 a.m. that same morning. (*Id*. at 117-22.) Hamm testified

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[2]Evidence presented at trial established that the murder occurred at approximately 4:30 a.m.

[3]Citations to page numbers for imaged documents on this Court's docket are based on CM/ECF pagination.

[4]Based on evidence presented at trial, at least three other relatives were living in the house at the time. Jones' aunt testified that she thought Jones was drunk when he came home that morning, but did not elaborate on that opinion. (*Id*. at 53.) One of Jones' cousins did not, during her testimony, comment on Jones' condition when he came home other than to note that he was muddy and dirty. (*Id*. at 65.) In addition, she testified about seeing Jones, Pope, and Jackson earlier that night, between midnight and 1:00 a.m. (*Id*. at 69-71.) She stated that she saw Pope drinking, but did not see Jones drinking and that she had never seen him drunk. (*Id*.) Another cousin living in the house testified that he did not have contact with Jones until later that morning, but his testimony made no reference to whether or not Jones appeared intoxicated. (*Id*. at 74-79.) He also testified that he had never seen Jones drunk. (*Id*.)

that the man appeared to be drunk, although he could not positively identify the man as Jones. (*Id*.)

In contrast and as noted by the Nevada Supreme Court, the testimony of two witnesses present when Jones shot Brown supports a finding that Jones was not visibly intoxicated at the time. (ECF No. 65-1 at 194-261.) While it is not disputed that Jones chugged a half-pint of vodka just minutes prior to the shooting, a medical examiner testified that there is a delay between the consumption of alcohol and the resulting impairment. (*Id*. at 287-88.) And, as also noted by the state supreme court, Jones' conduct immediately following the murder demonstrated that he was not so intoxicated that he was unable to form the specific intent necessary to be found guilty of first degree murder.

In summary, this Court does not have a grave doubt about whether the trial court's failure to issue the no-adverse-inference instruction had a "substantial and injurious" impact on the jury's verdict. Simply put, the balance of the evidence was not close enough for the absence of such an instruction to have any effect on the outcome of Jones' trial. Accordingly, the *Carter* error was harmless under the *Brecht* standard. Ground One is denied.

B. Ground Two

In Ground Two, Jones alleges that he was deprived of effective assistance of counsel, in violation of his constitutional rights, when his counsel advised him to stipulate to a life sentence without possibility of parole. As noted above, a jury sentenced Jones to death in his second trial, but that verdict was set aside by the Nevada Supreme Court, which remanded the case for a penalty hearing before a new jury. *Jones*, 707 P.2d at 1133-34. A few weeks prior to the scheduled date of the new penalty hearing, Jones' counsel sent him a letter advising him to accept a plea offer of life without possibility of parole. (ECF No. 40-38 at 37-38.) In that letter, counsel indicated that, even with that sentence, Jones had a good chance of being released at some point. (*Id*.)

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In contending counsel's advice constituted ineffective assistance, Jones cites to available evidence that could have been used to potentially soften the seriousness his prior felony convictions involving violence (the only aggravating circumstance found by the jury in the previous trial), demonstrate he was a model prisoner, and show that he possesses significant mental impairments. (ECF No. 55 at 21-28; *see also Jones*, 707 P.2d at 1130, 1132 n. 2.) Jones also points to the Nevada Supreme Court's finding on direct appeal noting that his case did not fit the pattern of cases in which the death penalty had been imposed since the State's reenactment of capital punishment in 1977. *See Jones*, 707 P.2d at 1134.

A claim of ineffective assistance of counsel (IAC) is examined under *Strickland v. Washington*, 466 U.S. 668 (1984), which means that a petitioner must show that (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) counsel's errors "deprive[d] the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687. Under the first *Strickland* prong, whether an attorney's performance was deficient is judged against an objective standard of reasonableness. *Id*. at 687-88. Under the second prong, a petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

Because Ground Two was procedurally defaulted, this Court considers the claim *de novo*. *See Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014).

As an initial matter, Jones contends that his ineffectiveness claim should be analyzed under *Hill v. Lockhart*, 474 U.S. 52 (1985), which addressed the proper *Strickland* prejudice inquiry to be applied to claims challenging a guilty plea. 474 U.S. at 59. The Court in *Hill* announced that, 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*.

While there are some similarities between foregoing a penalty hearing and waiving a trial to determine guilt, Jones offers no legal authority for his position that *Hill*

applies to his ineffectiveness claim. Moreover, a waiver of a right to trial on the issue of guilt is far more significant than a waiver of a right to trial on sentencing. Thus, this Court does not agree that, to show prejudice, Jones merely needs to show that, absent counsel's alleged errors, he would have insisted on going forward with the penalty hearing. Instead, Jones needs to show a reasonable probability that the outcome of the sentencing proceeding would have been more favorable than the sentence he received.

Before addressing whether Jones can show prejudice, however, the Court first considers whether counsel performed below constitutional standards in advising Jones to stipulate to a sentence of life without possibility of parole. Objectively speaking, the aforementioned letter counsel sent Jones overestimated Jones' chances of someday being released on parole. Counsel appears to have been correct in advising Jones that, because of the date of his offense, a commutation allowing for parole would not be governed by a then-recent amendment to the Nevada Constitution and subsequent changes to state law that restricted the availability of parole for prisoners sentenced to death or life without parole. *See* 2004 Nev. Op. Att'y Gen. No. 04 (Mar. 25, 2004); *see also Miller v. Ignacio*, 921 P.2d 882, 886 (Nev. 1996). Even so, counsel's use of the phrase "most likely" to describe Jones' chances of "having a life outside at some point" was overly optimistic.

That alone, however, does not establish that counsel's performance was deficient under *Strickland*. *See Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) (noting that "a mere inaccurate prediction, standing alone," does not constitute ineffective assistance). "[E]rroneous predictions regarding a sentence are deficient only if they constitute 'gross mischaracterization of the likely outcome' of a plea bargain 'combined with . . . erroneous advice on the probable effects of going to trial.'" *United States v. Keller*, 902 F.2d 1391, 1394 (9th Cir.1990) (quoting *Iaea*, 800 F.2d at 864-65).

Thus, even if counsel's prediction is considered a "gross mischaracterization of the likely outcome," Jones would still need to show that counsel gave him erroneous advice on the probable effects of proceeding to a penalty hearing. Because Jones had

been convicted of first degree murder, the only sentencing options available to the jury were life with possibility of parole, life without possibility of parole, and death. Counsel accurately advised Jones that, although the Nevada Supreme Court "made some encouraging remarks as to whether the death penalty is appropriate" in his case, the court reserved judgment as to whether it would uphold a subsequent death sentence. (ECF No. 40-38 at 37.) S*ee Jones*, 707 P.2d at 1134-35 ("If the newly empaneled jury opts to impose another death sentence on Jones, we will review the sentence at that time for proportionality as required by [Nevada law].").

Jones contends counsel's advice was erroneous because the Nevada Supreme Court had already determined that the death penalty was not "appropriate" in this case. (ECF No. 69 at 27.) The relevant excerpt from the Nevada Supreme Court's opinion stated as follows:

> 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.

Jones, 707 P.2d at 1134.

Absent from that discussion are the aggravating circumstances the jury relied upon in imposing the death sentence in the first place. The jury had been presented with evidence of three prior felony convictions involving the use or threat of violence. (ECF No. 65-3.) In 1968, Jones was convicted in Mississippi of assaulting a police officer but did not begin serving his sentence until October 1970. (*Id*. at 43-45.) In the meantime, Jones returned to Massachusetts, where he shot a man in the head in November of 1969 (*id*. at 47-49) and bit a police officer's ear lobe off (after trying to take the officer's gun out of his holster) in August of 1970 (*id*. at 57-58).

In the context of discussing a separate issue, the Nevada Supreme Court noted that Jones' mother had testified to mitigating circumstances underlying the Mississippi conviction. *Jones*, 707 P.2d at 1132 n.2. According to that testimony, the assault occurred as Jones was fleeing a car that the police had set on fire. *Id*. Jones' mother also testified that Jones had a low IQ and was illiterate. (ECF No. 65-3 at 85-86.) Jones also presented testimony from officers for the Clark County Detention Center and Las Vegas Metropolitan Police Department that demonstrated that Jones was a diligent worker and a calming influence on other prisoners while incarcerated. (*Id*. at 66-80.)

As additional mitigating evidence to present at the second penalty hearing, Jones had obtained a letter from an officer at the Nevada State Prison which confirmed that Jones had adjusted well to prison and had been a hard worker requiring minimal supervision. (ECF No. 70-1.) Jones claims that the defense also intended to subpoena a witness to the ear-biting incident who, according to Jones, would have testified that Jones was not attempting to take the officer's gun and that he bit the officer's ear only because the officer had grabbed his arm in manner that made him feel like it was about to be broken. (ECF No. 69 at 23.) However, the record indicates that the witness preferred not to be involved in the case and contains no verification that the witness would have testified to these alleged facts. (ECF No. 56-4.)

Viewed as whole, the record does not demonstrate that Jones' counsel gave him erroneous advice as to the possibility that he could be sentenced to death at a second penalty hearing. While the Nevada Supreme Court suggested that the circumstances surrounding the murder was atypical for capital cases reported between 1977 and 1985, it did not take the death penalty off the table as a sentencing option. A jury had already once reached a death verdict after considering almost all of the mitigating evidence discussed above and the "additional" evidence that may have been presented at the second hearing is not particularly compelling.

Counsel was also accurate in telling Jones that life with possibility of parole "would seem the least likely sentence of the three" due to his criminal history, which was

presented to jury at the prior sentencing hearing and would again be presented to the new penalty phase jury. (*Id*.) Under Nevada law in 1987, parole eligibility under such a sentence began after the prisoner served ten years. Nev. Rev. Stat. § 200.030 (1987). Jones had already served nine years at the time. Given that the prior jury had issued a death verdict, the likelihood was very remote that the new sentencing jury, after considering similar evidence, would reach a verdict that would make Jones eligible for parole in the near future.

In summary, Jones has not demonstrated that counsel's performance fell below an objective standard of reasonableness, which means that he is not entitled to federal habeas relief on Ground Two. *See Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). Moreover, Jones is also unable to satisfy the prejudice prong. To do so, he would need to establish, at a minimum, that there was a reasonable probability that, had he proceeded to a penalty hearing, the jury would have imposed a sentence of life with possibility of parole. For the reasons noted above, such a sentence was highly unlikely.

Finally, the transcript of the hearing at which Jones stipulated to a sentence of life without possibility of parole confirms that he did so without any promise from anyone, including counsel, that his sentence would ever be reduced and with the understanding that he could spend the rest of his life in prison. (ECF No. 38-6.)

Based on the foregoing, this Court concludes that Jones was not deprived of effective assistance of counsel, in violation of his constitutional rights, when his counsel advised him to stipulate to a life sentence without possibility of parole. Ground Two is denied.

IV. CONCLUSION

For the reasons set forth above, Jones' amended petition for habeas relief is denied.

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Certificate of Appealability

This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this Court to issue or deny a certificate of appealability (COA). Accordingly, the Court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id*.

Having reviewed its determinations and rulings in adjudicating Jones' petition, the Court finds that reasonable jurists could debate the Court's resolution of Ground Two, above. Specifically, it is at least arguable that Jones' counsel provided him with ineffective assistance of counsel in advising him to stipulate to a sentence of life without possibility of parole. The Court declines to issue a certificate of appealability for its resolution of any other procedural or substantive issue.

It is therefore ordered that petitioner's amended petition for writ of habeas corpus (ECF No. 55) is denied. The Clerk will enter judgment accordingly.

It is further ordered that a certificate of appealability is granted as to the following issue:

> Whether this Court erred in its resolution of Ground Two by concluding that Jones was not deprived of effective assistance of counsel, in violation of his constitutional rights, when his counsel advised him to stipulate to a sentence of life without possibility of parole.

It is further ordered that all pending motions for extension of time (ECF Nos. 61, 62, 63, 66, 67 and 68) are all granted *nunc pro tunc* as of their respective filing dates.

DATED THIS 14th day of March 2017.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT CHARLES JONES,

Petitioner,

v.

JACK PALMER, et al.

Respondents.

Case No. 3:11-CV-00467-MMD-WGC

REPLY TO RESPONDENTS' ANSWER TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS (ECF NO. 64)

Petitioner Robert Jones through his attorney of record, Assistant Federal Public Defender Jonathan M. Kirshbaum, hereby files this Reply to the Answer filed by Respondents (ECF No. 64). This Reply is based upon the attached points and authorities, and all pleadings, documents and exhibits on file herein.

DATED this 12th day of December, 2016.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

POINTS AND AUTHORITIES

I. INTRODUCTION

Jones is entitled to habeas relief on both grounds in the Amended Petition. First, as the state courts acknowledged and Respondents do not dispute, Jones' constitutional rights were violated when the trial court failed to instruct the jury that the jury could not draw an adverse inference against Jones for choosing not to testify at trial. Furthermore, this error cannot be considered harmless. Jones' state of mind was the central issue at trial. This included the question of whether or not Jones' voluntary intoxication had an impact on whether he committed a deliberate and premeditated murder. Jones himself had specific and particular knowledge related to both of these questions. It is precisely why Jones' decision not to testify would be a factor that the jury would have considered when answering these questions. The jury could have easily reached an adverse inference against Jones on this issue based on his failure to testify. In fact, the jury was never even instructed that *Jones had the right not to testify*.

With respect to Ground Two, Jones' counsel was ineffective in advising Jones to agree to the stipulated sentence and waive his right to proceed to a penalty phase hearing and sentencing by a jury. Because this Court has previously found cause and prejudice to overcome the default on this claim, it must review the claim *de novo*. Under an independent analysis, counsel's performance was unreasonable as there were significant reasons why he should not have advised Jones to agree to the stipulated sentence to avoid the death penalty, including the fact that the Nevada

Supreme Court had indicated that the death penalty was not appropriate in this case. Further, counsel induced Jones to accept the stipulated sentence under false pretenses, advising him that a sentence of life without parole meant that he would "most likely" be released from prison someday and that the average time in prison for such a sentence was 15 to 18 years. This deficient performance prejudiced Jones as Jones would most certainly have gone forward with the penalty phase hearing had counsel not provided him with this advice.

Accordingly, the writ should be granted. In the alternative, an evidentiary hearing should be held.

II. GROUNDS FOR RELIEF

A. GROUND ONE

JONES WAS DEPRIVED OF HIS PROTECTION AGAINST SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE COURT FAILED TO INSTRUCT THE JURY THAT THEY COULD NOT DRAW AN ADVERSE INFERENCE FROM JONES' FAILURE TO TESTIFY

1. Statement of Facts

a. Jury Trial

In an information, 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. (Ex. 4.[1])

---

[1] Exhibit citations are to those exhibits previously submitted in support of the Response to the Order to Show Cause and the Amended Petition. (*See* ECF Nos. 34-41, 56.) Respondents submitted as exhibits to its Answer the three volumes of the jury trial transcript. However, Jones already submitted them as exhibits. Because

After his first jury trial ended in a mistrial (Ex. 16), Jones' second jury trial commenced on June 19, 1980. (Ex. 18).

At trial Bobby Lee Robinson testified that on September 29, 1978, around 4:30 a.m., Bobby Lee Robinson was in the Chy Inn Bar in Las Vegas. (Ex. 20 at 182.) At that time, he saw Jones talking to Rayfield Brown near the bar. (*Id.* at 184-85.) Jones and Brown were arguing, so Robinson went over to calm them down. (*Id.* at 187-90, 195.) Robinson told the bartender to give everyone a drink. Jones said he was drinking vodka, so Robinson bought him a half pint of vodka. Jones chugged the entire bottle and handed the empty bottle to Robinson. (*Id.* at 190-91, 217, 219.) About three minutes later, Jones left the bar. He returned a short while later with a gun in his hand. He walked up to Brown and shot him. He then left the bar. (*Id.* at 192-94.)

Legion Morris testified that he was also in the bar at 4:30 a.m. He saw Jones and Brown having an argument that lasted about 30 minutes. Apparently, Jones had bumped into Brown's chair, which upset Brown. (Ex. 20 at 223-26.) At some point, Morris saw Jones chug an entire bottle of vodka. About fifteen minutes later, Jones shot Brown. (*Id.* at 227-28, 243.) Morris did not believe that Jones and Brown were drunk because they spoke in a normal manner. (*Id.* at 231-32.) However, it was later discovered that Brown's blood alcohol level was 0.211, well above the presumed intoxication level of 0.100. (*Id.* at 235; 267-68.)

Jones as well as this Court has previously relied upon Jones' exhibits, Jones will rely upon them again here.

At around 6:00 or 6:30 a.m., Clarice Pope, Jones' aunt, spoke to Jones at her house. He told her he shot someone with his uncle's gun. (Ex. 21 at 321-22.) Jones got rid of the gun. (*Id.* at 322.) Clarice believed that Jones was drunk when she spoke with him that morning. (*Id.* at 326.) After they spoke, Jones took a shower and then went outside and slept on the front lawn. (*Id.*)

Archie Pope, Jones' uncle, testified that he and Jones drank together on the night of the shooting until about 12:30 a.m. They consumed about eight or nine half-pint bottles of vodka plus some Canadian whiskey. (Ex. 21 at 332-35.) The next morning, when Jones arrived at Archie's house, Jones was intoxicated. (*Id.* at 333.)

Althea Gamage, Jones' cousin, testified that on the night of the shooting she saw Jones and Archie at her boyfriend's house between 12:00 a.m. and 1:00 a.m. (Ex. 21 at 341.) Althea looked in Archie's car and saw between ten and fifteen bottles of Canadian whiskey. However, she did not see Jones drink anything while inside her boyfriend's house. (*Id.* at 343-44.) Althea had never seen Jones drunk. (*Id.* at 344.) Jones returned to Archie's house the following morning. She heard him say he had shot someone in the head at the Chy Inn Bar. He asked Althea if she would wash his clothes for him. (*Id.* at 338-40.)

Ronnie Gamage, Jones's cousin, testified that at around 11:45 a.m. and then again at around 4:00 p.m. on September 29, 1978, Jones asked him if he had heard anything about what had happened. (Ex. 21 at 347-48.) Jones had told him he had gotten into an argument with some guy and "wasted" him. (*Id.* at 348.) Jones left on

the bus, but police arrested him in Colorado. However, Jones was arrested in Colorado. (Ex. 22 at 349, 373-76.)

At the close of the State's case, the court stated *sua sponte* that under NRS 175.171 Jones would not receive a "special instruction" regarding his failure to take the stand. Rather, it would instruct the jury only that Jones had a right not to testify as set forth under N.R.S. 175.181. (Ex. 22 at 378-79.) Jones informed the court he had decided not to testify. (*Id.* at 379.)

The defense recalled Archie to testify. Archie repeated that he and Jones were drinking together on the night of the shooting. Jones and Archie drank the same amount and Jones was intoxicated and staggering around. (Ex. 22 at 382-83, 386.) They drank about three half pints of whiskey and nine or ten bottles of vodka. (*Id.* at 384.)

One of Archie's neighbors, Andrew Hamm, saw Jones going through his backyard on the morning of September 29, 1978, at about 6:00 a.m. Jones appeared to be drunk and about ready to fall down. (Ex. 22 at 390, 392.)

In its jury instructions, the court included no instruction advising that no adverse inference can be drawn from Jones' decision not to testify. And despite its promise, the court gave *no* instruction related to Jones' decision not to testify. (*See* Ex. 28.) The court instructed the jury on voluntary intoxication: "[W]henever the actual existence of specific intent is a necessary element of a particular degree of crime, the fact of intoxication may be taken into consideration in determining such specific intent." (*Id.* (Instruction No. 15).)

In closing argument, the prosecutor discussed intent. He argued there was no direct evidence of intent:

> Another factor that you should consider in this case is circumstantial evidence of his state of mind. We have no direct evidence. That would be impossible in almost any case.
>
> I don't know what you are thinking. I have no direct evidence of what you're thinking. All I can consider is what you do as a reflection or circumstantial evidence of what you're thinking.

(Ex. 23 at 434.)

Defense counsel conceded that Jones was the shooter. (Ex. 23 at 446.) However, he argued Jones was guilty of a lesser crime and his state of mind was the central issue. (*Id.* at 447, 452.) He spent a significant portion of his argument asserting that Jones was intoxicated, which affected his state of mind. (*Id.* at 458-61, 464.)

In rebuttal, the prosecution acknowledged that Jones' level of intoxication was "really the issue in this case." (Ex. 23 at 471.)

The jury convicted Jones of first-degree murder. (Ex. 25.) After a penalty phase hearing before a jury, he was sentenced to death. (Ex. 30.)

b. Appeal

Jones brought a timely appeal to the Nevada Supreme Court. Under Issue Two, he argued the court erred in failing to instruct the jury that Jones' decision not to testify cannot be an inference of guilt and should not prejudice him as required under *Carter v. Kentucky*, 450 U.S. 288, 305 (1981). (Ex. 40 at 6.) He argued that it was futile for Jones to have made a specific request for the instruction because the

court had already indicated on its own that it would follow the statutes which prevented the defendant from receiving a "special instruction" regarding his testimony. (Ex. 40 at 6; Ex. 42 at 2.)

In its opinion the Nevada Supreme Court refused to grant relief on this ground. Before addressing the argument, the court stated, "The degree of Jones' intoxication was disputed during the trial. Defense counsel argued that Jones could not be guilty of first degree murder because he was severely intoxicated at the time of the shooting." (Ex. 44 at 3.) The court mentioned the following evidence concerning Jones' intoxication:

> Jones' uncle testified that Jones was intoxicated at 12:30 a.m., several hours before the confrontation at the bar. Another defense witness testified that jones was stumbling over shrubbery and appeared to be drunk at about 6:00 a.m., approximately one to two hours after the shooting. Eyewitnesses to the murder testified that Jones' gait and speech were normal, and that he did not appear drunk. The evidence also indicated that Jones managed to bury the gun and walk home via an inconspicuous route, indicating that Jones was capable of premeditating the murder.

(*Id.*)

Regarding the *Carter* claim, the court agreed with Jones that it was futile for him to ask for an instruction consistent with *Carter* because the Nevada Supreme Court had consistently upheld the instructions under NRS 175.171 and 175.181. (Ex. 44 at 4.) Nevertheless, the court determined that the absence of the instruction was harmless under *Chapman v. California*, 386 U.S. 18 (1967). (*Id.*) It concluded:

> After reviewing the evidence of Jones' guilt under this standard, we conclude that any prejudice to Jones resulting from the failure to give the cautionary instruction was harmless beyond a reasonable doubt. Evidence of Jones' guilt is overwhelming. Several eyewitnesses identified Jones as the killer. His counsel admitted in closing argument that Jones was the man who killed Brown. The only real dispute centered on the degree of Jones'

> intoxication. The jury was adequately instruction on this issue, and there was substantial evidence to support a finding that Jones was capable of premeditation. Given the overwhelming evidence of Jones' guilt, we conclude that the absence of a *Carter* instruction did not have any measurable impact on the jury's deliberations.

(*Id.* at 5.)

2. LEGAL ANALYSIS

a. Standard of Review

The state court adjudicated this claim in Jones' favor on the substantive constitutional claim, but ultimately denied him relief on the ground that the error was harmless under the *Chapman* standard. In their Answer, Respondents do not challenge the state court's conclusion that a constitutional error occurred here. They rely solely on the argument that the error was harmless. Because there is no current challenge to the state court's decision on the substantive constitutional finding, this Court should accept the state court's conclusion.

If this Court must decide whether there was a constitutional violation here, the § 2254(d) standard of review does not apply. Because the state court ruled in Jones' favor on the substance of the claim, it is outside the standard of review. The standard of review states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The only logical reading of the language of the statute is that a petitioner must meet the standard when there has been a decision in state court that is adverse to him. The statute states that relief cannot be granted "*unless*" the adjudication of the claim meets the standard. Thus, application of this standard to a state court decision *favorable* to the petitioner makes little sense. It requires that the petitioner show that the state court decision in his favor was unreasonable or contrary to clearly established law. That is an absurd application of the statute. But to require otherwise would run counter to the plain language of the statute.

In this regard, the Ninth Circuit has suggested (in a case later overturned on other grounds) that there are three potential standards for reviewing a claim on which the state court found federal constitutional error: (1) deference in favor of the petitioner; (2) *de novo* review; or (3) granting preclusive effect to the state court's decision that there was constitutional error. *Ayala v. Wong*, 730 F.3d 831, 840 n.3 (9th Cir. 2013), *rev'd on other grounds sub nom*, 135 S.Ct. 2187 (2015).

As discussed below, no matter what standard is used, a constitutional violation occurred.

b. Failure To Give A "No-Adverse-Instruction" Instruction Violated The Fifth Amendment And *Carter v. Kentucky*

The Fifth Amendment guarantees a defendant the privilege against self-incrimination. This privilege includes the right to have a jury not draw an adverse inference against the defendant for exercising this privilege. *Carter v. Kentucky*, 450 U.S. 288 (1981). In *Carter*, the United States Supreme Court clearly established that the Fifth Amendment requires a criminal trial judge must give a "no-adverse-inference" jury instruction when requested by a defendant to do so. *Id.* at 300.

Here, the court did not give the constitutionally required "no-adverse-inference" jury instruction. The Nevada Supreme Court concluded that a

constitutional violation occurred here. It also concluded that *Carter* applied here even without a specific request. This decision is correct. *Carter* and the Fifth Amendment require such an instruction, but it was not given. Although no specific request was made, the Nevada Supreme Court concluded that such a request was unnecessary here and would have been futile as the state highest court had repeatedly upheld the validity of the Nevada statutes that precluded the defense from obtaining a "no-adverse-inference" instruction.

Accordingly, Jones' rights under the Fifth Amendment were violated based on failing to give a *Carter* instruction.

c. The Constitutional Violation Cannot Be Considered Harmless

The standard for harmless error in federal habeas corpus proceedings is set forth in *Brecht v. Abramson*, 507 U.S. 619, 637 (1993). *See Davis v. Ayala*, 135 S.Ct. 2187, 2197-98 (2015). Under *Brecht*, this Court should grant relief if it had "grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Ayala*, 135 S.Ct. at 2198 (*citing O'Neil v. McAninch*, 513 U.S. 432, 435 (1995)). This standard requires *de novo* review and "places the burden on prosecutors to explain why those errors are harmless[.]" *Brecht*, 507 U.S. at 640 (Stevens, J, concurring); *see also O'Neil*, 513 U.S. 432, 435 (1995) ("We conclude that the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict"); *Fry v. Pliler*, 551 U.S. 112, 121 n.3 (2007) (affirming the *O'Neil* standard). To determine harmlessness, the Court must look at the "record as a whole." *Brecht*, 507 U.S. at 638; *Fry*, 551 U.S. at 121-22.

Because the state court engaged in a "harmlessness determination" under *Chapman*, it would appear under recent Supreme Court precedent that to obtain relief Jones also must show that the state court's harmless error ruling was "contrary to, or an unreasonable application of" *Chapman*. *Ayala*, 135 S.Ct. at 2198-99.

Nonetheless, because *Brecht* is viewed as a more demanding standard, *see Fry*, 551 U.S. at 121-22, a finding of harmlessness under *Brecht* would necessarily indicate that a petitioner can establish that the state court's harmless error analysis meets the § 2254(d) standard.

Here, the error cannot be harmless because it has a substantial and injurious effect on the verdict. In finding that Jones committed first-degree murder, the jury found that Jones committed a murder with premeditation and deliberation. This specific intent was the central factual question in this case. An element of this analysis was whether Jones was intoxicated when the crime occurred. His level of intoxication would affect his state of mind at the time of the incident. There was strong evidence he was intoxicated at the time of the shooting. He had drunk a significant amount of alcohol earlier in the night and chugged a half pint of vodka approximately 15 minutes before the shooting. Additionally, everyone who saw him about an hour to two hours after the shooting believed he was intoxicated. In fact, the chugging of the vodka would not only potentially render him intoxicated, but it is reasonable to deduce that only someone who is already extremely intoxicated would chug an entire half-pint of vodka. It seems unlikely that a sober person could tolerate all of that alcohol at once. In contrast, a severely intoxicated individual, who has lost control of his impulses and judgment, would have the requisite state of mind to do something so extreme.

At the same time, the evidence on intoxication was not entirely consistent. Morris, who was present at the time of the shooting, did not believe that Jones was drunk. Jones' cousin, who had seen him a couple of hours before the shooting, did not

see him drink anything. It was also not clear if there was enough time for Jones to have felt the full effect of chugging the bottle of vodka. Although the evidence of intoxication was significant, there was a dispute as to how intoxicated Jones was at the time of the incident and whether his level of intoxication affected his state of mind.

This is precisely why the jury would have placed significant weight on Jones's failure to testify. As the prosecution argued to the jury, it is difficult to get direct evidence of intent. However, Jones could have provided that direct evidence had he taken the stand. The same is true about his level of intoxication. Jones was arguably the best source for the jury to hear what his actual level of intoxication was during the crime. The jury would have been aware of that. And the jury could have easily drawn an adverse inference that the reason Jones did not testify was because, had he taken the stand, he would have had to admit that his level of intoxication was insufficient to affect his state of mind. Indeed, it would seem this is precisely the situation where a no adverse inference instruction is critically important—the main factual issue focuses on the defendant's own state of mind, which is something for which the defendant would possess critical information. The jury could have easily reached an adverse inference against Jones on this issue based on his failure to testify. In fact, the jury was never even instructed that *Jones had the right not to testify*. This magnifies the effect of the error here.

Moreover, the Nevada Supreme Court's harmless error analysis was both contrary to, and an unreasonable application of, *Chapman*. First, *Chapman* requires

that a court assess the impact the error had on the case. The Nevada Supreme Court did not even consider the effect that failing to give the charge had on the case. It solely looked at the alleged strength of the evidence. But that is not the only factor here. The court must determine whether the State had established beyond a reasonable doubt that the error "did not contribute to [the defendant's] convictions." *Chapman*, 386 U.S. at 26. Here, as in *Chapman*, the error had a direct effect on the jury's consideration of the intent element—the only disputed issue. The state court's failure to even consider the impact of the error on the case is contrary to *Chapman*.

The state court's decision is also an unreasonable application of *Chapman*. The first half of the court's analysis discussed how there was overwhelming evidence that Jones shot Brown, which is irrelevant here. It was not a disputed issue at trial. In fact, Jones admitted at trial he shot Brown. Thus, the state court's focus on whether Jones shot Brown was unreasonable.

Moreover, the court did not conclude there was overwhelming evidence that Jones was not intoxicated. As the court itself acknowledged, this was the only real issue at trial. And the competing evidence concerning his level of intoxication is precisely why the error here had an impact. Intent and intoxication were matters that Jones himself could testify about. In fact, he was likely the best source for this information. Failing to instruct the jury that no adverse inference can be drawn from Jones' silence allowed the jury to conclude that Jones was not intoxicated because he failed to affirmatively testify at trial that he was not. That is a constitutionally

impermissible conclusion, but one that a jury would invariably reach under the circumstances here. The Nevada Supreme Court did not address this issue.

Finally, there was not "substantial" evidence showing Jones was capable of premeditation, the required specific intent at issue here. The court seemed to focus on Jones' actions after the shooting to show he could act with a specific intent before the shooting. However, that is questionable logic. Moreover, it was far from clear Jones acted with any rational thought after the shooting. It is highly debatable whether Jones took an "inconspicuous route" home or was simply taking an unusual route because he was so intoxicated. It is also not clear how successfully burying a gun in the ground shows the ability to form a specific intent before the shooting. The possibility that Jones felt a panicked need to discard the gun after the shooting does not indicate he had acted with *premeditation and deliberation* before the shooting. One has no relation to the other. Furthermore, Jones exhibited other, more bizarre behavior after the shooting, such as sleeping on the front lawn of his Aunt's house. An objective witness described him as so drunk it looked like he was about to fall down. These are actions of someone so intoxicated that he has lost his ability to form a rational judgment.

Accordingly, the writ should be granted and the convictions and sentences vacated.

B. GROUND TWO

JONES WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN COUNSEL ADVISED HIM TO AGREE TO A STIPULATED SENTENCE OF LIFE WITHOUT PAROLE

1. Standard of Review

Respondents previously moved to dismiss this claim on the ground it was previously defaulted. (ECF No. 57.) This Court denied the motion, concluding that under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), the default on the ground was excused due to the ineffective assistance of postconviction counsel. (ECF 60 at 5-6.) Because Jones could overcome the procedural default, he is entitled to a *de novo* review of the underlying ineffective assistance of counsel claim. *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (*en banc*).

In their Answer, Respondents reverse course. They now argue not that the claim was procedurally defaulted, but the "Nevada Supreme Court entertained the claim on the merits." (ECF No. 64 at 14.) This is a contrary position to stating that the claim was procedurally defaulted. As the United States Supreme Court has clarified, a claim is either procedurally defaulted or was adjudicated on the merits. *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (petitioner must overcome procedural default or pass through § 2254(d) to obtain relief). Judicial estoppel prevents Respondents from taking this contrary position after previously *moving to dismiss* this claim as procedurally defaulted. *See Hamilton v. State Farm Fire & Ca. Co.*, 270

F.3d 778, 782-83 (9th Cir. 2001) ("Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.").

It is also plainly wrong. The Nevada Supreme Court did not address the merits of these claims. According to Respondents, the court purportedly addressed the merits in footnote six of their order of affirmance. This footnote stated:

> We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. If appellant has attempted to present claims or facts in those submissions not previously presented in the proceedings below, we have declined to consider them in the first instance.

(Ex. 185 at 3, n.6.)

Clearly, the language of this footnote does not resolve the merits of any claim. Rather, it appears to reference a document filed in the district court and docketed in the Nevada Supreme Court on January 5, 2011, as "Notice of Appeal documents," which has previously been filed as Exhibit 178 in this Court. (Exs. 178, 229.[2]) Other than the notice of appeal, this is the only *pro se* document on the Nevada Supreme Court's docket for the case. (*See* Ex. 229.) In this document, Jones asked for a stay from the Nevada Supreme Court due to a double jeopardy violation. (Ex. 178 at 1.) Based on the language of the footnote, it is readily apparent that the court was referencing this argument in this *pro se* document. Thus, the footnote does not

[2] The docket, which has been included as an exhibit, is available on the Nevada Supreme Court's website. The January 5, 2011 document can be downloaded from the site. Counsel confirmed that this document is the same as Ex. 178.

represent a merits adjudication on the relevant ineffective assistance of counsel claim.

Accordingly, Jones is entitled to a *de novo* review of this claim. In this regard, Respondents' argument that this Court's review on the ineffectiveness claim must be "doubly deferential" is wrong. "Double deference" is only relevant when reviewing an ineffectiveness claim under the § 2254(d) standard of review.

2. Statement of Facts

Prior to Jones' trial, the State gave notice it intended to seek the death penalty against Jones. (Ex. 15.) At the penalty hearing, the only aggravating circumstance was that Jones had prior convictions for violence. (Ex. 29.)

The penalty phase hearing occurred in June 1980. (Ex. 26.) Jones was represented by Robert Amundson and Robert Thompson of the Clark County Public Defender's Office. During the hearing, the State presented evidence that Jones had been convicted of assault in Mississippi in 1968 and sentenced to four years in the Mississippi State Penitentiary in Parchman, Mississippi, and Jones began serving the sentence in 1970. (*Id.* at 523-25.)

Fred Thomas, Jr., testified that on November 23, 1969, in Lynn, Massachusetts, Jones shot him in the ear. Thomas explained that when he arrived at a party, Jones was sitting on the porch. Earlier, there was some kind of fight at the party. After Thomas got out of the car, Jones jumped down off the porch and put a gun to his head. Thomas saw that Jones was bleeding. Jones shot Thomas in the ear as he ran away from the scene. (Ex. 26 at 527-32.) Jones was charged with committing this crime. (*Id.* at 536.)

William Alphen testified that on August 14, 1970, he was a sergeant with the East Lynn, Massachusetts patrol. On that night, Jones assaulted a police officer outside of a restaurant. Jones attempted to grab the revolver from the officer's

holster. The officer restrained Jones, who then bit off the officer's left ear lobe. Jones was charged with committing this crime. (Ex. 26 at 537-38.)

The defense called several mitigating witnesses. Michael Anthony Colonna testified he was an officer at the Clark County Detention Center. He acted primarily as a buffer between the guards and the inmates. He was also in charge of the "paint team" in the jail, on which Jones was a member. He had seen Jones almost every day for the prior five months. As a worker, Jones was outstanding. He was very loyal and conscientious. Jones kept the climate within the cell at a non-violent level as the tank representative. Other inmates viewed him as a just person, which caused the other inmates to act calmer. He described Jones as a "good man." There had never been an inquiry regarding any violent behavior by Jones in the jail. (Ex. 26 at 547-54.)

Roy Lee Westley testified for the defense. He was employed as a corrections officer for the Las Vegas Metropolitan Police Department. He was a sergeant. Westley had known Jones for six to seven months and saw him almost every day. Jones was on the paint detail. He thought Jones was a very good worker. Jones had never given him, any other officer, or any other inmate any trouble. (Ex. 26 at 556-57.)

Howard Stevens testified for the defense. He was also employed by the Las Vegas Metropolitan Police Department. (Ex. 26 at 557.) He testified that he had worked very closely with Jones, who had never given Stevens, any other officer, or any other inmates, "any trouble at all." (Ex. 26 at 557-58.)

Alberta Jones testified for the defense. She was Jones' mother. She indicated that Jones had a low I.Q. and did not go far in school, completing only up to the fourth grade. However, he was only promoted due to his physical size, not his ability. (Ex. 27 at 563-65.) She explained that what he "would learn one day, he would forget it the next." (*Id.* at 564.) He could not read and write. (*Id.* at 565.) Alberta had kidney

issues and Jones had planned to donate a kidney to her. (*Id.* at 565-66.) She said that, when Jones would drink excessively, he would not remember what happened. (*Id.* at 569-71.)

Alberta knew Freddie Thomas. He and Jones had a running feud. Thomas would call Jones a name, which would lead to them fighting. (Ex. 27 at 567.) On the night of the shooting, a gang of people had jumped Jones and beat him on the head with chains and shoe heels before the shooting occurred. (*Id.* at 568, 570).

Alberta explained that, regarding the conviction in Mississippi, Jones committed the assault when he was attempting to escape from a car that police officers had set on fire. (Ex. 27 at 578-79.) Because Covington County in Mississippi was dry, people would go over to Charles County to drink. Over the bridge between the counties, there was a bar. The police would wait on the other side of the bridge for people to come back over into Convington. 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. But 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. (*Id.* at 585-86.) Alberta stated that the FBI investigated the incident. (*Id.* at 586.) Due to the fire, Jones received serious burns, requiring hospitalization. Prior to this incident he had never been in trouble. (*Id.* at 584, 587.)

The jury sentenced Jones to death, finding there was an aggravating circumstance, which justified the death penalty, and there were not mitigating circumstances sufficient to outweigh the aggravating circumstance. (Ex. 27 at 642.)

a. Nevada Supreme Court's Opinion Vacating Death Penalty

On October 17, 1985, the Nevada Supreme Court vacated the death sentence based on prosecutorial misconduct during the penalty phase as the prosecutor misstated the powers of the pardons board. (Ex. 44 at 9-12.) In concluding that the prosecutorial misconduct affected the jury's decision whether to impose the death sentence, the court stated that 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 dies 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.

(*Id.* at 11-12.) Because the court vacated the defendant's sentence, it conducted no proportionality review. It stated, "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 12.)

Also in the opinion, the court upheld the trial court's admission into evidence of detailed testimony about Jones' prior convictions. (Ex. 44 at 6-7.) However, the court noted that such evidence could work to the defendant's advantage, such as what occurred in this case. It stated:

> Furthermore, we note that detailed information regarding prior convictions may work to the benefit of a defendant as well as to his detriment. For example, in this case, after the state introduced evidence of Jones' three prior convictions, one in Mississippi and the other two in Massachusetts, Jones' mother testified that the 1968 Mississippi conviction was the subject of a civil rights investigation. According to Mrs. Jones, her son was stopped by a group of white policemen as he crossed the Covington County line from Charles County. Covington County is a dry county; Jones apparently had gone to Charles County to visit a bar. The police forced Jones to drive his car to a nearby graveyard instead of taking him to jail. They then poured gasoline on the car while Jones was still inside and then ignited the gas, trapping Jones inside. Jones, fearful for his life and severely burned, forced his way out of the car, hit one of the officers and ran through the woods to his aunt's house. Jones was subsequently convicted for felonious assault of a police officer and sentenced to serve four years in the Mississippi State Penitentiary. This was the first time Jones was in "trouble" with the law.

(*Id.* at 7, n.2.)

b. Jones Agrees to Stipulated Sentence of Life Without Parole Based on Counsel's Advice that He Would "Most Likely" Be Released from Prison

On remand, Deputy Public Defender Thompson returned to represent Jones. On February 2, 1987, the State filed notice of their intent to seek the death penalty. (Ex. 48.) The defense was prepared to present the same evidence at the second

penalty hearing as they had presented at the first. (Ex. 49 at 12.) Although Jones' mother had died in late 1986 (Ex. 224), the defense sought to admit her testimony from the prior hearing (Ex. 226). Furthermore, the defense intended to subpoena William Burris, who would testify that, regarding the incident in which Jones bit an officer, Jones was not trying to get the officer's gun. Rather, Jones had been pushed into the officer by another police officer. The officer then grabbed Jones' arm in such a manner that Jones felt his arm might get broken, so he bit the officer's ear. (Ex. 227.)

The defense had also obtained a letter from Donald Helling, an officer at Nevada State Prison. The letter, dated January 9, 1987, indicated that Jones' adjustment with the Nevada Department of Corrections had been "excellent." (Ex. 228.) He did excellent work in his job assignments and required "minimal supervision." (*Id.*) Jones got along well with staff and other inmates and had not been a management problem for prison staff. (*Id.*)

In a letter dated March 2, 1987, Thompson advised Jones he believed that a life without parole was an "appropriate resolution" to the case. (Ex. 171, Ex. A at 2.) 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." *Id.*

Thompson 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. (*Id.* at 2). To support his advice, he stated that someone sentenced to life without parole on average served between 15 to 18 years in prison (*Id.*). The sentence would mean that Jones would "most likely" be released at some point (*Id.*). Specifically, Thompson stated:

> 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.

(Id.)

At a "Change of Plea Proceedings" on March 23, 1987, Jones agreed to a stipulated sentence of life without the possibility of parole and waive his right to a penalty phase hearing. (Ex. 49 at 2). The court asked the attorneys to place "the negotiations" on the record. (*Id.*) Defense counsel stated that Jones was agreeing to this sentence "to avoid the death penalty or any possibility of getting the death penalty." (*Id.* at 2-3). Jones stated that he understood and adopted that statement. (*Id.* at 3, 10-11).

The court asked whether there was an agreement between the parties about the impact of the constitutional amendment that precluded the Pardons Board from commuting a sentence of life without parole to one that would allow parole. (Ex. 49 at 5.) While defense counsel believed that Jones would fall under the law as it existed in 1979, the prosecutor refused to agree to that position. (*Id.* at 5-6.) The court asked Jones whether he understood there was a "discrepancy." Jones acknowledged there

was. (*Id.* at 7.) The court also informed Jones that the law changed in 1982 because of the constitutional amendment that prevented the parole board from granting parole for someone whose sentence was commuted unless certain requirements are met. (*Id.* at 7-8.) Jones said that he understood. (*Id.* at 8.) The court asked him whether he understood he was taking his chances that the Pardons board would follow the prior law; Jones said he understood and it was agreeable to him. (*Id.* at 9.)

Jones 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." (Ex. 49 at 14-15.) He agreed with the court that his sentence could conceivably mean he would spend the rest of his natural life in prison. (*Id.* at 15-16).

The court sentenced Jones to life without the possibility of parole. (Ex. 50.)

In a declaration, Jones states 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 life without parole sentences had served on "average" 15 to 18 years in prison and that he would most likely be released from prison. (Ex. 230, ¶ 2.) Prior to receiving that advice, Jones was not willing to agree to a sentence of life without the possibility of parole. (*Id.*, ¶ 3.) 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. (*Id.*)

Finally, the expert report from neuropsychologist Susan Kotler establishes that Jones has an IQ of 65 and suffers with mental retardation. Jones can barely read or write. His test results also indicate a probable learning disability. Furthermore, he has only had limited education, and this education could not increase his ability to comprehend legal issues. In fact, his cognitive skills as an adult in his 60s remain the same as they were when he was a young child. The allegations concerning Jones' intellectual disability are set forth in the First Amended Petition

on pages 35 to 42. These allegations are adopted and incorporated herein. Fed. R. Civ. P. 10(c).

3. Legal Analysis

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.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Here, Jones argues that counsel was ineffective for advising him to agree to the stipulated sentence and waive his right to a penalty phase hearing and sentencing by a jury. This type of ineffectiveness claim is fully analogous to an ineffectiveness claim concerning an attorney's deficient performance during plea negotiations. Just as with a guilty plea, the court conducted a full canvas of Jones to determine whether he was knowingly and voluntarily waiving his rights and agreeing to the stipulated sentence. In fact, the proceedings themselves were entitled "change of plea." The court considered the agreement here to result from "negotiations."

Thus, the ineffectiveness claim should be analyzed under the standard used for determining whether an attorney was ineffective during plea proceedings. That standard is set forth in *Hill v. Lockhart*, 474 U.S. 52 (1984). The deficient performance prong is essentially the same as *Strickland*. However, to establish prejudice, 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. *Hill* does not require that a defendant prove that he would have won after trial, only that he would have gone to trial.

Under this standard, Jones need not show that he would have received a different sentence had he proceeded to the guilty phase hearing. He needs to show that, absent his attorney's deficient conduct, he would have proceeded to the penalty phase hearing.

Here, Jones can easily meet this standard. Jones' counsel was ineffective in advising Jones to agree to the stipulated sentence and waive his right to proceed to a penalty phase hearing and sentencing by a jury. As the Nevada Supreme Court made very clear in its opinion vacating Jones' death sentence, this was not a case in which the death penalty was appropriate. As that court stated, there was an absence of true aggravating circumstances. Furthermore, the mitigating circumstances reduced the impact of Jones' prior convictions, the sole aggravating circumstance previously found by the jury. Indeed, Jones was never in trouble with the law until police officers attempted to set him on fire in a graveyard. And defense counsel was prepared to present additional mitigating evidence to lessen the impact of one of his other prior convictions. Counsel had also obtained further evidence that Jones had adjusted well to prison and was not a problem for prison officials. Counsel should not have been advising Jones to be sentenced to the rest of his life in prison to take the death penalty off the table when the death penalty was not an appropriate sentence in this case.

Just as important, counsel induced Jones to accept the sentence under false pretenses. In his letter, he assured Jones that a sentence of life without parole meant that he would "most likely" be released from prison someday. Counsel told him that the average time that someone with a life without parole sentenced served was 15 to 18 years, but that he would "most likely" be released. It is simply incredible that he would tell this to Jones. He did not indicate to Jones that a life without parole sentence means what it says it means. He did nothing to qualify his assurance of a

release. He did not explain that the potential for release depended solely on a pardon from the Governor and there was no guarantee that any Governor would pardon him. He also did not mention the recent changes in the pardons law, which actually could have limited Jones' ability to get a pardon. 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).

This was critically important here. The grossly inaccurate and misleading advice from counsel would have had a tremendous effect on Jones' ability to make a voluntary and intelligent decision here. As his mother testified to at the original penalty phase hearing, Jones has a low I.Q. That finding has been confirmed nearly forty years later by the expert's report. The Supreme 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). Jones was also going through the emotional trauma of losing his mother close in time to when the stipulated sentence was entered into. Although the court attempted to explain to him the law 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 was relying on the inaccurate and misleading statements from his attorney.

This deficient performance prejudiced Jones. From the attorney's letter, it is clear that Jones was not interested in a life without parole sentence. In his letter the attorney acknowledged that Jones had indicated that he would not consider agreeing to that sentence. To change his mind, his attorney advised him that he would "most likely" be getting out. That was the reason Jones changed his mind to agree to the

stipulated sentence. Jones has confirmed that in his declaration. He only agreed to the stipulated sentence based on the advice that his attorney gave him in the letter that he would get out. Without that advice, Jones would have gone forward with the penalty phase hearing. And as discussed before, there were many reasons Jones would have gone forward with the penalty phase hearing. The Nevada Supreme Court gave him reasons to believe the death penalty was an inappropriate penalty. He had more mitigation evidence than he did the first time and hoped to obtain a sentence that assured him release from prison. Until his attorney gave him the inaccurate advice, he clearly believed that the only way to get that sentence would be to go before the jury at the penalty phase hearing.

In this regard, it must be emphasized that counsel's statement to the court that Jones was agreeing to the sentence to avoid the death penalty was not accurate. Jones was only agreeing to the sentence because he was advised that it would mean he would get released someday.

To the extent that Jones needs to show here that 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. Three correctional officers intended to testify on his behalf, one of them would have gone so far as describing Jones as a "good man." A prison official would have provided new, additional mitigating evidence concerning his excellent adjustment in prison. Such compelling testimony to support an inmate is highly unusual from correctional officers and prison officials 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. Further, Jones would have presented even further mitigating evidence at this new sentencing proceeding concerning a different allegation of prior violence. Jones also would have presented evidence of his intellectual disability, another mitigating fact. 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.

IV. CONCLUSION

For the reasons stated herein and in the First Amended Petition for Writ of Habeas Corpus and the other prior pleadings in this case, Jones respectfully requests that this Court grant the writ or, in the alternative, conduct an evidentiary hearing so his claims may be properly reviewed and determined on their merits.[3]

DATED this 12th day of December, 2016.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

[3] The appropriateness of holding an evidentiary hearing is not governed by Section 2254(e)(2). First, Jones did attempt to develop the factual basis of this claim in state court in 2010 petition. Second, although a state habeas lawyer's errors normally are imputed to a habeas petitioner for purposes of determining whether the petitioner has been diligent under § 2254(e)(2), such imputation makes no sense in the context of a claim rescued from procedural default by *Martinez*, as is the situation here with respect to Ground Two. *See Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (*en banc*) (opinion of Fletcher, J.).

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 12th day of December, 2016, a true and correct copy of the foregoing **REPLY TO RESPONDENTS' ANSWER TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS (ECF No. 64)**, was filed electronically with the United States District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT CHARLES JONES, Petitioner, v. JACK PALMER, et al., Respondents.	Case No.: 3:11-cv-00467-MMD-WGC **ANSWER TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS** **28 U.S.C. § 2254**

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THE RESPONDENTS ABOVE-NAMED, through legal counsel ADAM PAUL LAXALT Attorney General of Nevada, by Victor-Hugo Schulze, II, Senior Deputy Attorney General, do hereby submit their Answer to the claims within the Petition for Writ of Habeas Corpus in the above-entitled matter.

In denying these claims, the Nevada Supreme Court reasonably applied well-established and controlling law to "run-of-the-mill" claims it has considered many times. There was no error. Under the standard set forth in 28 U.S.C. § 2254(d), relief must be denied.

BACKGROUND

Petitioner Robert Jones ("Jones") a State prisoner, has filed a petition for writ of habeas corpus challenging the Constitutionality of his conviction in the Eighth Judicial District Court for the crime of Murder. Petitioner Jones did an exemplary job in the previous response to the court's order to show cause, ECF No. 33, laying out the tortured history of Jones' many filings leading to this instant amended petition, most of which were reviewed again in the court's order, ECF No. 51. As shown below, for purposes of the

instant claims, the salient facts are simple: Jones and the victim were in a bar late one night, arguing; at one point Jones left the bar, returning shortly thereafter armed with a handgun and shot Brown, the victim, at close or contact range in the head without any notice. There was no provocation for the shooting, and Jones had a cooling off period after the argument when he left the bar. The murder was witnessed by multiple witnesses, who saw the argument and Jones leaving, only to return. Jones leaving the bar evidenced both premeditation and planning. Later, Jones confessed to two cousins that he shot someone, and he attempted to destroy evidence by hiding the murder weapon in the desert (where it was found by a child). After the murder, Jones demonstrated his guilty conscience by buying a bus ticket for Boston and fleeing the State, only to be arrested in Vail, Colorado. Jones has a history of violence as evidence by three separate prior judgments for violent crimes. Notably, one of those priors was for an incident where Jones shot the victim in the head. Jones was no stranger to violent outbursts. Jones' first capital sentence was overturned in the direct appeal by the Nevada Supreme Court based on the prosecutor's misrepresenting to the jury the mechanics of a pardon, and upon remand, the State and defense stipulated to a non-capital sentence.

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DIGEST OF TRIAL FACTS[1]

Officer Berkowitz of the North Las Vegas Police Department testified first. he was an identification technician. INDEX at Exhibit A, part 1, p. 139. He photographed the crime scene at the Chy-Inn bar, collected items of evidence including fingerprints, took measurements, and drew a sketch. The witness testified to photographs of the scene, and the general layout of the building.

Berkowitz was followed by Bobby Lee Robinson. INDEX at Exhibit A, part 1, p. 182. He testified that he was in the bar twice the night of the shooting. He first saw the defendant Jones at the bar between 8:00 p.m. and 9:00 p.m. on September 28, 1978, when he was leaving. Jones was getting out of a taxi cab. Around 4:00 a.m. the next night, on the 29th, the witness returned to the bar to play pinball. He identified a diagram of the bar lay out. He bought the defendant a drink and told everybody to "cool it" because he, the defendant, was arguing with another patron named Rayfield Brown. When finished, the defendant gave the bottle to the witness who placed it on the bar. Shortly after that the defendant left the

[1] This review focuses on the observations of eyewitnesses at the scene of the shooting, the confessions, and the finding of the murder weapon. It omits technical forensic evidence like fingerprints and shell casings located at the scene and the like.

bar. A minute or two later Jones came back in to the bar and went over near the pool tables. At this point it appeared he was carrying a gun. Rayfield Brown was sitting down. The witness heard a shot. The witness then saw Jones lower his hands and walk out the rear exit casually, neither running nor stumbling. Jones and Brown were arguing loudly. During his time in the bar Jones was standing upright, straight. A few other patrons were in the bar. The witness told the barmaid to call the police. On cross examination, the witness described the argument between Jones and Brown as a "macho" argument where each one was on an "ego trip" "boasting about who's done the biggest deed" or which one was the greatest.

Legion Morris testified that he was the security guard in the bar on the 29th of September, 1978, and was present around 4:30 a.m. INDEX at Exhibit A, part 1, p. 222. Defendant Jones, or a man appearing to be similar to him, was also present, as were about six others, including Brown. The witness identified photographs of the scene at the bar. The man and Brown were having an argument that progressed through the evening. The man went over and touched Brown on the back. At one point the man who looked like defendant Jones left the bar going out the side door, and came back in less than a minute. He walked directly up to Brown and said something to the effect that "You one of them bad niggers," held a gun up to his head and shot him at close range in the side of the head. He stood there for a second, turned around and walked out the back door with a normal pace. The witness called the police. When shot, the victim was just sitting there. Having previously worked as a bartender, the witness testified that Jones was not slurring his speech, but was talking normally.

The Clark County Medical Examiner testified that he performed the autopsy on Brown, and that the cause of Brown's death was a .38 gunshot wound to the right temple of the head. INDEX at Exhibit A1, p. 250. He removed a projectile from the victim's head and provided it to a police officer, Kozak. The character of the wound indicated a close or direct contact shot.

Sallie Zimmerman testified. INDEX at Exhibit A, part 2, p. 284. She testified that on September 29, 1978, her dog woke up the family between 6:15 a.m. and 6:30 a.m. whereupon she looked outside and saw the defendant Jones climbing over their fence in their back yard and then went over the fence into the other neighbor's yard where he was living at the time at 2701 San Marcos Avenue. He was wearing dark clothing and appeared to be really dirty, which was strange because he was usually clean.

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Nine year old James Sommers testified, INDEX at Exhibit A, part 2, p. 289, that on September 29, 1978, he found a gun with two shells in it in the desert near his house in North Las Vegas, hidden in some bushes. He told a friend to tell his mother to call the police.

Vernon Adams testified that he and other officers retrieved the gun, and went to the location where it was found with the juveniles, a location off of Civic Center Boulevard that was vacant of development. INDEX at Exhibit A, part 2, p. 295.

Ronald Kozak testified he and Sergeant Adams retrieved the gun on the 29th of September, processed it and placed it in evidence. INDEX at Exhibit A, part 2, p. 296.

Richard Goode, a firearms examiner for the Las Vegas Metropolitan Police Department testified that he processed the gun and determined it to be the murder weapon by its microscopic markings in comparison between the test firings of the gun and the suspect round. INDEX at Exhibit A, part 2, p. 307.

Clarice Pope testified. INDEX at Exhibit A, part 2, p. 320. She told the jury that Jones was living with her and her family at 2701 San Marcos on September 29, 1978, and on that date she saw Jones around 6:30 in the morning looking muddy and dirty in dark clothes, after the kids had asked him what was wrong with him. Jones told Clarice that he did it, he "did it with Arch's gun," Archie being Clarice's husband. Jones said he would not get Archie in trouble for using his gun because he, Jones, had buried it and no one would find it. Jones said he was leaving for Massachusetts. When she saw Jones he appeared to be really upset.

Archie Pope testified that he lived at 2701 San Marcos in September, 1978, that Jones was his nephew, and that on September 29, 1978, he was at the house, and they went to Western Union to pick up some wired money for Jones from his mother in Massachusetts. He identified Exhibit 14A, the gun, as his. INDEX at Exhibit A, part 2, p. 327.

Jones' cousin Althea Gammage testified that Jones confessed to her that after he came home all dirty on the 29th, he had shot a guy in the head at the Chy-Inn bar. He said he was going away. INDEX at Exhibit A, part 2, p. 337.

Witness Robert King testified that he was a police officer with the North las Vegas Police Department and that as part of his involvement in the Jones case he travelled to Vail, Colorado to retrieve

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evidence, including a footlocker and duffel bag, and to take Jones into custody. Among item retrieved was a bus ticket from Las Vegas to Boston through Denver. INDEX at Exhibit A, part 2, p. 354.

Alan Hart testified that he worked for the Eagle County, Colorado Sheriff's Office, that in September, 1978 he was employed with the Vail, Colorado police Department, and that he arrested Jones in Vail after being called by a detective in North Las Vegas. INDEX at Exhibit A part 2, p. 373.

The defense case centered around the contention that Jones was intoxicated on the evening of September 28, 1978, so that he could not form the intent to commit first degree murder. The evidence supporting this defense was defense testimony by Archie Pope. INDEX at Exhibit A, part 2, p. 382. Another witness for the defense testified that a black man who appeared to be drunk was walking behind the house around 6:00 a.m., but the witness was not able to make an identification. INDEX at Exhibit A, part 2, p. 389.

After the jury found Jones guilty of murder in the first degree, INDEX at Exhibit A, part 2, p. 480, the court conducted the sentencing hearing. The State presented evidence of three prior violent felony convictions in aggravation. INDEX at Exhibit A, part 3, p. 523, et seq. The defense then presented evidence in mitigation of Jones' disability primarily through his mother. INDEX at Exhibit A, part 3, p. 563. The jury imposed the death penalty. INDEX at Exhibit A, part 3, p. 641. That sentence was reversed. ECF No. 38-1. Jones agreed to a non-capital sentence. ECF No. 38-6, 38-7.

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STANDARD FOR RELIEF IN HABEAS CASES

Federal habeas corpus is a limited remedy for claims challenging constitutional violations in State court criminal proceedings leading to judgments of conviction. The remedy was further limited by the adoption by Congress of amendments to then-existing habeas law entitled the Antiterrorism and Effective Death Penalty Act of 1996, "AEDPA," and signed into law by President Clinton. Under 28 U.S.C. § 2254 (d), a federal district court considering the merits of the habeas corpus claims of a State inmate that were disposed of on the merits in a State court proceeding cannot grant relief unless the State court's adjudication of those claims resulted in a decision that was "contrary to," or involved an "unreasonable application of," clearly established Federal law as determined by the Supreme Court, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in

the state court proceeding. State court factual determinations must be presumed to be correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The burden of proving that he is entitled to habeas relief is on the Petitioner. *Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388, 1398 (2011). Under the "contrary to" standard, it is not enough if the federal court merely disagrees with the disposition of the state court; in order for relief to issue, the decision of the state court must be *objectively unreasonable*. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000). The term "contrary to" means "diametrically different" and opposite in character." *Williams,* 529 U.S., at 405. Writing for the majority in part II of the decision, Justice O'Connor said:

> A state court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a federal court will be unconstrained by § 2254 (d)(1) because the state-court decision falls within that provision's 'contrary to' clause. ***On the other hand, a run-of-the-mill state court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254 (d)(1)'s 'contrary to' clause.*** Assume, for example, that a state court decision on a prisoner's ineffective assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim. Quite clearly, the state court decision would be in accord with our decision in *Strickland* as to the legal prerequisites for establishing an ineffective assistance claim, even assuming the federal court considering the prisoner's habeas application might reach a different result applying the *Strickland* framework itself. It is difficult, however, to describe such a run-of-the-mill state court decision as 'diametrically different' from, 'opposite in character or nature' from, or 'mutually opposed' to *Strickland*, our clearly established precedent. Although the state court decision may be contrary to the federal court's conception of how *Strickland* ought to be applied in that particular case, the decision is not 'mutually opposed' to *Strickland* itself.

Williams, 529 U.S., at 406 (emphasis added). Accord, *Lockyer v. Andrade*, 538 U.S. 63 (2003). Likewise, a state court's decision can involve an unreasonable application of federal law if it either correctly identifies the governing rule but then applies it to a set of facts in a way that that is objectively unreasonable, or extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable.

The Supreme Court has admonished courts against equating the terms "unreasonable application" with "clear error." These two standards are not the same. The gloss of clear error fails to give proper

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deference to state courts by conflating error (even clear error) with unreasonableness. *Andrade*, 538 U.S. at 75.

A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fair-minded jurists could disagree" on the correctness of the State court's decision. *Cf, Yarborough v. Alvardo*, 541 U.S. 652, 664 (2004). The standard was intended by Congress to be a difficult one to reach:

> It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. See *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). If this standard is difficult to meet, this is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. *Cf. Felker v. Turpin*, 518 U.S. 651, 664…It preserves authority to issue the writ in cases where there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for for ordinary error correction through appeal.

Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 786-87 (2011).

Under AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant State court decision." *Williams*, 529 U.S. at 412. *Andrade*, 531 U.S. at 71. If there is no Supreme Court precedent that controls a legal issue raised by a habeas petitioner in state court, the state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law. *Wright v. Van Patten*, 552 U.S. 120, 125-26 (2008) (per curiam). See, *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006). A state court need not cite to or even be aware of the controlling Supreme Court cases. *Bell v. Cone*, 543 U.S. 447, 455 (2005) (per curiam). A federal habeas court cannot presume that a state court failed to apply its own law in disposing a claim based on the state court's failure to cite its own controlling law. Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation. *Bell*, 543 U.S. at 455.

A state court's silent denial of federal claims constitutes a denial on the merits for purposes of federal habeas review, and the AEDPA deferential standard of review applies. *Harrington,* ___ U.S. ___, 131 S.Ct. at 770. Under the "look through" doctrine, federal habeas courts look through a state court's silent decision to the last reasoned decision of a lower state court and apply the AEDPA standard to that decision. See, *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). The AEDPA standard applies even if no

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state court issued a decision explaining the reasons for its denial of the federal claim. *Harrington*, 131 S.Ct. at 784-85. In the absence of a reasoned decision, the federal court must independently review the record to determine whether the state court was objectively unreasonable in its application of clearly established federal law. *Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir. 2011). *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

Even when the federal court undertakes an independent review of the record in the absence of a reasoned state court decision, the federal court must "still defer to the State court's ultimate decision." *Pirtle*, 313 F.3d at 1167. If the State court decision does not furnish any analytical foundation, the review must focus on Supreme Court cases to determine "whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law." *Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2002). Federal courts also look to Ninth Circuit law for persuasive authority in applying Supreme Court law and to determine whether a particular state court decision is an "unreasonable application" of Supreme Court precedent. *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004.

AEDPA further limits the circumstances under which district courts may grant an evidentiary hearing. Section 2254(e) provides as follows:

> If the applicant has failed to develop the factual basis of in state court proceedings, the court shall not hold an evidentiary hearing unless the applicant shows that:
>
> (A) the claim relies on:
>
> i. a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> ii. a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim 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. § 2254(e)(2).

Under AEDPA, when determining whether to grant an evidentiary hearing, the district court must first ascertain whether the petitioner has failed to develop the factual basis of the claim in State court. *Insyxiengmay v. Morgan*, 403 F.3d 657, 670 (9th Cir. 2005). As explained by the Supreme Court:

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> For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met.

Williams v. Taylor, 529 U.S. 420, 437 (2000).

If the prisoner has not failed to develop the factual basis of the claim in state court, an evidentiary hearing is required if (1) the petitioner establishes a colorable claim for relief—i.e., the petitioner alleges specific facts that, if proved, would entitle him to relief, and (2) the petitioner did not receive a full and fair opportunity to develop those facts in state court. *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005).

This decisional law represents a continuation of earlier law requiring the development of facts in the state courts. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715 (1992) the Supreme Court held that it was the duty of a State inmate to present all of his facts in the state proceedings:

> The concerns that motivated the rejection of the deliberate bypass standard in *Wainwright, Coleman*, and other cases are equally applicable to this case. n3 As in cases of state procedural default, application of the cause-and-prejudice standard to excuse a state prisoner's failure to [***329] develop material facts in state court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum. …
>
> Applying the cause-and-prejudice standard in cases like this will obviously contribute to the finality of convictions, for requiring a federal evidentiary hearing solely on the basis of a habeas petitioner's negligent failure to develop facts in [*9] state-court proceedings dramatically increases the opportunities to relitigate a conviction.
>
> Similarly, encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance. It reduces the "inevitable friction" that results when a federal habeas corpus court "overturn[s] either the factual or legal conclusions reached by the state-court system." *Summer v. Mata*, 449 U.S. 539, 550, 66 L.Ed. 2d 722, 101 S.Ct. 764 (1981).
>
> Also, by ensuring that full factual development takes places by the earlier, state-court proceedings, the cause-and-prejudice standard plainly serves the interest of judicial economy. It is hardly a good use of scarce judicial resources to duplicate fact finding in federal court merely because a petitioner has negligently failed to take advantage of opportunities in state-court proceedings.
>
> Furthermore, ensuring that full factual development of a claim takes place in state court channels the resolution of the claim to the most

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> appropriate forum. The state court [**1720] is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of fact finding to late federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings. This is fully consistent with, and gives meaning to, the requirement of exhaustion. The Court has long held that state prisoners must exhaust state remedies before obtaining federal habeas relief. *Ex parte Royall*, 117 U.S. 241, 29 L.Ed 868, 6 S.Ct. 734 (1886). The requirement before a writ of habeas corpus is granted by a federal court is now incorporated in the federal habeas statute. n4 28 U.S.C. [*10] § 2254. Exhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful. …

Since the adoption of the AEDPA amendments in 1996, then, a federal habeas court does no more than to engage in a highly deferential review of the earlier review process engaged in by the state courts of claims disposed of on the merits. Habeas corpus, for claims previously denied by State courts, is, in essence, a review of a review.

***Strickland*, *Cullen*, and Double Deference to Defense Counsel.**

Likewise, claims of ineffective assistance of counsel are judged under a highly deferential standard of review under the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). "The governing legal standard plays a critical role in defining the question[s] to be asked in assessing the prejudice from counsel's error. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. The reviewing the claim must consider the totality of the evidence and keep in mind that some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways, some pervasive and some trivial. *Id*. at 695-96. The Supreme Court warned courts and advocates that viewing a case in hindsight after a conviction can lead either to an unwarranted invasion of the attorney-client relationship or to a distorted view of the legal and factual landscape existing at the time of the pre-trial preparations and the trial execution: "The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges…counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Strickland,* 466 U.S. at 690.

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The Supreme Court recognized the obvious fact that there are, in a typical case, countless ways to formulate a defense in any case, and that two attorneys, or even a hundred, will approach a case in a different manner:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable…A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. **Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'** *Strickland,* 466 U.S. at 689.

Because defense attorneys must have great leeway to formulate defenses that differ from case to case, strategies formed after adequate investigation are virtually unchallengeable.

The input from the defendant is of paramount concern in any *Strickland* claim—the Supreme Court recognized that the starting point for the defense investigation is the information given to counsel by the defendant himself: "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland,* 466 U.S. at 691. Defense counsel's paramount function is to make the adversarial testing process work in the particular case. *Id.*

A "doubly deferential judicial review applies in analyzing ineffective assistance of counsel claims under 28 U.S.C. § 2254. See *Cullen*, 131 S.Ct. at 1410-11. The rule of *Strickland*, i.e., that a defense counsel's effectiveness is reviewed with great deference, coupled with AEDPA's deferential standard, results in double deference. *See Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010). Put another way, when § 2254 (d) applies, "the question is not whether counsel's actions were reasonable[;] [t]he question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington*, 131 S.Ct. at 788. Moreover, because *Strickland's* standard for assessing defense counsel's effectiveness is a general one, state courts have greater leeway in reasonably applying that rule,

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which in turn translates into a narrower range of decisions that are objectively unreasonable under AEDPA. See, *Cheney*, 614 F.3d at 995, citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

An error by counsel, even if professionally unreasonable, does not necessarily warrant setting aside the judgment of conviction. In addition to proving attorney deficiency, the defendant must prove the second Strickland prong: actual prejudice. Any deficiencies in counsel's performance must be prejudicial to the defense, that is, they must meet the "materiality" standard for exculpatory evidence in *United States v. Agurs*, 427 U.S. at 104. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "Reasonable probability" in this context means a probability sufficient to undermine confidence in the outcome.

Here, the decisions of the State courts were neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court, and this court may not therefore grant relief on the claims. 28 U.S.C. §2254 (d). *Williams v. Taylor*, supra, 529 U.S. 362, 120 S.Ct. 1495 (2000). *Early v. Packer*, 537 U.S. 3 (2002). *McClain v. Prunty*, 217 F.3d 1209 (9th Cir. 2000).

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ANSWER TO CLAIMS

I. Claim 1

In claim 1, the Jones alleges that he had a right to a no-adverse-inference instruction where Jones did not testify at trial. This claim is governed by *Carter v. Kentucky*, 450 U.S. 268 (1981) which did not exist at the time of trial.

This claim was denied in the direct appeal, ECF No. 38-1, where the Nevada Supreme Court held that the instruction should have been given but that error in not giving the instruction was harmless under the *Chapman* standard due to the evidence adduced against the defendant/petition being overwhelming. This holding is more complicated than it appears. *Carter* did not exist at the time of trial. However, prior to the judgment being entered in the direct appeal, the conviction was not yet "final," so that the intervening decision of the Supreme Court would still apply, and that circumstance would not constitute the "retroactive' application of a new constitutional rule. *See*, *Teague v. Lane*, 489 U.S. 288 (1989); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). Presumably trial counsel did not request the no-adverse-instruction at trial because the right to do so had not yet been established by the Supreme Court. Although the instruction was not requested by defense

counsel, the Nevada Supreme Court appeared to hold that counsel did not make the request because a Nevada Statute, NRS 175.181(1) disallowed instructions on the defendant's right to testify. The Court appears to have held that counsel's lack of requesting the instruction was premised on Nevada case law holding that such a request would have been futile at the time of trial, furnishing cause for not requesting the instruction. ECF No. 38-1, p. 3-4. *Theriault v. State*, 92 Nev. 185 (1976). The same result would have been reached under federal law by citing to *Griffith* and *Schriro* in the *Teague* line of cases. The point is that either way, *Carter* applied to Jones' case because the conviction was not yet final with the conclusion of the direct appeal when *Carter* was announced.

When a no-adverse-inference instruction is sought, it must be given. *Carter v. Kentucky*, 450 U.S. 268 (1981). Because of the intervening change in constitutional law, the Nevada Supreme Court had two choices: it could have remanded for a new trial with the instruction being given, or it could have analyzed the case for harmless error under *Chapman v. California*, 386 U.S. 18 (1967), where the State has the burden to prove that error was harmless beyond a reasonable doubt. The Nevada Supreme Court chose the second alternative. The Court was correct to hold that the lack of the instruction was harmless based on the overwhelming evidence adduced at trial, as digested above, including the eyewitness accounts, the finding of the murder weapon, and the confessions given by Jones. That evidence also included testimony that Jones was the aggressor, that the shooting was cold and calculated, with Jones calmly approaching the seated victim, and in a calculated manner raising the gun at close or contact range and shooting him in the head, thereafter walking out of the bar. The State's case further showed that prior to the shooting, Jones had been in an argumentative mood all evening and had been arguing with the victim. Premeditation and deliberation were shown by Jones' leaving the bar to retrieve the gun. Planning was shown by Jones' using his uncle's gun that he had knowledge of, and his attempt to hide the weapon in the desert, and to leave the State immediately thereafter. The State's evidence included the gun being found, Archie Pope's testimony that was his gun, and two confessions to cousins. While Jones introduced testimony from Archie Pope that he was intoxicated earlier that evening, all of the bar witnesses and those in the neighborhood testified that Jones showed no sign of intoxication, was walking normally, had no slurred speech, and was able to climb six foot walls to get back home using a backyard route that avoided the use of streets where he may have been seen. Jones' thinking was, therefore, clear, planned, and calculated.

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However, because this is a federal habeas proceeding, the claim is in a different posture here than it was below, and the harmless error component has a higher burden for Jones to meet. The harmless error analysis shifts to Jones having the burden to disprove the presumption that no prejudice arose. Jones must meet the standard of *Brecht v. Abrahamson* 507 U.S. 619, 638 (1993), rather than the easier standard of *Chapman v. California*, 386 U.S. 18 (1967), to obtain relief. The *Brecht* standard presumes that error was harmless, and it places the burden on *Jones* to show that any error was not harmless under the substantial and injurious injury test. Jones cannot meet this standard because the State's case was simply too strong, including eyewitness accounts, the finding of the "buried" gun, and multiple confessions to family members. Further undermining the claim is the dearth of evidence that any juror actual maintained any inference against Jones. On this central point the claim offers nothing but sheer speculation. Jones cannot overcome the *Brecht* standard, and the claim should be quickly denied.

II. Claim 2

In Claim 2, Jones alleges that trial counsel was ineffective for advising him to agree to a stipulated non-capital sentence, after the first sentence was reversed for the prosecutor's misinforming the jury about the details of clemency. Although the Nevada Supreme Court held that the untimely and successive petition was properly dismissed on procedural grounds, the Nevada Supreme Court entertained the claim on the merits. See, ECF No. 41-13, fn 6. Therefore Jones is correct that it is exhausted.

The claim boggles the mind because with the stipulated sentence, counsel *guaranteed* a non-capital sentence in a case where a capital sentence had been handed down in the first sentencing hearing. The first jury handed down a sentence of death, based on Jones violent criminal history, one conviction showing virtually the same facts of Jones shooting the victim in the head. Here, with the stipulated sentence, Jones was *guaranteed* a sentence of less than death. Under these circumstances it is impossible for counsel to have been deficient in saving his client's life. To argue the alternative, that counsel ought to have taken a chance that a jury might have done something different the second time, or that the pardons board might have granted a pardon to a lesser sentence—both purely speculative positions—would itself have been the epitome of ineffectiveness. Reasonable counsel would not have played Russian Roulette with Jones' life. Even the mere suggestion is to suggest that counsel ought to have been ineffective. Had counsel taken that

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roll of the dice, and lost, Jones would be arguing here that counsel was deficient under *Strickland* for *not* trying to negotiate a sentence. This is the classic 20/20 hindsight claim that the Supreme Court warned about in *Strickland*. That Jones both wanted the guaranteed sentence and understood that life in prison meant life in prison is established by the record. See, ECF No. 55, p. 27, l. 5-8. Exhibit 49.

Here, counsel should be lauded for his exemplary advocacy for *guaranteeing* that Jones would be spared a capital sentence. Had the case been returned to a second jury, the most likely scenario was for a second death sentence. But, some 40 years later, the argument about maybes and potentialities is academic, as it is simply not known what a jury, or the pardons board would have done, even assuming arguendo that a pardon would even have been available. Arguably, in a new sentencing hearing, militating for Jones was his disability; but militating against Jones was not one, but *three*, violent prior convictions as aggravators, one of which was the virtual identity of the instant crime, and the cool and collected manner in which he murdered Brown, casually walking away. This claim is premised on the gossamer wings of hope and nothing else. The claim was properly denied because Jones was guaranteed a non-death sentence by counsel's stipulation. Relief should be quickly denied.

Dated this 13th day of June, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Victor-Hugo Schulze, II
VICTOR-HUGO SCHULZE, II
Senior Deputy Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ***Answer to Petition for Writ of Habeas Corpus*** with the Clerk of the Court by using the CM/ECF system on the 13th day of July, 2016.

The following participants in this case are registered CM/ECF users and will be served by the CM/ECF system:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT CHARLES JONES, Petitioner, vs. JACK PALMER, et al., Respondents.	Case No. 3:11-cv-00467-MMD-WGC **FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254**

Petitioner, Robert Charles Jones ("Jones"), by and through his attorney, Jonathan M. Kirshbaum, Assistant Federal Public Defender, hereby files this First Amended Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254.[1]

DATED this 16th day of June, 2015.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

By: /s/ *Jonathan M. Kirshbaum*
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

[1] The Exhibits referenced in this Amended Petition are identified as "Ex." Exhibits 1 to 223 were submitted in support of the Response to the Order to Show Cause. Exhibits 224 to 227 have been submitted as supplemental exhibits in support of this petition. Documents that are already part of this Court's record are identified as "CR." Petitioner reserves the right to file supplemental exhibits as needed and relevant.

I.

PROCEDURAL HISTORY

1. On April 10, 1987, the Clerk of the Eighth Judicial District Court, Clark County, Nevada entered a Judgment of Conviction in the case entitled State of Nevada v. Robert Charles Jones, case number C43949 (Ex. 50).

2. Following a five-day jury trial, the jury convicted Jones of First Degree Murder. Pursuant to negotiations following a remand by the Nevada Supreme Court, the judge sentenced Jones to life without the possibility of parole (Id.). Jones is currently housed at the Northern Nevada Correctional Center in Carson City, Nevada.

CASE NO. C43949

3. The Criminal Complaint was filed on December 27, 1978, in North Las Vegas Justice Court case number 298, docket number 78FN[2] (Ex. 2). Jones was charged with Murder in the first degree (Id.).

4. The Clark County Public Defender was appointed to represent Jones on December 27, 1978 (Ex. 1 at 1).

5. The preliminary hearing was held on January 11, 1979 (Ex. 3). Jones was present throughout with attorney Herbert Ahlswede. Following testimony of witnesses, Jones was bound over to the Eighth Judicial District Court on the murder charge (Id.).

6. The Information was filed on January 23, 1979, charging Jones with Murder under NRS 200.010 and 200.030 (Ex. 4). At the arraignment, Jones pled not guilty to the information (Ex. 5).

7. On July 11, 1979, attorney Robert Amundson filed a Motion for Confidential Psychiatric Examination (Ex. 6). Amundson requested an examination to determine: 1) If Jones was presently so mentally ill that he was unable to aid and assist counsel in his defense; and, 2) If Jones, at the time of the commission of the alleged offense, was so mentally ill that he was insane. (Id.)

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[2] This was the second complaint filed against Jones. The original information charging Jones with murder was dismissed without prejudice to re-file.

The District Court granted the motion (Ex. 9). At a later court date, Amundson informed the District Court that he had receive two psychiatric reports and both indicated that Jones was competent to stand trial (Ex. 11).

8. On June 2, 1980, Jones filed a Motion for Medical Testing and Notice of Motion (Ex. 13). Jones requested two medical tests be performed on him to determine whether he suffers more severe and abnormal brain activity when under the influence of alcohol (Id.). The District Court granted Jones' motion (Ex. 14).

9. The case proceeded to trial on June 19, 1980 and continued through June 25, 1980. The Honorable James A. Brennan presided[3] (Exs. 18 through 23). Attorneys Amundson and Robert Thompson represented Jones throughout the trial (Id.). On June 25, 1980, the jury returned a Verdict finding Jones guilty of Murder in the First Degree (Ex. 25).

10. The case proceeded to the penalty phase of trial on June 30, 1980 and continued through July 1, 1980. The Honorable James A. Brennan presided (Exs. 26 and 27). Attorneys Amundson and Thompson represented Jones throughout the penalty phase (Id.). At the conclusion of the penalty phase, the jury returned a Special Verdict finding one aggravating circumstance and no mitigating circumstances sufficient to outweigh the aggravating circumstance (Ex. 29). The jury also returned a Verdict imposing the sentence of death upon Jones (Ex. 30).

DIRECT APPEAL

11. A timely Notice of Appeal from the Judgment of Conviction was filed on July 29, 1980 (Ex. 35). The Nevada Supreme Court docketed this appeal as case number 12844.

12. Attorney Jeffrey Sobel substituted in as counsel for Jones on appeal (Ex. 39).

13. Appellant's Opening Brief was filed on September 21, 1981 (Ex. 40). Sobel raised the following issues on appeal:

I. WHETHER PROSECUTORIAL MISCONDUCT COMPELS REVERSAL IN THE INSTANT CASE.

/ / /

[3] The first trial ended in a mistrial (Ex. 16).

II. WHETHER THE COURT ERRED IN WARNING THE DEFENDANT IF HE DID NOT TESTIFY, THAT THE ONLY INSTRUCTION HE WOULD BE ENTITLED TO WAS THAT "NO PERSON CAN BE COMPELLED IN A CRIMINAL ACTION TO BE A WITNESS AGAINST HIMSELF."

III. WHETHER THE CONVICTION SHOULD BE REVERSED BECAUSE THE NEVADA STATUTORY SCHEME FOR CRIMES OF HOMICIDE DOES NOT PERMIT A PERSON CHARGED BY WAY OF INFORMATION TO BE FOUND GUILTY OF A PARTICULAR DEGREE OF MURDER BY A JURY.

IV. WHETHER THE COURT ERRED IN ALLOWING TESTIMONY ABOUT THE SUBSTANCE OF PRIOR CONVICTIONS AND THE TERM OF IMPRISONMENT RELATED THERETO.

V. WHETHER THE COURT ERRED IN DENYING A MISTRIAL WHEN A POLICE OFFICER INDICATED TO THE JURY THAT THERE MAY HAVE BEEN MANY MORE CRIMINAL CHARGES LEVELED AGAINST JONES THEN WERE BEING USED TO PROVE AN AGGRAVATING CIRCUMSTANCE.

VI. WHETHER THE COURT ERRED IN INSTRUCTING THE JURY IN THE PENALTY PHASE.

VII. WHETHER THE SUPREME COURT SHOULD REDUCE THE SENTENCE IN THE CASE UNDER THE POWERS GIVEN TO IT BY N.R.S. 177.055.

14. Jones filed a Supplemental Brief on May 18, 1982 (Ex. 42). Sobel raised the following additional issue:

VIII. WHETHER THIS COURT SHOULD ADOPT THE POSITION OF THE CALIFORNIA SUPREME COURT IN PEOPLE V. RAMOS, AN ISSUE ORDERED TO BE BRIEFED BY THIS COURT.

15. On October 17, 1985, the Nevada Supreme Court filed an Opinion granting Jones relief on appeal (Ex. 44). The Court affirmed Jones' conviction, but vacated his sentence and remanded the case for a new penalty hearing (Id.). Remittitur issued on November 5, 1985 (Ex. 45).

DISTRICT COURT PROCEEDINGS (cont'd)

16. At a hearing on July 2, 1986, the District Court reappointed the Clark County Public Defender (Ex. 1 at 16). Thompson appeared as counsel (Id.).

17. The State filed it's Notice of Intent to Seek Death Penalty on February 2, 1987 (Ex. 48).

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18. The penalty hearing was held on March 23, 1987, before the Honorable James A. Brennan (Ex. 49). Jones was present throughout with attorneys Thompson and Sharon Gwin. At the hearing, Thompson informed the District Court that negotiations had resulted in a stipulation that Jones would agree to be sentenced to life without the possibility of parole. Jones confirmed that Thompson accurately related the negotiations. Following a plea canvass, the District Court sentenced Jones to life without the possibility of parole (Id.).

19. The Judgment of Conviction was filed on April 10, 1987 (Ex. 50).

FIRST STATE POST-CONVICTION

20. On April 14, 1988, Jones, in proper person, filed his Petition for Post-Conviction Relief in the Eighth Judicial District Court (Ex. 52), Points of Authorities in Support of Petition for Post-Conviction relief (Ex. 53) and an Affidavit in Support of Petition for Post-Conviction Relief (Ex. 54). The petition indicates that William McKinney, NDOC #13355, prepared the petition for Jones while they were housed together at Nevada State Prison ("NSP") (Ex. 52 at 1; see also Ex. 212, ¶¶ 3-5). He raised the following grounds for relief:

I. STATE ADMITTED OPINION TESTIMONY ABOUT PETITIONER'S STATE OF MIND AT HIS TRIAL.

II. THE LAW SURROUNDING DEFENSE OF INTOXICATION IN EFFECT AT THE TIME OF PETITIONER'S CONVICTION WAS UNCONSTITUTIONAL.

III. INVOLUNTARY INTOXICATION.

IV. TRIAL COURT GAVE PREJUDICIAL INSTRUCTION TO THE JURY ON INTOXICATION.

V. CHARGING JURY AS TO MATTERS OF FACT.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL.

VII. PREJUDICIAL HEARSAY TESTIMONY.

VIII. TRIAL COURT'S FAILURE TO GIVE INVOLUNTARY INTOXICATION INSTRUCTION DENIED PETITIONER A FAIR TRIAL.

IX. INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

X. PROSECUTORIAL MISCONDUCT.

XI. JURY SELECTION PROCESS WAS UNCONSTITUTIONAL.

21. On April 19, 1988, the State filed it's Response (Ex. 55).

22. At a hearing on May 16, 1988, the District Court denied Jones' petition (Ex. 1 at 23). The written Order was filed on May 25, 1988 (Ex. 56). Jones did not appeal the denial. McKinney transferred away from NSP soon after filing the petition on Jones behalf (Ex. 212, ¶ 5).

FIRST FEDERAL POST-CONVICTION

23. On April 22, 1997, Jones mailed his pro per Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 By A Person In State Custody in United States District Court case number CV-S-97-00600-JBR-RJJ (97-CR 1, Ex. 58)[4]. Lanny Wayman drafted the petition for Jones (97-CR 1 at 9; Ex. 58 at 9). He raised the following grounds for relief:

> I. I ALLEGE THAT MY STATE COURT CONVICTION AND/OR SENTENCE ARE UNCONSTITUTIONAL, IN VIOLATION OF MY SIXTH AMENDMENT RIGHT TO COUNSEL.
>
> II. I ALLEGE THAT MY STATE COURT CONVICTION AND/OR SENTENCE ARE UNCONSTITUTIONAL, IN VIOLATION OF MY FOURTEENTH AMENDMENT RIGHT TO APPELLATE REVIEW.
>
> III. I ALLEGE THAT MY STATE COURT CONVICTION AND/OR SENTENCE ARE UNCONSTITUTIONAL, IN VIOLATION OF MY FOURTEENTH/FIFTH AMENDMENT RIGHT TO DUE PROCESS/REMAIN SILENT.

24. Jones mailed a pro per Amended Petition on May 14, 1997 (97-CR 3, Ex. 60). Michael J. Zellis drafted this petition for Jones (97 CR 3 at 9; Ex. 60 at 9; see also Ex. 215, ¶ 7). He raised the following ground for relief:

> I. I ALLEGE THAT MY STATE COURT CONVICTION AND/OR SENTENCE ARE UNCONSTITUTIONAL, IN VIOLATION OF MY SIXTH AMENDMENT RIGHT TO COUNSEL.

Zellis was released from prison after he filed this petition (Ex. 215, ¶ 7-8). At some point, James Adams, a.k.a. "Red Devil," took over the litigation (Ex. 215, ¶ 8).

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[4] Citations to the Clerk's Record for Case No. CV-S-97-00600-JBR-RJJ will be referred to as "97-CR ..." for clarity between references to the Clerk's Record (CR) in the instant case, Case No. 3:11-cv-00467-ECR-WGC.

25. On July 7, 1997, Respondent filed a motion to dismiss the Amended Petition (97-CR 5, Ex. 61). Respondent argued that the amended petition should be dismissed because it was time-barred pursuant to Section 101 of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") of 1996 (Id.).

26. Jones requested appointment of counsel on July 15, 1997 (97-CR 6, Ex. 62).

27. On July 17, 1997, Jones, in proper person, filed a Motion to Withdraw Amended Petition or, Alternatively, to Amend Amended Petition (97-CR 7, Ex. 63). Jones requested that he be allowed to withdraw his amended petition (97-CR 3, Ex. 60) and proceed on his original petition (97-CR 1, Ex. 58), or, in the alternative, to amend his amended petition to serve only as a supplemental petition (Id.).

28. On November 6, 1997, this Court filed an Order denying Jones' request for appointment of counsel (97-CR 8, Ex. 64). On that same day, this Court filed an order granting Jones' Motion to Withdraw the Amended Petition and ordering that the amended petition be withdrawn from consideration (97-CR 9, Ex. 65).

29. On November 6, 1997, a Magistrate Judge issued a Report and Recommendation, recommending that Respondent's Motion to Dismiss be denied as Jones' original petition was timely filed (97-CR 10, Ex. 66). On this same day, this Court filed an Order directing Respondent to file an answer to Jones' petition (97-CR 11, Ex. 67).

30. On December 8, 1997, Respondent filed a motion to dismiss the amended petition (97-CR 12, Ex. 68). Respondent argued that Jones had not exhausted all the claims raised in his petition in state court (Id.).

31. On April 27, 1998, Jones, in proper person, filed a Response to Motion to Dismiss Amended Petition for a Writ of Habeas Corpus (97-CR 20, Ex. 69). Jones argued that Respondent's Motion to Dismiss Amended Petition was moot because the amended petition (97-CR 3, Ex. 60) was withdrawn and the only petition before the Court was the original petition (97-CR 1, Ex. 58).

32. On July 30, 1998, this Court directed Respondent to file an answer to Jones' original petition within thirty (30) days (97-CR 24, Ex. 70). On September 2, 1998, Respondent informed this Court that it had not been served with Jones' original petition and that it would respond to Jones'

claims if this Court would effect service of the petition upon them (97-CR 25, Ex. 71).

33. On September 24, 1998, this Court filed an Order where in it directed Respondents to file an answer to Jones' petition (97-CR 26, Ex. 72). Although this Court was directing Respondent to respond to Jones' original petition, the order only referenced Jones' amended petition which had been withdrawn from consideration.

34. Respondent filed a motion to dismiss the petition on September 30, 1998 (97-CR 27, Ex. 73). Respondent moved to dismiss Jones' amended petition (97-CR 3, Ex. 60), arguing that the one claim Jones raised was unexhausted and furthermore that they could not rationally understand Jones' claim (Id.). The motion to dismiss did not address any of the three grounds raised that were pled in the original petition.

35. On October 15, 1998, Jones' opposed the motion and sought clarification of what claims were being reviewed by the Court (97-CR 28B, Ex. 75). Jones argued that Respondent was either inadvertently or intentionally addressing the issues raised in his amended petition which was withdrawn, rather than addressing the three issues raised in his original petition (Id.).

36. On November 20, 1998, Respondent filed a reply (97-CR 33, Ex. 80). Respondent argued that it had responded to Jones' petition and reasserted that Jones had only raised one ground for relief (Id.).

37. On December 4, 1998, Jones, in proper person, filed a Motion for Appointment of Counsel (97-CR 34, Ex. 81).

38. On December 7, 1998, a Magistrate Judge filed a Report and Recommendation, recommending that the Motion to Dismiss be granted and that Jones original petition be denied without prejudice for failure to exhaust state court remedies (97-CR 36, Ex. 83).

39. On December 15, 1998, Jones, in proper person, filed his Objection to Magistrate's Report and Recommendation (97-CR 37, Ex. 84). Jones argued that he should be given an opportunity to withdraw the unexhausted claim prior to dismissal and that Respondent has never raised an exhaustion defense to his original petition (97-CR 1, Ex. 58) (Id.).

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40. On December 15, 1998, Jones, in proper person, filed a Notice to Court (97-CR 38, Ex. 85). Jones stated that Respondent had erroneously responded to his amended petition when this Court had ordered Respondent to respond to his original petition. Jones requested this Court to order Respondent to respond to Jones' original petition (Id.).

41. On December 18, 1998, this Court adopted the Report and Recommendation granting Respondent's Motion to Dismiss and denying Jones' petition without prejudice (97-CR 39, Ex. 86). The Judgment in a Civil Case was filed on December 18, 1998 (97-CR 40, Ex. 87).

42. On December 30, 1998, Jones, in proper person, filed a Motion for Reconsideration (97-CR 41, Ex. 88). Jones requested that this Court set aside it's order and allow him to withdraw the unexhausted claim rather than dismiss his petition (Id.). This Court filed an Order on February 9, 1999 wherein it denied the motion (97-CR 42, Ex. 89).

SECOND STATE POST-CONVICTION

43. On November 28, 2000, Jones, in proper person, filed his Petition for Writ of Habeas Corpus (Post-Conviction) (Ex. 92) and his Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) (Ex. 93) in the Eighth Judicial District Court. James Adams, a.k.a. "Red Devil," wrote the petition (Ex. 215, ¶ 8; Ex. 216, ¶ 13).[5] He raised the following grounds for relief:

I. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL BY COUNSEL'S FAILURE TO RAISE AVAILABLE MERITORIOUS ISSUES ON APPEAL AND TO ADVISE PETITIONER OF THOSE AVAILABLE ISSUES.

II. THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO FIND PETITIONER GUILTY OF FIRST DEGREE MURDER WHEREAS ONE OF THE TWO ALLEGED EYEWITNESSES DID NOT SEE BROWN BEING SHOT AND THE OTHER COULD NOT IDENTIFY PETITIONER AS THE ONE WHO SHOT BROWN.

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[5] The inmate who drafted the petition did not identify himself by name in the petition. Rather, he described himself as a 74-year-old man with poor eyesight (Ex. 92 at 3B). Jones has identified this man as Red Devil (Ex. 215, ¶ 8; Ex. 216, ¶ 13). This Office has identified Red Devil as James Adams, who is now deceased (Ex. 216, ¶ 13).

III. PETITIONER'S CONVICTION WAS OBTAINED BY THE KNOWING USE OF PERJURED TESTIMONY AND WAS FUNDAMENTALLY UNFAIR AND MUST BE SET ASIDE.

44. The State filed it's Opposition to Defendant's Petition for Writ of Habeas Corpus on December 18, 2000 (Ex. 95).

45. On December 19, 2000, Jones requested appointment of counsel (Ex. 96). This motion was drafted by "para-legal J. Benjamin Odoms #11978" (Id.).

46. The hearing on Jones' Petition for Writ of Habeas Corpus and Motion for Appointment of Counsel was held on January 3, 2001, before the Honorable Sally Loehrer (Ex. 1 at 24). Jones was not present for this hearing, nor was he represented by counsel. At the hearing, the District Court found that Jones' petition and motion were both time-barred and accordingly, both were denied (Id.).

47. The Order denying Jones' Motion for Appointment of Counsel was filed on January 11, 2001 (Ex. 97).

48. The Findings of Fact, Conclusions of Law and Order was filed on January 11, 2001 (Ex. 98). The Notice of Entry of Order was mailed to Jones on January 12, 2001 (Ex. 99).

49. On January 29, 2001, Jones, in proper person, filed a Motion for Reconsideration (Ex. 100) and a Manifest Injustice as Additional Good Cause to Withdraw Guilty Plea (Ex. 101).

50. A timely pro per Notice of Appeal from the denial of the post-conviction petition was filed on January 29, 2001 (Ex. 102). The Nevada Supreme Court docketed this appeal as case number 37388.

51. On January 30, 2001, Jones, in proper person, filed a Motion for New Penalty Hearing (Ex. 106), a Motion to Withdraw Guilty Plea (Ex. 107), an Affidavit of Robert C. Jones in Support of Motion to Withdraw Guilty Plea (Ex. 108), a Notice of Motion and Supplemental Petition for Writ of Habeas Corpus (Ex. 105), a Good Cause for Delay and Filing a Petition for Writ of Habeas Corpus (Post-Conviction Relief) (Ex. 103), a Response to State's Opposition to Defendant's Petition for Writ of Habeas Corpus (Ex. 104) and a Memorandum of Exhibits (Ex. 109).

52. On February 8, 2001, Jones, in proper person, filed a Judicial Notice (Ex. 111), Motion for an Evidentiary Hearing (Ex. 112) and a Motion for Appointment of Counsel (Ex. 113).

53. On February 9, 2001, the State filed it's Opposition to Defendant's Motion to Withdraw Guilty Plea (Ex. 114) and Opposition to Defendant's Motion for Reconsideration (Ex. 115).

54. The hearing on Jones' pending motions filed on January 29, 2001, January 30, 2001 and February 8, 2001 was held on February 21, 2001, before the Honorable Sally Loehrer (Ex. 1 at 25). Jones was not present for this hearing, nor was he represented by counsel. At the hearing, the District Court denied all of Jones' motions (Id.). The judge warned Jones on the record that his motions were "serial in nature" and if he filed them again "the Court will order sanctions" (Ex. 1 at 25). The minutes from the proceeding were sent to Jones (Id.) The written Order was filed on February 20, 2001 (Ex. 118).

55. A timely pro per Notice of Appeal from the denial of the Motion to Withdraw Guilty Plea was filed on February 15, 2001 (Ex. 116). The Nevada Supreme Court docketed this appeal as case number 37448.

APPEAL OF PETITION FOR WRIT OF HABEAS CORPUS (Case No. 37388)

56. On September 6, 2001, Jones, in proper person, filed Appellant's Opening Brief (Ex. 121). He raised the following issue on appeal:

> I. THE DISTRICT COURT ABUSED IT'S DISCRETION FOR FAILURE TO GRANT AN EVIDENTIARY HEARING IN THIS PARTICULAR CASE, WHERE BECAUSE OF PETITIONER'S 'ACTUAL INNOCENCE' THIS HONORABLE COURT HAD JURISDICTION TO DO SO, EVEN THOUGH PETITIONER FAILED TO DEMONSTRATE ACTUAL CAUSE AND PREJUDICE, THE FACTS OF THE CASE SHOWED ACTUAL INNOCENCE.

57. On September 14, 2001 and September 26, 2001, Jones, in proper person, filed two Motions to Consolidate case numbers 37388 and 37448 (Exs. 122 and 124). The disposition of Jones' appeal is outlined below at paragraph 60.

APPEAL OF MOTION TO WITHDRAW GUILTY PLEA (Case No. 37448)

58. On April 19, 2001, Jones, in proper person, mailed Appellant's Opening Brief to the Nevada Supreme Court for filing (Ex. 120). He raised the following issues on appeal:

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I. THE DISTRICT COURT ABUSED IT'S DISCRETION FOR FAILURE TO CONSIDER AND RULE ON PETITIONER'S GOOD CAUSE FOR DELAY AND FILING THE MOTION TO WITHDRAW GUILTY PLEA BASED ON A MANIFEST INJUSTICE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE STATE, FEDERAL AND UNITED STATES CONSTITUTION.

II. THE DISTRICT COURT ABUSED IT'S DISCRETION FOR FAILURE TO GRANT AN EVIDENTIARY HEARING BE HELD, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE STATE, FEDERAL AND UNITED STATES CONSTITUTION.

59. On September 19, 2001 and September 26, 2001, Jones, in proper person, filed two Motions to Consolidate case numbers 37388 and 37448 (Exs. 123 and 124). The disposition of Jones' appeal is outlined below at paragraph 60.

CONSOLIDATED DISPOSITION OF CASE NUMBERS 37388 AND 37448

60. On November 21, 2001, the Nevada Supreme Court filed an Order of Affirmance, denying Jones relief on both appeals (Ex. 125). Remittitur issued on December 18, 2001 (Ex. 126).

DISTRICT COURT PROCEEDINGS (cont'd)

61. On February 6, 2008, Jones, in proper person, filed a Motion to Withdraw Guilty Plea to Correct a Manifest Injustice (Ex. 132). Jones argued that his plea was not entered knowingly, voluntarily and intelligently because he received erroneous advice from counsel concerning his eligibility for parole on a sentence of life without the possibility of parole; he functions at a third grade education level, is illiterate and can not comprehend the severity of the proceedings; and, he was coerced into entering the plea by his counsel (Id.). On this same day, Jones, in proper person, also filed a Motion to Correct Illegal Sentence (Ex. 133). Jones argued that the District Court lacked the subject-matter jurisdiction to permit him to enter a plea to First Degree Murder and be sentenced to a term of life without the possibility of parole based upon a defective information which was lacking of the essential elements of premeditation and deliberation which can only amount to a charge of Second Degree Murder (Id.). These two documents were prepared by Eric "Termite" Douglas (Exs. 132 at 2; 133 at 2).

62. On February 14, 2008, the State filed its Opposition to the motions (Ex. 134 and 135).

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63. The hearing on Jones' pending motions, filed February 6, 2008, was held on February 20, 2008, before the Honorable Sally Loehrer (Ex. 1 at 26). Jones was not present for this hearing, nor was he represented by counsel. The District Court denied the motions (Id.).

64. On March 3, 2008, Jones, in proper person, filed motions for reconsideration on the denials of both of the motions (Ex. 136 and 137). The State filed opposition to the motion to correct illegal sentence on March 14, 2008 (Ex. 138).

65. The Order Denying Defendant's Motion to Correct Illegal Sentence was filed on March 17, 2008 (Ex. 139).

66. The hearing on Jones' motions for reconsideration was held on March 17, 2008, before the Honorable Sally Loehrer (Ex. 1 at 26). Jones was not present for this hearing, nor was he represented by counsel. The District Court denied the motions (Id.).

67. A timely pro per Notice of Appeal from the denial of the Motion to Correct Illegal Sentence was filed on March 17, 2008 (Ex. 140). The Nevada Supreme Court docketed this appeal as case number 51295.

68. A timely pro per Notice of Appeal from the denial of the Motion to Withdraw Guilty Plea to Correct Manifest Injustice was filed on March 17, 2008 (Ex. 141). The Nevada Supreme Court docketed this appeal as case number 51296.

69. On April 3, 2008, the Nevada Supreme Court directed the District Court to enter a written order denying the motion to withdraw guilty plea (Ex. 144), which the lower court did on April 8, 2008 (Ex. 145).

CONSOLIDATED DISPOSITION OF CASE NUMBERS 51295 AND 51296

70. On September 25, 2008, the Nevada Supreme Court filed an Order of Affirmance, denying Jones relief on both appeals (Ex. 146). Remittiturs issued on October 21, 2008 (Exs. 148 and 150).

PETITION FOR WRIT OF HABEAS CORPUS TO NEVADA SUPREME COURT

71. On October 20, 2008, Jones, in proper person, filed his Petition for Writ of Habeas Corpus of Actual Innocence Pursuant to NRS 34.360 to 34.830 Inclusive in the Nevada Supreme Court (Ex. 147). Inmate J. Benjamin Odoms prepared the petition (Ex. 147 at 10). The Nevada

Supreme Court docketed this petition as case number 52603. Jones raised the following grounds for relief:

I. VIOLATION OF THE 6TH, 14TH AMENDMENT UNITED STATES CONSTITUTION, WHERE THE PETITIONER JONES IS FACTUAL INNOCENT, BECAUSE HE DID NOT KNOW THE TRUE CONSEQUENCE OF A STIPULATED PLEA AGREEMENT (AKA) NOLO CONTENDERE.

II. THE DISTRICT COURT FAILED TO PROPERLY CANVASS PETITIONER/APPELLANT JONES (VIOLATION OF 6TH, 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION).

III. THE DISTRICT COURT FAIL TO APPOINT ATTORNEY FOR THE FIRST POST-CONVICTION PURSUANT TO NRS 177.345(1), NRS 34.820(1)(A) (VIOLATION OF THE 6TH, 14TH AMENDMENT TO UNITED STATES CONSTITUTION).

72. On November 6, 2008, the Nevada Supreme Court filed an Order Denying Petition, denying Jones relief on appeal (Ex. 152). The Notice in Lieu of Remittitur issued on December 2, 2008 (Ex. 153).

DISTRICT COURT PROCEEDINGS (cont'd)

73. On December 26, 2008, Jones, in proper person, filed a Motion for Correction of Sentence (Ex. 154). Jones argued that the District Court erred when it sentenced Jones to life without the possibility of parole at the second penalty hearing when the District Court did not possess a pre-sentence investigation report from the Department of Parole and Probation (Id.). The petition does not indicate who drafted it, but it was most likely prepared by J. Benjamin Odoms. The State filed it's Opposition to Defendant's Pro Per Motion for Correction of Sentence on January 9, 2009 (Ex. 155). The hearing was held on January 12, 2009, before the Honorable Stefany Miley (Ex. 1 at 27). Jones was not present for this hearing, nor was he represented by counsel. At the hearing, the District Court denied Jones' motion (Id.). The written Order Denying Defendant's Pro Per Motion for Correction of Sentence was filed on January 30, 2009 (Ex. 156).

THIRD STATE POST-CONVICTION

74. On December 8, 2008, Jones, in proper person, mailed his Petition for Writ of Habeas Corpus to the First Judicial District Court (Ex. 157). It is not clear who drafted this petition. The Petition was filed in the Eighth Judicial District Court on March 6, 2009. He raised the following

ground for relief:

I. MY 4TH, 5TH, 6TH, AND 14TH AMEND. RIGHTS TO THE U.S. CONST. BECAUSE MY CUSTODY IS NOT LAWFUL BY WARDEN IN THIS COURT'S JURISDICTION.

75. On July 14, 2009, the State filed its Motion to Dismiss (Ex. 159).

76. The hearing on Jones' Petition for Writ of Habeas Corpus was held on July 15, 2009, before the Honorable Stefany Miley (Ex. 1 at 28). Jones was not present for this hearing, nor was he represented by counsel. At the hearing, the District Court took the matter under advisement and advised that it would prepare a written decision (Id.).

77. On July 20, 2009, the District Court filed a Minute Order re Court's Decision (Ex. 1 at 28). The District Court denied the petition (Id.).

78. Jones, in proper person, filed Petitioner's Opposition to Respondents Motion to Dismiss and Return on July 30, 2009 (Ex. 160). It is not clear who drafted this opposition. He argued that the Judgment of Conviction furnished by the State was invalid due to it not being signed by the District Court judge (Id.).

79. On January 7, 2010, Jones, in proper person, filed a Motion of Inquiry (Ex. 161). The hearings on Jones' motion were held on February 1 and 18, 2010, before the Honorable Stefany Miley (Ex. 162 and 1). Jones was not present for either hearing, nor was he represented by counsel. On February 23, 2010, the District Court filed a written Decision (Ex. 163).

80. A timely pro per Notice of Appeal from the denial of the Petition for Writ of Habeas Corpus was filed on March 9, 2010 (Ex. 164). The Nevada Supreme Court docketed this appeal as case number 55603.

81. On March 26, 2010, the Nevada Supreme Court directed the District Court to enter a written order denying Jones' Petition for Writ of Habeas Corpus (Ex. 166).

82. On April 28, 2010, the District Court filed a Decision denying Jones' Petition for Writ of Habeas Corpus (Ex. 167). The Notice of Entry of Decision and Order was filed on May 10, 2010 (Ex. 168).

83. On September 29, 2010, the Nevada Supreme Court filed an Order of Affirmance, denying Jones relief on appeal (Ex. 174). Remittitur issued on October 27, 2010 (Ex. 175).

FOURTH STATE POST-CONVICTION

84. On August 10, 2010, Jones, in proper person, filed his Petition for Writ of Habeas Corpus (Post-Conviction) (Ex. 170) and Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) Motion for Evidentiary Hearing (Ex. 171) in the Eighth Judicial District Court. It is not clear who prepared this petition. He raised the following grounds for relief:

> I. JONES ALLEGES THAT COUNSEL WAS INEFFECTIVE IN NOT REQUESTING A JURY INSTRUCTION ON INTOXICATION NEGATING THE SPECIFIC INTENT TO KILL OR THE INTENT TO DO ACTS WHICH CONSTITUTES IMPLIED MALICE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.
>
> II. JONES WAS ALLOWED TO ENTER INTO A STIPULATED PUNISHMENT AGREEMENT BASED ON FAULTY LEGAL ADVICE DENYING HIM THE RIGHT TO DUE PROCESS OF THE LAWS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

85. On September 8, 2010, the State filed it's Motion to Dismiss (Ex. 172). On September 27, 2010, Jones, in proper person, filed his Opposition to Respondent's Motion to Dismiss Petitioners Writ of Habeas Corpus Post-Conviction (Ex. 173).

86. The hearing on the petition was held on December 15, 2010, before the Honorable Jack B. Ames (Ex. 177). Jones was not present for this hearing, nor was he represented by counsel. At the hearing, the District Court dismissed Jones' petition (Id.).

87. A timely pro per Notice of Appeal from the denial was filed on December 28, 2010 (Ex. 178). The Nevada Supreme Court docketed this appeal as case number 57463.

88. The Findings of Fact, Conclusions of Law and Order was filed on January 25, 2011 (Ex. 182). The Notice of Entry of Order was mailed to Jones on February 16, 2011 (Ex. 184).

89. On June 8, 2011, the Nevada Supreme Court filed an Order of Affirmance, denying Jones relief on appeal (Ex. 185). Remittitur issued on July 6, 2011 (Ex. 186).

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CURRENT FEDERAL PETITION

90. Jones mailed his Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody in the instant action on June 26, 2011 (CR 7). This document was prepared by law clerk Edward E. Seely, inmate #83449 (Id.).

91. On July 1, 2011, Jones requested to proceed in forma pauperis (CR 1), appointment of counsel (CR 1-3) and an evidentiary hearing (CR 1-4). On October 18, 2011, this Court denied his request to proceed in forma pauperis (CR 4), and Jones paid the fee (CR 5).

92. On November 23, 2011, this Court denied Jones' motions for appointment of counsel and an evidentiary hearing. In the order, this Court sua sponte raised the question of whether the petition was time-barred under 28 U.S.C. § 2244(d)(1). This Court ordered Jones to show cause within thirty (30) days as to why the petition should not be dismissed (CR 6).

93. On August 24, 2012, this Court filed an Order granting Jones' motion for appointment of counsel and appointed the Federal Public Defender for the District of Nevada to represent Jones (CR 20).

94. On June 20, 2013, Jones, through counsel, filed a response to the order to show cause (CR 33). 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 preventing him from filing a timely petition (Id.).

95. On January 5, 2015, this Court made "an initial finding that petitioner appears to be entitled to equitable tolling" on these grounds (CR 51 at 8). This Court ordered Jones to file an amended petition that "shall include all claims as well as all arguments, set forth in full and supported by exhibits, that demonstrate that petitioner is entitled to equitable tolling" (Id.).

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II.

GROUNDS FOR RELIEF

GROUND ONE

JONES WAS DEPRIVED OF HIS PROTECTION AGAINST SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE COURT FAILED TO INSTRUCT THE JURY THAT THEY COULD NOT DRAW AN ADVERSE INFERENCE FROM JONES' FAILURE TO TESTIFY

Statement of Exhaustion: This ground was presented to, and decided upon by, the Nevada Supreme Court on direct appeal (Exs. 40, 44).

A defendant is entitled to a cautionary instruction that no inference can be drawn from the defendant's failure to testify.

In an information, 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 (Ex. 4.)

At trial, Bobby Lee Robinson testified that, on September 29, 1978, around 4:30 a.m., Bobby Lee Robinson was in the Chy Inn Bar in Las Vegas (Ex. 20 at 182). At that time, he saw Jones talking to Rayfield Brown near the bar (Id. at 184-85). Jones and Brown were arguing, so Robinson went over to try to calm them down (Id. at 187-90, 195). Robinson told the bartender to give everyone a drink. Jones said he was drinking vodka, so Robinson bought him a half pint of vodka. Jones drank the entire bottle and handed the empty bottle to Robinson (Id. at 190-91, 217, 219). About three minutes later, Jones left the bar. He returned a short while later with a gun in his hand. He walked up to Brown and shot him. He then left the bar (Id. at 192-94).

Legion Morris testified that he was also in the bar at 4:30 a.m. He saw Jones and Brown having an argument that lasted about 30 minutes. Apparently, Jones had bumped into Brown's chair, which upset Brown (Ex. 20 at 223-26). At some point, Morris saw Jones chug an entire bottle of vodka. About fifteen minutes later, Jones shot Brown (Id. at 227-28, 243). Morris did not believe that Jones and Brown were drunk because they spoke in a normal manner (Id. at 231-32). However, it was later discovered that Brown's blood alcohol level was 0.211, well above the presumed intoxication level of 0.100 (Id. at 235; 267-68).

At around 6:00 or 6:30 a.m., Clarice Pope, Jones' aunt, spoke to Jones at her house. He told her that he shot someone with his uncle's gun (Ex. 21 at 321-22). Jones got rid of the gun (Id. at 322). Clarice believed that Jones was drunk when she spoke with him that morning (Id. at 326). After they spoke, Jones took a shower and then went outside and slept on the front lawn (Id.).

Archie Pope, Jones' uncle, testified that he and Jones drank together on the night of the shooting. They drank together up until about 12:30 a.m. They drank about eight or nine half-pint bottles of vodka plus some Canadian whiskey (Ex. 21 at 332-35). The next morning, when Jones arrived at Archie's house, Jones was intoxicated (Ex. at 333).

Althea Gamage, Jones' cousin, testified that, on the night of the shooting, she saw Jones and Archie at her boyfriend's house between 12:00 a.m. and 1:00 a.m. (Ex. 21 at 341). Althea looked in Archie's car and saw between ten and fifteen bottles of Canadian whiskey in the car. However, she did not see Jones drink anything in her boyfriend's house (Id. at 343-44). Althea had never seen Jones drunk (Id. at 344). Jones returned to Archie's house the following morning. She heard him say that he had shot someone in the head at the Chy Inn Bar. He asked Althea if she would wash his clothes for him (Id. at 338-40).

Ronnie Gamage, Jones's cousin, testified that at around 11:45 a.m. and then again at around 4:00 p.m. on September 29, 1978, Jones asked him if he had heard anything about what had happened (Ex. 21 at 347-48). Jones had told him that he had gotten into an argument with some guy and "wasted" him (Id. at 348). Ronnie took Jones to the bus station that night. Jones bought a ticket for Boston (Id. at 349). However, Jones was arrested in Colorado (Ex. 22 at 373-76).

At the close of the State's case, the court informed Jones that he would not receive a "special instruction" with respect to his failure to take the stand. It would only instruct the jury that Jones had a right not to testify (Ex. 22 at 378-79). Jones informed the court that he had decided not to testify (Id. at 379).

The defense recalled Archie to testify. Archie repeated that he and Jones were drinking together on the night of the shooting. Jones and Archie drank the same amount and Jones was pretty intoxicated and was staggering around (Ex. 22 at 382-83, 386). They drank about three half pints of whiskey and nine or ten bottles of vodka. (Id. at 384).

One of Archie's neighbors, Andrew Hamm, saw Jones going through his backyard on the morning of September 29, 1978, at about 6:00 a.m. Jones appeared to be drunk and about ready to fall down (Ex. 22 at 390, 392).

The court did not include an instruction that no adverse inference can be drawn from Jones' decision not to testify.

In closing argument, the prosecutor discussed intent. He argued that there was no direct evidence of intent:

> Another factor that you should consider in this case is circumstantial evidence of his state of mind. We have no direct evidence. That would be impossible in almost any case.
>
> I don't know what you are thinking. I have no direct evidence of what you're thinking. All I can consider is what you do as a reflection or circumstantial evidence of what you're thinking (Ex. 23 at 434).

Defense counsel conceded that Jones was the shooter (Ex. 23 at 446). However, he argued that Jones was guilty of a lesser crime and his state of mind was the central issue in the case (Id. at 447, 452). He spent a significant portion of his argument asserting that Jones was intoxicated and this had an impact upon his state of mind (Id. at 458-61, 464).

In rebuttal, the prosecution acknowledged that Jones' level of intoxication was "really the issue in this case." (Ex. 23 at 471).

Jones was deprived of his constitutional rights based on the court's failure to give a cautionary instruction that no adverse inference can be drawn from the defendant's failure to testify. As the Nevada Supreme Court concluded, such a constitutional violation occurred here (Ex. 44 at 3-4). However, contrary to the Nevada Supreme Court's decision, this error cannot be considered harmless. The factual question of intent was the central question in this case. This included whether Jones was intoxicated when the crime occurred. His level of intoxication clearly would have an impact on his state of mind at the time of the incident. There was strong evidence that he was intoxicated at the time of the shooting. He had drunk a significant amount of alcohol earlier in the night, he had chugged a half pint of vodka approximately 15 minutes before the shooting, and everyone who saw him about an hour and half after the shooting believed he was intoxicated.

However, the evidence on intoxication was not consistent. Morris, who was present at the time of the shooting, did not believe that Jones was drunk. Jones' cousin, who had seen him a couple of hours before the shooting, did not see him drink anything. It was also not clear if there was enough time for Jones to have felt the full effect of drinking the bottle of vodka. Therefore, there was a dispute as to how intoxicated Jones was at the time of the incident and whether his level of intoxication had an impact on his state of mind.

This is precisely why the jury would have placed a significant amount of weight on Jones's failure to testify. As the prosecution argued to the jury, it is difficult to get direct evidence of intent. However, Jones would have been able to provide that direct evidence had he taken the stand. The same is true about his level of intoxication. Jones was arguably the best source for the jury to hear what his actual level of intoxication was at the time of the crime. The jury clearly would have been aware of that. And the jury could have easily drawn an adverse inference here that the reason that Jones did not testify was because, had he taken the stand, he would have had to admit that his level of intoxication was insufficient to affect his state of mind. Indeed, it would seem that this is precisely the type of situation where a no adverse inference instruction is critically important – the main factual issue focuses on the defendant's own state of mind, which is something for which the defendant would, obviously, possess critical information. For these reasons, the error cannot be considered harmless. Any contrary decision by a state court would be contrary to, or an unreasonable application of, clearly established federal law, and/or would involve an unreasonable determination of the facts. See 28 U.S.C. § 2254(d)(1) and (2). The writ should be granted and the conviction and sentence should be vacated.

GROUND TWO

JONES WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN COUNSEL ADVISED HIM TO AGREE TO A STIPULATED SENTENCE OF LIFE WITHOUT PAROLE

Statement of Exhaustion: This ground was presented to, and decided upon by, the Nevada Supreme Court upon the appeal from the denial of his August 2010 state post-conviction petition

(Exs. 170, 185).

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) that 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.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Prior to Jones' trial, the State gave notice that it intended to seek the death penalty against Jones (Ex. 15). At the penalty hearing, the only aggravating circumstance was that Jones had prior convictions for violence (Ex. 29).

At the penalty phase hearing, Jones was represented by Robert Amundson and Robert Thompson of the Clark County Public Defender's Office. During the hearing, the State presented evidence that Jones had been convicted of assault in Mississippi in 1968 and sentenced to four years in the Mississippi State Penitentiary in Parchman, Mississippi, and Jones began serving the sentence in 1970 (Ex. 26 at 523-25).

Fred Thomas, Jr., testified that, on November 23, 1969, in Lynn, Massachusetts, Jones shot him in the ear. Thomas explained that he had arrived at a party. Jones was sitting on the porch. There was some kind of fight at the party that night. When Thomas got out of the car, Jones jumped down off the porch and put a gun to his head. Thomas saw that Jones was bleeding. Jones shot Thomas in the ear as he ran away from the scene (Ex. 26 at 527-32). Jones was charged with committing this crime (Id. at 536).

William Alphen testified that, on August 14, 1970, he was a sergeant with the East Lynn, Massachusetts patrol. On that night, Jones assaulted a police officer outside of a restaurant. Jones had tried to grab the revolver from the officer's holster. The officer restrained Jones, who then bit off the officer's left ear lobe. Jones was charged with committing this crime (Ex. 26 at 537-38).

Michael Anthony Colonna testified for the defense. He was an officer at the Clark County Detention Center. He acted primarily as a buffer between the guards and the inmates. He was also

in charge of the "paint team" in the jail. Jones was on this team. He had seen Jones almost every day for the prior five months. As a worker, Jones was outstanding. He was very loyal and conscientious. Jones kept the climate within the cell at a non-violent level as the tank representative. Other inmates viewed him as just person, which caused the other inmates to act more calm. He described Jones as a "good man." There had never been an inquiry with respect to any violent behavior by Jones in the jail (Ex. 26 at 547-54).

Roy Lee Westley also testified for the defense. He was employed as a corrections officer for the Las Vegas Metropolitan Police Department. He was a sergeant. He had known Jones for six to seven months. He saw him almost every day. Jones was on the paint detail. His opinion was that Jones was a very good worker. Jones had never given him, any other officer, or any other inmate any trouble (Ex. 26 at 556-57).

Alberta Jones testified for the defense. She was Jones' mother. She indicated that Jones had a low I.Q. Jones did not go far in school, around the fourth grade. However, he was only promoted due to his physical size, not his ability (Ex. 27 at 563-65). She explained that what he "would learn one day, he would forget it the next" (Id. at 564). He could not read and write (Id. at 565). Alberta had kidney issues and Jones was going to donate a kidney to her (Id. at 565-66). She said that, when Jones would drink excessively, he would not remember what happened (Id. at 569-71).

Alberta knew Freddie Thomas. He and Jones had a running feud. Thomas would call Jones a name, which would lead to them fighting (Ex. 27 at 567). On the night of the shooting, a gang of people had jumped Jones and began beating him on the head with chains and shoe heels before the shooting occurred (Id. at 568, 570).

Alberta explained that, with respect to the conviction in Mississippi, Jones committed the assault when he was attempting to escape from a car that police officers had set on fire (Ex. 27 at 578-79). Because Covington County in Mississippi was a dry, people would go over to Charles County to drink. Right over the bridge between the counties there was a bar. The police would sit on the other side of the bridge and wait for people to come back over into Convington. Jones and some friends went over to Charles County to drink. On their way back, some white police officers stopped them and told them that they were under arrest and would be taking them to the jail. But,

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 would not. One of the police officers said, "I'll get him out." The officer threw something on the car which set it on fire. Jones was trapped in the back seat. Jones broke through the plastic that separated the front from the back and climbed out the front. As this was happening, Jones received serious burns that required him to be hospitalized. After he escaped from the car, he knocked down the police officers in order to get away from them (Id. at 585-86). Alberta stated that the FBI investigated the incident (Id. at 586). Prior to this incident he had never been in trouble (Id. at 584, 587).

The jury sentenced Jones to death, finding that there was an aggravating circumstance, that circumstance justified the death penalty, and there were not mitigating circumstances sufficient to outweigh the aggravating circumstance (Ex. 27 at 642).

On October 17, 1985, the Nevada Supreme Court vacated the death sentence based on prosecutorial misconduct during the penalty phase as the prosecutor misstated the powers of the pardons board (Ex. 44 at 9-12). In concluding that the prosecutorial misconduct had an impact upon the jury's decision as to whether to impose the death sentence, the court stated that 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 dies almost 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.

(Id. at 11-12). Because the court vacated the defendant's sentence, it did not conduct a

proportionality review. It stated, "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 12).

Also in the opinion, the court upheld the trial court's admission into evidence of detailed testimony about Jones' prior convictions (Ex. 44 at 6-7). However, the court noted that such evidence could actually work to the defendant's advantage, such as what occurred in this case. It stated:

> Furthermore, we note that detailed information regarding prior convictions may work to the benefit of a defendant as well as to his detriment. For example, in this case, after the state introduced evidence of Jones' three prior convictions, one in Mississippi and the other two in Massachusetts, Jones' mother testified that the 1968 Mississippi conviction was the subject of a civil rights investigation. According to Mrs. Jones, her son was stopped by a group of white policemen as he crossed the Covington County line from Charles County. Covington County is a dry county; Jones apparently had gone to Charles County to visit a bar. The police forced Jones to drive his car to a nearby graveyard instead of taking him to jail. They then poured gasoline on the car while Jones was still inside and then ignited the gas, trapping Jones inside. Jones, fearful for his life and severely burned, forced his way out of the car, hit one of the officers and ran through the woods to his aunt's house. Jones was subsequently convicted for felonious assault of a police officer and sentenced to serve four years in the Mississippi State Penitentiary. This was the first time Jones was in "trouble" with the law.

(Id. at 7 n.2).

On remand, Deputy Public Defender Thompson returned to represent Jones. On February 2, 1987, the State filed notice of their intent to seek the death penalty (Ex. 48). The defense was prepared to present the same evidence at the second penalty hearing as they had presented at the first (Ex. 49 at 12). Although Jones' mother had died in late 1986 (Ex. 224), the defense sought to admit her testimony from the prior hearing (Ex. 226). Further, the defense intended to subpoena William Burris, who would testify that, with respect to the incident in which Jones bit an officer, Jones was not trying to get the officer's gun. Rather, Jones had been pushed into the officer by another police officer. The officer then grabbed Jones' arm in such a manner that Jones felt his arm might get broken, so he bit the officer's ear (Ex. 227).

/ / /

In a letter dated March 2, 1987, Thompson told Jones that the District Attorney's Office had offered a life without parole sentence (Ex. 171, Ex. A). He advised Jones to take the offer (Id. at 2). He stated that someone sentenced to life without parole on average served between 15 to 18 years in prison (Id.). The sentenced would mean that Jones would "most likely" be released at some point (Id.). Specifically, Thompson stated:

> 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.

(Id.)

On March 23, 1987, Jones agreed to be sentenced to life without the possibility of parole (Ex. 49 at 2). Defense counsel informed the court that Jones was agreeing to this sentence "to avoid the death penalty or any possibility of getting the death penalty" (Id. at 2-3). Jones stated that he understood and adopted that statement (Id. at 3, 10-11).

The court asked whether there was an agreement between the parties about the impact of the constitutional amendment that precluded the Pardons Board from commuting a sentence of life without parole to one that would allow parole (Ex. 49 at 5). While defense counsel believed that Jones would fall under the law as it existed in 1979, the prosecutor refused to agree to that position (Id. at 5-6). The court asked Jones whether he understood that there was a "discrepancy" here. Jones acknowledged that there was (Id. at 7). The court also informed Jones that the law changed in 1982 as a result of the constitutional amendment that prevented the parole board from granting parole for

someone whose sentence was commuted unless certain requirements are met (Id. at 7-8). Jones said that he understood (Id. at 8). The court asked him whether he understood that he was taking his chances that the Pardons board would follow the prior law; Jones said he understood and it was agreeable to him (Id. at 9).

Jones 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" (Ex. 49 at 14-15). He agreed with the court that his sentence could conceivably mean that he would spend the rest of his natural life in prison (Id. at 15-16).

Counsel was ineffective for advising Jones to agree to stipulate to a sentence of life without parole. As the Nevada Supreme Court made very clear in its opinion vacating Jones' death sentence, this was not a case in which the death penalty was appropriate. As that court stated, there was an absence of true aggravating circumstances. Further, the mitigating circumstances reduced the impact of Jones' prior convictions, the sole aggravating circumstance that had previously been found by the jury. Indeed, Jones was never in trouble with the law until white police officers attempted to set him on fire in a graveyard. And defense counsel was prepared to present additional mitigating evidence to lessen the impact of one of his other prior convictions. Counsel should not have been advising Jones to agree to be sentenced to the rest of his life in prison to take the death penalty off the table when it was clear that the death penalty was not an appropriate sentence in this case.

Just as important, it was clear that counsel induced Jones to accept the sentence under false pretenses. In his letter, he assured Jones that a sentence of life without parole actually meant that he would "most likely" be released from prison someday. Counsel told him that the average time that someone with a life without parole sentenced served was 15 to 18 years, but that he would "most likely" be released. It is simply incredible that he would tell this to Jones. He gave no indication to Jones that a life without parole sentence could truly mean that he would be spending the rest of his life in prison. Thus, it is not surprising that Jones told the court that he accepted the risks of taking the life without parole sentence. His counsel had told him that he had nothing to worry about. This was critically important here. As his mother testified to at the original penalty phase hearing, Jones has a low I.Q. And Jones was going through the emotional trauma of losing his mother close

in time to when the stipulated sentence was entered into. Although the court attempted to explain to him the law at the stipulated sentencing proceeding, Jones clearly was incapable of understanding the complexity of the change in law. Jones was relying on the statements from his attorney. And his attorney had said to him that he would "most likely" be getting out. That was clearly the reason why he changed his mind to agree to the stipulated sentence. Counsel's statements to the court that Jones was agreeing to the sentence to avoid the death penalty were not accurate.

Accordingly, counsel acted unreasonably in advising Jones to accept the stipulated sentence. This deficient performance prejudiced Jones. Any contrary decision by a state court would be contrary to, or an unreasonable application of, clearly established federal law, and/or would involve an unreasonable determination of the facts. See 28 U.S.C. § 2254(d)(1) and (2). The writ should be granted and the sentence should be vacated.

III.

JONES IS ENTITLED TO EQUITABLE TOLLING

A. LEGAL STANDARDS

This action was commenced below pursuant to 28 U.S.C. § 2254. Since it was filed after April 24, 1996, it is controlled by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Id. Specifically, sections 2244(d)(1) and (2) of the AEDPA provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;
> >
> > © the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

B. EQUITABLE TOLLING

Because Jones' conviction was final prior to the passage of the AEDPA, he had one-year from the date of passage of the statute, April 24, 1996, to timely file his federal habeas petition. See Calderon v. United States District Court for the Central District of California, 128 F.3d 1283, 1287 (9th Cir. 1997). Jones timely filed his federal petition on April 22, 1997[6]. Jones contends that his petition was equitably tolled from April 22, 1997 (the date he filed his first federal habeas petition), up to and including June 26, 2011 (the date he mailed the pro se original petition).

A petitioner is entitled to equitable tolling if extraordinary circumstances beyond his control make it impossible to file a petition on time. Holland v. Florida, 130 S.Ct. 2549 (2010); Lott v. Mueller, 304 F.3d 918, 924 (9th Cir. 2002) (citing Calderon v. United States District Court, 163 F.3d 530, 541 (9th Cir. 1998)). The failure of the timely filing of a federal habeas petition "may, in some circumstances, involve a confluence of numerous factors beyond a prisoner's control." Lott, 304 F.3d at 924 (citations omitted).

The equitable tolling inquiry also considers whether the petitioner made diligent efforts to pursue his rights in spite of the hurdles placed in his way. Holland, 130 S.Ct. at 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)); see also Roy v. Lampert, 465 F.3d 964, 969 (9th cir. 2006). "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." Id. at 2565 (internal citations and quotations omitted)."Moreover, the due diligence inquiry is an individualized one that must take into account the conditions of confinement and the reality of the prison system." Downs v. McNeil, 520 F.3d 1311, 1323 (9th Cir. 2008) (quoting Aron v. United States, 291 F.3d 708, 712 (11th Cir. 2002).

The Ninth Circuit has stated that whether equitable tolling is warranted is a "fact-specific inquiry." Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citing Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001)). In addressing an equitable tolling claim, the Supreme Court has "emphasized the need for 'flexibility' and for 'avoiding mechanical rules.'" Nedds v. Calderon, 678

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[6] As discussed in more detail infra, that petition was erroneously dismissed, which is one of the grounds justifying equitable tolling.

F.3d 777, 7480 (9th Cir. 2012) (quoting Holland, 130 S.Ct. at 2563, in turn quoting Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946)).

Jones can establish two grounds for equitable tolling. First, the district court erroneously dismissed his first timely filed petition. Second, Jones' cognitive limitations made it impossible for him to file a timely petition on his own. Further, Jones can show that, for an individual with his cognitive limitations, he exercised reasonable diligence during the relevant time period.

1. The District Court Erroneously Dismissed Jones' First Timely-Filed Federal Habeas Petition

The Ninth Circuit has found that equitable tolling is appropriate where a district court erroneously dismisses a timely filed mixed federal habeas petition. Smith v. Ratelle, 323 F.3d 813, 819 (9th Cir. 2003). In Smith, the district court summarily dismissed a petitioner's timely filed habeas petition without affording him the opportunity to amend his petition to delete the unexhausted claim. Smith, 323 F.3d at 815-16. The Ninth Circuit concluded that the dismissal was in error because the one-year statute of limitations expired while the federal petition was pending, preventing the petitioner from pursuing his timely filed exhausted claims. Id. at 817-18. The court noted:

> This unfortunate predicament was entirely avoidable. Because the statute of limitations may prevent a petitioner from submitting a new petition under Lundy, we have long held that district courts must allow petitioners to amend their mixed petitions and withdraw their unexhausted claims as an alternative to suffering dismissal. See Anthony [v. Cambra], 236 F.3d [568,] 572 [9th Cir.2000]. Moreover, in light of the severe consequences of a dismissal under AEDPA, the complexity of habeas law, and our preference for decisions on the merits, we have recognized that district courts must take special care to advise pro se habeas petitioners of their right to strike unexhausted claims.
>
> The district court erred by summarily dismissing Smith's second habeas petition and entering final judgment without first giving him an informed opportunity to withdraw his one unexhausted claim before dismissal. Although the court told Smith that he could withdraw his unexhausted claim through a new petition after dismissal and final judgment, this option was illusory: because the limitations period had already expired, any new petition would have been untimely.

Id.

The situation here is highly similar to the one in Smith. In fact, the situation here is *worse* than in Smith. The district court completely mishandled the original, timely-filed habeas petition, concluding that it solely contained unexhausted claims when it is abundantly clear from the face of

the petition that it contained an exhausted claim, making it a mixed petition. Just as in Smith, the district court should have offered Jones the opportunity to save the exhausted claims in his timely-filed petition from dismissal. The court's failure to do this extinguished Jones' ability to pursue his federal habeas petition in a timely fashion.

Because Jones' conviction became final prior to the passage of the AEDPA, Jones had one year from the date of passage of the AEDPA, April 24, 1996, to file a federal habeas petition. Calderon v. United States District Court for the Central District of California, 128 F.3d 1283, 1287 (9th Cir. 1997). Jones complied with the statute of limitations and filed a timely federal habeas petition on April 22, 1997.[7] His limitations period expired two days later.

In his first, timely-filed federal petition, Jones raised three grounds, including as Ground 3 a claim that his rights to "due process/remain silent" were violated when the trial court failed to give a cautionary instruction under Carter v. Kentucky, 450 U.S. 288 (1981), that no inference could be drawn from Jones' failure to testify (97-CR 1 at 7, Ex. 58 at 7). He indicated that this claim was raised on direct appeal to the Nevada Supreme Court (Id. at 8). His opening brief on direct appeal confirms that the Carter claim was raised as Issue Two (Ex. 40 at 1 and 6). The Nevada Supreme Court's decision affirming the conviction has a lengthy discussion of the Carter issue (Ex. 44 at 3-5).

On May 14, 1997, Jones filed an amended petition that did not include the Carter claim (97-CR 3, Ex. 60). However, on July 17, 1997, Jones moved to withdraw the amended petition (97-CR 7, Ex. 63), and, on November 6, 1997, the district court granted the request (97-CR 9, Ex. 65). The court ordered the State to respond to the original petition (97-CR 11, Ex. 67). However, on December 8, 1997, the State moved to summarily dismiss the amended petition, arguing that the claim raised was not exhausted (97-CR 12, Ex. 68). On April 27, 1998, Jones responded that the State's response was moot because the amended petition had been withdrawn (97-CR 20, Ex. 69).

On July 30, 1998, the district court agreed with Jones and filed an order telling the State to respond to Jones' petition (97-CR 24, Ex. 70). On September 2, 1998, the State informed the court

[7] As discussed in more detail in Part III.B.2 *infra*, Jones did not draft the federal petition or any of the documents filed in the case.

that it had never been served with the original petition (97-CR 25, Ex. 71). On September 24, 1998, the court issued a new order directing the State to respond but erroneously indicating that the State should respond to 97-CR 3 (Ex. 60), the amended petition (97-CR 26, Ex. 72). Less than a week later, on September 30, 1998, the State moved to dismiss the amended petition, arguing, once again, that the single claim in the amended petition was unexhausted (97-CR 27, Ex. 73). The motion did not address the three claims raised in the initial petition (Id.). On October 15, 1998, Jones opposed the motion, arguing that the State responded to the wrong petition (97-CR 28B, Ex. 75). He stated that the original petition had three claims, including the Carter claim (Id.).

On December 7, 1998, a magistrate judge issued a Report and Recommendation recommending that the State's motion to dismiss be granted and the original petition be dismissed because Jones "failed to exhaust available state remedies" (97-CR 36, Ex. 83). It described the petition as "premature" (Id.). The report did not offer Jones the opportunity to delete unexhausted claims and just proceed on any exhausted claims.

On December 15, 1998, Jones objected to the report, arguing that he "should have been given an opportunity to withdraw the unexhausted claim pursuant to Rose v. Lundy, prior to dismissal" (97-CR 37, Ex. 84). He added that the State has not raised an exhaustion defense as to the three claims raised in the original petition (Id.). He also filed a "notice" to the court, arguing that the State never responded to the original petition (97-CR 38, Ex. 85). He attached the original petition to the notice (Id.).

On December 18, 1998, the district court adopted the Report and Recommendation (97-CR 39, Ex. 86). The court concluded that, regardless of the State's arguments, the report itself referred to the original petition (Id.). It indicated that "Petitioner does not present any evidence that he exhausted his available state remedies under either petition" (Id.). The court gave Jones no opportunity to withdraw his unexhausted claims and just pursue his exhausted claim.

The district court's erroneous dismissal of the petition as fully unexhausted represents a ground for equitable tolling. The court's conclusion that Jones had not provided any evidence of exhaustion was clearly wrong. On the face of the petition itself, Jones showed that the Carter claim was exhausted. He stated that it had been raised on direct appeal. The opening brief on direct appeal

confirms this and the Nevada Supreme Court engaged in a lengthy discussion of this issue. Thus, the district court was flatly wrong in concluding otherwise. Indeed, as Jones argued to the district court, the State *never* argued that this Carter claim was unexhausted. The State only argued that the claim in the amended petition was unexhausted. But, of course, that document had been withdrawn.

In this regard, the erroneous decision was simply the culmination of the repeated mishandling of the timely filed petition. The district court mistakenly asked the State to respond to the amended petition, even though it had been withdrawn. The State informed the district court that it had never been served with the original petition and the district court took no steps to ensure that the State was in possession of the correct petition. Jones repeatedly told the court that the State was addressing only the single claim in the amended petition and not the three claims in the original petition. Further, Jones specifically asked that he be allowed to proceed on just the exhausted claim. However, the court dismissed his complaints. And, just as in Smith, the court never offered Jones the opportunity to amend his petition to remove the unexhausted claims.

The deleterious impact of the district court's erroneous decision is the same as it was in Smith. By the time the district court had issued its mistaken opinion, Jones' one-year time period had expired, extinguishing his ability to pursue, at the very least, the exhausted claim in the timely-filed petition.[8] As in Smith, this unfortunate predicament was entirely avoidable had the district court carefully and properly handled the original petition. The district court's erroneous decision adopting the Report and Recommendation, particularly in the face of meritorious objections from Jones, represents an extraordinary circumstance beyond Jones' control that justifies equitable tolling.

2. Jones Is Entitled to Equitable Tolling Because His Mental Impairments Were an Extraordinary Circumstance Beyond His Control.

When a petitioner asserts equitable tolling based upon a mental impairment, the Ninth Circuit recently developed a two-part test which must be met:

> (1) *First*, a petitioner must show his mental impairment was an "extraordinary circumstance" beyond his control, see Holland, 130 S. Ct. at 2562, by demonstrating

[8] Just as in Smith, Jones also had the ability to seek a stay to pursue the unexhausted claims in state court. See Smith, 323 F.3d at 818-19.

> the impairment was so severe that either
>
> > (a) petitioner was unable rationally or factually to personally understand the need to timely file, or
> >
> > (b) petitioner's mental state rendered him unable personally to prepare a habeas petition and effectuate its filing.
>
> (2) *Second*, the petitioner must show diligence in pursuing the claims to the extent he could understand them, but that the mental impairment made it impossible to meet the filing deadline under the totality of the circumstances, including reasonably available access to assistance. See id.
>
> To reiterate: the "extraordinary circumstance" of mental impairment can cause an untimely habeas petition at different stages in the process of filing by preventing petitioner from understanding the need to file, effectuating a filing on his own, or finding and utilizing assistance to file. The "totality of the circumstances" inquiry in the second prong considers whether the petitioner's impairment was a but-for cause of any delay. Thus, a petitioner's mental impairment might justify equitable tolling if it interferes with the ability to understand the need for assistance, the ability to secure it, or the ability to cooperate with or monitor assistance the petitioner does secure. The petitioner therefore always remains accountable for diligence in pursuing his or her rights.
>
> . . . .
>
> In practice, then, to evaluate whether a petitioner is entitled to equitable tolling, the district court must: (1) find the petitioner has made a non-frivolous showing that he had a severe mental impairment during the filing period that would entitle him to an evidentiary hearing; (2) determine, after considering the record, whether the petitioner satisfied his burden that he was in fact mentally impaired; (3) determine whether the petitioner's mental impairment made it impossible to timely file on his own; and (4) consider whether the circumstances demonstrate the petitioner was otherwise diligent in attempting to comply with the filing requirements.

Bills v. Clark, 628 F.3d 1092, 1099-1100 (9th Cir. 2010) (emphasis in original). In Bills, the petitioner alleged that he was entitled to equitable tolling based upon his "inability to read and write, his neurological deficits, borderline to mildly retarded level of intelligence, concurrent psychosis and lack of assistance available to him." Id. at 1094. The Ninth Circuit reversed the district court's denial of equitable tolling and remanded the case for consideration of the tolling claim under the proper legal standard. Id. at 1101.

In this case, Jones' significant cognitive limitations did, in fact, affect his ability to file a timely federal habeas petition on his own. The expert report establishes that Jones suffers with mental retardation. Jones cannot read or write. His test results also indicate a probable learning disability. Further, he has only had limited education, and this education has not been able to

increase his ability to comprehend legal issues. In fact, his cognitive skills as a 66-year-old man remain the same as they were when he was a young child. These factors have prevented him from drafting and filing his own federal petition as well as understanding relevant federal law, including the need to meet the one-year time line. Due to his limitations, he has been completely dependent on other inmates for assistance with all of his legal pleadings. These inmates have always guided the course of his post-conviction legal litigation. And these inmates confirm that Jones was simply incapable of doing this himself or even monitoring the assistance that they provided. The evidence further shows that Jones exercised whatever diligence a person with cognitive limitations such as his can use to try to assert his legal rights.

a. Expert's Conclusions That Jones Has Mental Retardation Rendering Him Unable to File a Habeas Petition on His Own

An expert has concluded that, for almost all relevant cognitive functions, Jones suffers with mental retardation. She has opined that Jones' cognitive limitations, which also include illiteracy, limited education, and most likely a learning disability, rendered him unable to file a habeas petition on his own (Ex. 211 at 3-4).

On April 19, 2013, and May 5, 2013, Dr. Susan Kotler conducted a neuropsychological evaluation of Jones (Ex. 211 at 1). She concluded that Jones' full scale IQ score was 65, which placed him in the mild Mental Retardation ("MR") range (Id.). 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*" (Id., emphasis added).

Jones is now 66 years old; however, Dr. Kotler found that his ability to read individual words was in the mild MR range equivalent to a 2.6 grade level; his spelling ability was in the borderline MR range, equivalent to a 2.8 grade level; and his comprehension of written material was in the mild MR range, equivalent to a 1.9 grade level (Ex. 211 at 1 and 15). On a test to measure his ability to define words of increasing complexity and abstraction, he was in the borderline MR range (Id. at 15).

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 (Ex. 211 at 1 and 15). He had

moderate impairment of his auditory attention and working memory, his mental processing speed, and his verbal abstract reasoning (Id.). He scored below average on a test of concept formation where he was unable to use feedback about his performance to formulate an appropriate strategy (Id.). His "immediate free recall of orally-presented stories," a test that Dr. Kotler referred to as "Logical Memory," was in the borderline MR range (Id. at 15). His free recall of the stories after a 30-minute delay was in the mild MR range (Id.). His performance on tests relating to the recall of individual words was consistent with a conclusion that he had "difficulty organizing verbal information" (Id.). She noted that "on the learning and free recall trials, he made a very high number of repetitions and intrusions, and on the recognition trial, he made a high number of false positive errors, consistent with problems discriminating accurate from inaccurate information" (Id.). Jones scored in the borderline MR range in the delayed memory index subtest and scored in the mild MR range for the auditory memory index (Id.).

Jones scored in the MR range for several tests concerning language; attention/concentration/mental sequencing; and reasoning/concept formation (Ex. 211 at 15-17). He scored in the mild MR range on a test that measures comprehension of orally-presented statements, such as conversations and stories (Id. at 16). In fact, his score was so low that it was "approximately equivalent to the average score for a *kindergarten student*" (Id.; emphasis added). He also scored in the mild MR range on a test measuring his working memory (Id.). He scored in the borderline MR range on the following tests: (i) phonemic/letter verbal fluency; (ii) a test of ability to follow commands of varying complexity and number of steps, and to understand logical statements presented in a yes-no format; (iii) auditory comprehension; (iv) several different memory tests; (v) a test to rapidly match symbols to their corresponding numerals; (vi) a test to rapidly identify symbols that match examples; (vii) a test of ability to rapidly connect numbered and lettered circles in alternating alphabetical and numerical sequence; (viii) social reasoning and knowledge; (ix) abstract verbal reasoning; and (x) non-constructional spatial reasoning (Id. at 16).

Dr. Kotler opined that Jones' test results provided evidence of a learning disability in addition to his mental retardation. She stated that the difficulty that Jones exhibited in his ability to process auditory information and the severe deficits in language-based abilities in her evaluation were "not

inconsistent with his low intelligence" (Ex. 211 at 2). She noted that, while Jones did have average performance on some visual-based tests, those results were also not inconsistent with the "normal variation in abilities for individuals who are mildly mentally retarded" (Id.). Moreover, this large disparity between visual and verbal abilities "*may also indicate a learning disorder involving processing of verbal information, superimposed on mild MR*" (Id., emphasis added).

Apart from the evidence of mental retardation and learning disability, Dr. Kotler noted that Jones had limited exposure to educational experiences since his childhood (Id.). While this could have an impact on his inability to read and write, Dr. Kotler explained that, even as a child, Jones was described as "'unusually slow'" and was unable to learn basic academic skills (Id.). As an adult, he was unable to benefit significantly from educational classes (Id.). According to Dr. Kotler, "[t]his evidence is more consistent with a learning disorder and/or mild MR than limited educational experiences" (Id.).

Dr. Kotler provided a description of Jones current functioning (Ex. 211 at 12-19). In her interviews with Jones, he acknowledged that he is usually not able to keep track of dates and he requires reminders about his appointments (Ex. 211 at 12). He easily loses track of his thoughts (Id.). His memory is not "'real good'" and he sometimes misplaces things (Id.). While he got along with other inmates, he viewed himself as a loner and did not share his feelings with them (Id.). He told Dr. Kotler that he spends his time going to school and is "trying really hard to learn how to read, but he has had difficulty because he reverses his letters and he cannot seem to remember how to read words he has already learned (Ex. 211 at 12-13). In fact, Dr. Kotler herself observed this. She indicated that, when Jones was reading, he would "'sound out'" individual parts of a word and then put these parts together to say the whole word (Id.). However, when he encountered the same word later in a different context, he "would still have to go through this process, as if he had been unable to retain knowledge about the word he had previously read" (Id.).

Dr. Kotler indicated that Jones did not understand his current legal challenges (Ex. 211 at 2). In her interviews, Jones had difficulty providing a clear account of his current legal case, even when she gave him prompts (Ex. 211 at 3 and 13). When she asked him to describe his current legal issues at the first interview, he explained that someone in the law library referred him to an inmate named

Ed Seely who got his case back into court. When asked how he received "John" as his attorney, he could only say that he was "with the Feds" (Id. at 13). When asked what relief he was seeking in the current challenge, he went on a "rambling account" about problems with the evidence in his case (Id.). When Dr. Kotler asked him at the second interview to describe his legal case, he spoke about mistaken identification evidence and stated that he was "in a Pandora's box," although he could not explain what he meant by this (Id.). He was unable to explain how his attorney was attempting to accomplish his stated goal of "get[ting] out of here" (Id.).

In her neuropsychological evaluation, Dr. Kotler indicated that, during her interviews, "it was necessary to simplify terminology and limit the length of sentences in order for Mr. Jones to fully comprehend the question" (Ex. 211 at 14). Jones' overall manner of verbal expression indicated "simple, unsophisticated thought processes" (Id.). "In open-ended conversation, and sometimes when answering specific questions, his responses could be quite rambling, and circumstantial or tangential at times. It was difficult to understand what he was talking about on several occasions" (Id.). His "processing speed" was also slower than normal for his age (Id.). Jones was aware of his intellectual limitations and his difficulty with reading and spelling, "but he had limited insight into how these limitations might affect his functioning" (Id.).

Dr. Kotler indicated that Jones' history and the information she learned from him were consistent with a diagnosis of mild mental retardation (Ex. 211 at 2). In the historical information section of her report, Dr. Kotler indicated that Jones was born and raised in a small, rural town in Mississippi (Id. at 7). When he was a child, his mother moved to Massachusetts after his father was murdered (Id.). Jones stayed in Mississippi and was raised by his grandparents, who put him to work in the fields as a young child (Id.). As a result, he went to school infrequently, which his school records confirmed (Id.; Ex. 217). Although he performed poorly academically, he was passed through to the next grade "'to keep up with the other kids [his] age'" (Ex. 211 at 7).

His school records from Collins Elementary school, an all Black school, from 1958 to 1963, show poor grades (D's and F's or incompletes) and irregular attendance (Ex. 211 at 7-8; Ex. 217). He failed the third grade, and when he was promoted to the fourth grade, he had to repeat that grade as well (Ex. 211 at 8; Ex. 217). The records show a high number of absences and comments in the

record expressing concern about his irregular attendance (Ex. 217). He only attended the 7th grade for nine days before dropping out (Ex. 211 at 8; Ex. 217). His achievement tests from 1959, when he was in the fourth grade, indicated scores at or below the third grade level (Ex. 211 at 8; Ex. 217). His scores actually went down the following year in many categories (Id.). On March 18, 1959, his fourth-grade teacher indicated that, "This child needs to be taught only on the first grade level. He was sent to the 4th grade because of his age" (Id.). A fourth grade note from 1960 stated, "Progress unusually slow" (Id.).

As Dr. Kotler noted, these records and, in particular the statements from the teachers are consistent with the testimony of Jones' mother, Alberta Jones, during the penalty phase of his trial in 1980 (Ex. 211 at 8). She testified that "he's got a low IQ" (Ex. 27 at 564). She said that he could not read or write (Id. at 565). She said that he went to school, but he had a "mental problem" (Id. at 564). He was only passing because of his age (Id.). He was put in the fourth grade, "but you know he really shouldn't have been there; because what [Jones] would learn one day, he would forget the next" (Id.).

Dr. Kotler indicated that, with respect to more recent assessments of Jones' academic abilities, a letter from Deborah Robison, dated October 9, 2008, indicated that when Jones entered her reading class in November 2007, he was reading at the first grade level (Ex. 211 at 8; Ex. 204). After a year of instruction, he was at the 2nd to 3rd grade reading level (Id.). Robison informed Michele Blackwill, a defense investigator, that she recalled that Jones made little progress in her reading class (Ex. 211 at 8; Ex. 216, ¶ 15). He had difficulty retaining the sounds of words; could not "'decode'" words on a page; and was unable to put syllables together to form words (Ex. 211 at 8; Ex. 216, ¶ 17). He wrote at a 2nd or 3rd grade level and his letter formation was immature (Ex. 211 at 8; Ex. 216, ¶ 18).

Based on her examination, interview, testing, and review of documents, Dr. Kotler was of the opinion that Jones did not have the cognitive capability to personally complete the complicated tasks necessary to prepare and file a federal petition for a writ of habeas corpus without assistance. Jones' IQ of 65, within the mild MR range, and the numerous test scores in either the mild or borderline MR range demonstrated the profound cognitive limitations with which he suffers. 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). Indeed, he scored extremely low on tests that focused on the skills necessary to draft a habeas petition on his own and file it in a timely fashion: reading, writing, expressive vocabulary, memory, mental sequencing, comprehension of oral stories, abstract verbal reasoning, and logical thinking (Ex. 211 at 15-17). His results showed a problem discerning accurate from inaccurate information (Id. at 15). And these issues appeared very early in his life, when he was still in elementary school, where his teacher indicated that, even though he was in the fourth grade, he had to be taught at a first grade level (Id. at 8). However, while he was aware of these limitations, he had limited insight into how they affected his functioning (Id. at 2).

These factors prevented Jones from being able to prepare and file the petition on his own. Dr. Kotler explained:

> Mr. Jones may understand the need to complete various legal activities according to a specific sequence of steps and a time schedule, but he would not be able to complete such tasks or meet required deadlines on his own. He reported that he needs reminders to keep track of his appointments, medications, and so forth, and testing revealed slowed information processing speed, difficulty with mental sequencing, and problems organizing information, all of which would interfere with his ability to complete tasks in an organized or timely manner. While he is able to complete simple, routine, well-learned tasks independently, he would not be able to complete more complex activities such as preparing and filing petitions on his own. In addition, there is evidence of deficits in learning ability and in literacy skills since early childhood. Since mental retardation and learning disorders are lifelong conditions that do not improve significantly with maturation or additional training, it is very unlikely that Mr. Jones would have ever been able to complete the tasks necessary to prepare and file any legal paperwork on his own.

(Ex. 211 at 3).

Dr. Kotler stated that Jones' cognitive limitations would have an impact on his ability to effectively communicate with other people concerning what assistance he would need from them (Ex. 211 at 3). She explained:

> Mr. Jones was clearly able to express his desire to "get out" of prison, and he offered several possible means for accomplishing this, such as a pardon or a reduced charge. However, while he may be able to communicate to others that he needs assistance, he may have significant difficulty being specific about the type of assistance he would need. In addition, he would have significant difficulty evaluating the relative merits of the various options for assistance. He may be able to understand this information if it were explained to him in very simple terms and repeated to him several times.

(Id.).

Dr. Kotler also believed that his mental impairments would limit his ability to monitor the assistance that he received from other inmates (Ex. 211 at 3-4). Once again, he had extremely low test results on skills necessary to accomplish this task, such as reading and auditory comprehension, as well as mental sequencing and logical thinking (Id. at 15-17). She explained:

> [F]rom an intellectual and cognitive standpoint, he would have significant difficulty monitoring the assistance he is receiving. During my evaluation, Mr. Jones stated that he did not know what actions his attorney was pursuing in his case, nor did he know what progress had been made in his case. The test results indicated that even if this information had been provided to Mr. Jones, he may not have understood it or he may not remember it accurately. Misunderstanding or misremembering would be more likely to occur if the information was presented in a written format or if it was not presented in a simplified manner and repeated several times to ensure his comprehension.

(Id. at 4).

It was clear to Dr. Kotler that Jones did not have an understanding of his current federal habeas litigation. She explained:

> Mr. Jones was unable to provide a detailed or clear description of his current legal situation, even when I gave him some prompts. He was unable to tell me if he was attempting to obtain a pardon, a reduced sentence to life with possibility of parole, or a reduced charge to "manslaughter." He was unable to tell me how his attorney is helping him (i.e., what actions his attorney had taken) or what progress had been made in his case.

(Id. at 2-3).

Dr. Kotler also opined that the cognitive limitations would prevent Jones from being able to teach himself about legal matters or understand when someone explained them to him. She explained:

/ / /

> Even if Mr. Jones were to take the initiative to educate himself about legal matters, he would not be able to understand legal material in writing. He would have significant difficulty understanding most legal material even if it were explained to him in simple, "lay" terms, although he may be able to gain an understanding of some basic concepts if they were greatly simplified and repeated.
>
> * * * *
>
> Mr. Jones' scores on auditory comprehension tests were below average, and he required simplification of questions during the interview and testing. He could follow simple, multi-step commands but he became easily confused by more complex commands and other verbal information containing multiple clauses, relational prepositions, and other complex constructions. However, his receptive vocabulary is fairly good, and he may be able to gain an understanding of his own legal case if this information were presented to him in very simple, concrete terms, and if this information were repeated to him. He should be encouraged to ask questions and not just say "yes sir" if he does not understand the information presented to him. In addition, to ensure that he has understood the information, he should be asked to repeat back what he has been told, and if his understanding is inaccurate or incomplete, the material should be repeated. A large number of studies that have shown that mentally-retarded individuals do not comprehend the information presented in Miranda waiver; they are susceptible to making false confessions due to being suggestible and misunderstanding of the information presented to them; and they may not comprehend information presented during sentencing and appeals. Mentally retarded individuals may be especially deferential to authority, which may result in their agreeing to something they do not understand. Mr. Jones' comprehension of information cannot be ascertained by simply asking him "Do you understand?"

(Id. at 3-5).

Thus, it is clear from Dr. Kotler's report that Jones has met the first prong of the Bills standard. Jones' cognitive limitations rendered him unable personally to prepare a habeas petition and effectuate its filing.

b. People Who Know And/or Have Worked with Jones Confirm That He Does Not Have the Cognitive Capability to File a Petition on His Own

Beyond Dr. Kotler's expert opinion, there is a well-spring of evidence to support her conclusions that Jones' cognitive limitations would prevent him from being able to file a habeas petition on his own in a timely fashion. For people who have worked with Jones and know him, it becomes quickly apparent that he does not have the ability to pursue his legal case on his own.

(i) Investigator Interview with Jones and Statements from his Wife

This Office's investigator, Michele Blackwill, met with Jones on April 12, 2013, to speak with him about his background and his legal case (Ex. 216, ¶ 2). With respect to his education, Jones confirmed much of the information contained in his school records and repeated the information he told Dr. Kotler: He rarely attended school as a child and, instead, was made to work in the fields (Id., ¶ 3; see also Ex. 214, ¶ 2). He has always had a desire to learn, but his "learning disabilities" have stood in his way (Id.). He acknowledged that he had "disabilities" regarding his reading and writing skills (Id., ¶ 4). Jones relied upon other inmates to read and write his kites and letters (Id., ¶ 5). His wife, Inetta Jones, stated that Jones is illiterate and is embarrassed about his inability to read and write (Id., ¶ 3; see also Ex. 216, ¶ 19). He would actually pretend to read in front of others (Id.). However, he eventually grew to trust some inmates and they would read her letters to him (Id.)

Jones repeatedly told Blackwill that he does not understand his legal proceedings (Ex. 216, ¶ 4). Blackwill asked him if he understood his federal petition, the statute of limitations, and the difference between state and federal court, but Jones did not understand any of these terms and concepts (Id., ¶ 12). He did not know any of his current legal claims and clearly did not understood the conversation (Id.). While he knew that there were "procedural bars," he clearly did not comprehend what they were (Id., ¶ 10).

Jones indicated that he has needed to rely on other inmate "law clerks" to pursue his legal case (Ex. 216, ¶ 4). He never knew what advice to ask from the law clerks (Id.). He would get connected to law clerks through word of mouth; however, when he did approach someone, he would not know what to say to them about his case (Id., ¶ 5). The law clerks made all of the decisions in his cases (Id., ¶ 4). The law clerks told him what they were doing, but he never understood any of the legal language (Id.). He never understood where his case was procedurally (Id.). He recognized some common legal terms that he heard over the years, but he did not know the meaning or how they impacted his case (Id.). Over the years, other inmates tried to teach him to recognize sounds and vowels (Id., ¶ 7). He also took many classes and programs to try and learn how to read and write, but he simply did not understand what was being taught and he could not retain any information (Id.,

¶ 8). Overall, Jones "cannot aid in his defense. He has no knowledge of his case and does not understand legal procedure" (Id., ¶ 11). He had to trust that the law clerks were acting in his best interest, but knew that some of them were only interested in getting paid (Id., ¶¶ 5, 7).

(ii) Inmates Whom Have Worked With Jones

The inmates whom have worked with Jones during his time in Department of Corrections custody all indicated that Jones could not understand anything about his legal case. Investigators in this office have spoken with numerous inmates who have worked with Jones over the years. Declarations have been submitted from the following inmates:

1.	Cecil Williams	Long-time friend who writes letters for Jones and reads letters to him (Ex. 209, ¶¶ 2-3)
2.	Samuel Blake	Long-time friend who has tried to teach Jones how to read (Ex. 208, ¶¶ 2-3)
3.	William McKinney	Prepared and filed the 1988 state petition (Ex. 212, ¶ 5; Ex. 52)
4.	Michael Zellis	Prepared and filed the amended petition in the federal habeas litigation that began in 1997 (Ex. 215, ¶ 7; 97-CR 3, Ex. 60)
5.	J. Benjamin Odoms	Worked on Jones' second state petition in 2000 and prepared and filed the 2008 actual innocence petition (Ex. 210, ¶ 5; Ex. 96; Ex. 147)
6.	Eric Douglas	Prepared and filed Jones 2008 motion to correct illegal sentence (Ex. 213, ¶ 3; Ex. 133)
7.	Edward Seely	Prepared and filed the instant federal petition (Ex. 207, ¶ 3; CR 7)

These inmates, most of whom have known Jones for a significant period of time, were able to observed that Jones was illiterate (Ex. 209, ¶ 3; Ex. 208, ¶ 3; Ex. 212, ¶ 4; Ex. 213, ¶¶ 5, 8; Ex. 210, ¶ 4; Ex. 207, ¶ 5; Ex. 215, ¶¶ 3, 4; see also Ex. 214, ¶ 8). Blake, who has known Jones for 35 years, stated, "He can barely read and write. He needs pictures to understand many words" (Ex. 208, ¶ 3). Odoms, who has known Jones for over 30 years, stated, "The only way he recognized any words was by hearing them used over and over, but he did not understand their meaning and concept" (Ex. 210, ¶ 4). Jones has always relied upon other inmates to read and write his letters and correspondence because he cannot do this on his own (Ex. 209, ¶¶ 3, 4; Ex. 210, ¶ 4). His teacher

in 2007 and 2008, Deborah Robison, indicated that, in her class, Jones "had to learn to draw letters, very basic like a toddler. It was very difficult for him" (Ex. 216, ¶ 18).

These inmates were able to see that Jones does not understand the legal process (Ex. 208, ¶ 3; Ex. 212, ¶ 4; Ex. 210, ¶ 4; Ex. 215, ¶ 3; see also Ex. 214, ¶ 16). McKinney stated that Jones "had no idea how to help himself with his own legal work" (Ex. 212, ¶ 4). Odoms stated, "He does not understand legal terms at all" (Ex. 210, ¶ 4). Seely, who has worked with Jones most recently, indicated that Jones' "mental capacity is too low to understand any of the legal proceedings and he never understood the work being done on his case" (Ex. 207, ¶ 4). Zellis stated, "I learned he had no concept of the legal process and he could not comprehend what the words said" (Ex. 215, ¶ 3).

Jones also has been unable to learn the legal process. Blake stated, "I continue to try to teach him legal language. I have used the Webster and Black Legal Dictionary to try to educate him, but Mr. Jones cannot grasp it" (Ex. 208, ¶ 3). Seely added, "I tried to teach Mr. Jones legal concepts and definitions of relevant legal terms. Mr. Jones inability to read and write cause him not to understand concepts. I believe, at times, he understood minimal legal issues, but he was unable to retain information" (Ex. 207, ¶ 5).

These inmates stated that, as a result, Jones has always needed other inmates to prepare his legal documents for him (Ex. 213, ¶ 9; Ex. 215, ¶ 12). Each of the relevant documents in his post-conviction litigation were indeed prepared by other inmates (see, e.g., Ex. 52; 97-CR 1 (Ex. 58); 97-CR 3 (Ex. 60); Ex. 92; Ex. 96; Ex. 132; Ex. 147; Ex. 133; CR 7). The inmates who assisted him made the decisions for him on how to proceed with the case (Ex. 210, ¶ 5; Ex. 207, ¶ 6; Ex. 215, ¶ 7; see also Ex. 213, ¶ 4).

However, Jones did not understand the legal documents that were filed on his behalf (Ex. 209, ¶ 3). Douglas stated, "He could not comprehend words and meanings. I constantly had to repeat what I was doing over and over. I had to 'dumb it down' to try to get Mr. Jones to understand legal terms" (Ex. 213, ¶ 5). Douglas added, "Mr. Jones did not understand the legal process at all. He had no idea what claims were. He would nod his head yes, but I knew he didn't know what I was talking about. I spent a lot of time trying to explain the process to him" (Ex. 213, ¶ 6). Similarly, Odoms stated, "I would repeatedly read to him the legal work I had prepared. He still did not have

a true understanding of what he was signing even though I attempted to explain the documents" (Ex. 210, ¶ 4). Zellis added, "I continuously went over the paperwork with Mr. Jones. I would discuss what was being filed and I tried to get him to engage and give me his opinion and ideas. This is how I know he just didn't understand" (Ex. 215, ¶ 9). Jones' wife, Inetta, reported similar information. She said that she "would read the documents to Robert, and he would admit that he never understood the documents at all. Robert is 'child-like" when it comes to understanding concepts" (Ex. 214, ¶ 9). Robison, also believed "that on paper, [Jones] was helpless. [T]here was no way that Mr. Jones could comprehend legal terms and the language associated with his legal filings. He clearly did not know what he was signing" (Ex. 216, ¶ 20).

Jones has had to take the law clerks' word for it when he was signing the filings (Ex. 209, ¶ 3; Ex. 213, ¶ 10; Ex. 215, ¶ 12). Jones' wife, Inetta, stated, "Robert never understood what was being filed, and he had no choice but to believe what all these other inmates were telling him to do. He depended on them because of his learning disabilities" (Ex. 214, ¶ 12).

(iii) Attorney Who Worked With Jones on a Civil Case

Inetta indicated that she hired attorneys that were "supposed to help Jones receive consideration from the pardons board and file documents on his behalf in federal court" (Ex. 214, ¶ 15). These attorneys eventually filed a civil rights lawsuit against the Department of Corrections, Jones, et al. v. Pacheco, et al., 03-CV-1329 (D.Nev.), based on a false disciplinary report being filed against Jones and Jones contracting Hepatitis C while incarcerated (see Ex. 128). One of the attorneys, Patricia M. Erickson, has stated that in September 2003, she met with Jones in order to read him out loud the 46-page complaint (Ex. 201). She did this because it was her understanding that he was unable to read and that his writing skills were very limited (Id.). She stated, "During the reading of the complaint to Mr. Jones, I was required to explain the legal terminology and other words to Mr. Jones as he clearly did not understand all that was written even as I read it to him" (Id.).

(iv) Department of Corrections' Records

Numerous documents from Department of Corrections records also indicate Jones' cognitive issues. When he entered Department of Corrections custody back in 1980, it was noted that he was

unable to complete the inmate information portion of the intake form because he could not read or write (Ex. 220 at NDOC(IL2)0018-0019). Academic documents from indicate that he was a "non-reader" and that he was working very hard to learn "sight words" (Ex. 219 at NDOC(IL1)0111, 0113 and 0114). A psychiatric evaluation from 1985 indicated that Jones was unable to read, so he could not take a psychiatric test (Ex. 220 at NDOC(IL2)0017). The doctor noted that he may be "borderline mentally deficient" (Id.). A notation from 1994 on his master list of medical issues indicated that he was illiterate (Ex. 190). It was often reported on transfer documents that he was illiterate (Exs. 194 and 197). In 1985 and then again in 1994, he was approved for cassette tape correspondence due to his "handicap in my communicating and receiving correspondence (CR 19; Ex. 219 at NDOC(IL1)0086; Ex. 188; Ex. 189). When Jones was 41 years old, he received a Raven's Progressive Matrices percentile score of 8 (equivalent to IQ of 76) (Ex. 223 at 22). The Case Note printout indicates that he entered the system with a 4th grade education (Ex. 193 at 5). Other notes in the Case Notes mention a low level education, limited number of years in school, and that he needs more education (Id. at 7, 10, 11, 12).

In August 2006, Jones submitted a medical kite requesting a psychiatric examination to determine whether he had a mental disorder (Ex. 203). Jones stated that he was told in the past by a psychiatrist that one side of his brain was "dead in terms of comprehending things" (Id.). Another kite written in August 2006 also asked for psychiatric evaluation "concerning his disability to 'comprehend the english language as far as reading and writing,' and 'dislecia [sic] problem'" (Ex. 202). The request was rejected but he was told that he could receive help from education (Id.). In a September 2006 memo, the principal of the school at Ely State Prison stated that he received a call from Inetta in which she said that Jones had dyslexia and that the medical department had told him to go to school (Ex. 222 at NDOC(IR2)0091). She added that he could barely read and write (Id.). In a consent for the disclosure of medical records to Inetta, it was reported that Jones could not read or write (Ex. 196).

(v) Legal Filings

Throughout his legal cases in court, individuals who have assisted Jones have consistently informed the court about Jones' cognitive limitations (Ex. 52 at 8; 97-CR 6 (Ex. 62); 97-CR 34 (Ex.

81); Ex. 93 at 2; Ex. 92 at 7A; Ex. 96 at 2; Ex. 108 at 1-2; Ex. 103 at 2, 10-11; Ex. 113 at 2; Ex. 130 at 1-2; Ex, 129 at 2-3; Ex. 132 at 7; Ex. 137 at 5-6; Ex. 147 at 8; Ex. 133 at 4; Ex. 171 at 8; CR 8 at 2; CR 14 at 1, 7; CR 19 at 5, 21).

* * *

This evidence from many different sources is fully consistent with the expert's opinion that Jones does not have the cognitive capability to personally complete the complicated tasks necessary to prepare and file a federal habeas petition on his own. The people who know him or have worked with him confirm that he does not have an understanding of legal processes, including his current case. He cannot read or write and has always needed other people to perform those tasks for him. He has always depended upon other inmates to file legal proceedings for him. It was those inmates who made the decisions on how his legal case should proceed. Jones never understood the legal documents that he was asked to sign. He was unable to monitor the assistance that he received. Indeed, even an attorney who has worked with him in the past ten years confirmed that Jones does not understand legal documents, even after they have been read to him. It has been repeatedly reported in documents filed with the court that Jones is illiterate and has cognitive limitations. Over the years, he has been fundamentally unable to gain any knowledge or understanding about his case. It is also well-documented in Department of Corrections records that he had mental deficiencies, low education, and was unable to read and write. These extraordinary circumstances beyond Jones' control support a finding of equitable tolling. Section 2244(d)(1)'s one-year statute of limitations should be deemed equitably tolled for the relevant periods of time (April 22, 1997, up to and including June 26, 2011).

3. Jones has shown diligence in pursuing his claims

The evidence here shows that Jones exercised whatever diligence a person with cognitive limitations such as his can use to try to assert his legal rights. Bills, 628 F.3d at 1100-01. As discussed at length above, Jones' cognitive limitations made it impossible to file the petition on his own. He was completely dependent on other inmates to assist him with his filings.

At the same time, regardless of the availability of assistance, Jones' cognitive limitations made it very difficult for him to seek assistance to file a federal habeas petition as he did not have

the capability to explain to other inmates what he needed from them. It was clear to both this office's investigator and Dr. Kotler that Jones did not understand his current federal legal challenge (Ex. 211 at 2-3; Ex. 216, ¶ 11). All of the inmates who worked with him confirmed that Jones simply did not understand the legal case (Ex. 208, ¶ 3; Ex. 212, ¶ 4; Ex. 210, ¶ 4; Ex. 215, ¶ 3). His wife also has stated that he does not understand (Ex. 214, ¶ 16).

As a result, Jones was significantly limited in his ability to seek assistance from others. Dr. Kotler opined that Jones' cognitive limitations would have an impact on his ability to effectively communicate with other people concerning what assistance he would need from them (Ex. 211 at 3). She explained:

> Mr. Jones was clearly able to express his desire to "get out" of prison, and he offered several possible means for accomplishing this, such as a pardon or a reduced charge. However, while he may be able to communicate to others that he needs assistance, he may have significant difficulty being specific about the type of assistance he would need. In addition, he would have significant difficulty evaluating the relative merits of the various options for assistance. He may be able to understand this information if it were explained to him in very simple terms and repeated to him several times.

(Id.).

Dr. Kotler also believed that Jones' mental impairments would limit his ability to monitor the assistance that he received from other inmates (Ex. 211 at 3-4). Once again, he had extremely low test results on skills necessary to accomplish this task, such as reading and auditory comprehension, as well as mental sequencing and logical thinking (Id. at 15-17). She explained:

> [F]rom an intellectual and cognitive standpoint, he would have significant difficulty monitoring the assistance he is receiving. During my evaluation, Mr. Jones stated that he did not know what actions his attorney was pursuing in his case, nor did he know what progress had been made in his case. The test results indicated that even if this information had been provided to Mr. Jones, he may not have understood it or he may not remember it accurately. Misunderstanding or misremembering would be more likely to occur if the information was presented in a written format or if it was not presented in a simplified manner and repeated several times to ensure his comprehension.

(Id. at 4).

As a result, Jones did not have the capability to review the work that other inmates were doing on his behalf and ask them to do something different. The inmates who worked with him

confirmed that Jones did not have an understanding of the documents that they filed on his behalf, even when they attempted to explain it to him (Ex. 209, ¶ 3; Ex. 213, ¶¶ 5-6; Ex. 210, ¶ 4; Ex. 215, ¶ 9; see also Ex. 214, ¶ 9). The inmates who assisted him made the decisions for him on how to proceed with the case (Ex. 210, ¶ 5; Ex. 207, ¶ 6; Ex. 215, ¶ 7; see also Ex. 213, ¶ 4).

To be sure, several inmates did file legal documents on Jones' behalf. During the time that those proceedings were pending, he was clearly being diligent. Because Jones could not monitor the assistance, he had to trust that these inmates were properly litigating his case. This includes the following time periods:

First Federal Petition:	April 22, 1997 to February 9, 1999
Second State Petition:	November 16, 2000 to December 18, 2001
Motion to Correct Sentence:	February 6, 2008 to October 21, 2008
Actual Innocence Petition:	October 20, 2008 to December 2, 2008
Third State Petition:	December 3, 2008 to October 27, 2010
Motion to Correct Sentence:	December 26, 2008 to January 30, 2009
Fourth State Petition:	August 6, 2010 to July 6, 2011

During the remaining time periods, Jones did act diligently even in the face of his cognitive limitations. In the first instance, the inmate who assisted him with his 2001 state petition did not tell him that he needed to go to federal court (Ex. 210, ¶ 5). Of course, even if this inmate had done this, there is strong reason to believe that Jones would not have been able to understand that he had to do this. Dr. Kotler opined that Jones would have a limited ability to understand his legal case if explained to him as he becomes "easily confused by more complex commands and other verbal information containing multiple clauses, relational prepositions, and other complex constructions" (Ex. 211 at 4). Nevertheless, the inmate who had been most closely working with him on his case did not advise him of this critical information.

Further, after 2001 Jones was operating under the belief that he would get in trouble if he filed anything else. In January 2001, Judge Sally Loehrer denied Jones' second state petition (Ex. 98). Despite the denial, the inmate working on Jones' case continued to file motions with the court (Exs. 100-01, 103, 105-09, 111-12). The minutes indicate that, at a court date for these motions on

February 21, 2001, Judge Loehrer warned Jones that he would face sanctions if he continued to file these motions (Ex. 1 at 25). These minutes were sent to Jones, who was not present in court (Id.). Also, his wife Inetta was in the audience when the judge made the threat and she spoke to Jones about it (Ex. 214, ¶ 10). Jones told this office's investigator that it was his belief that he would get in trouble if he filed anything else (Ex. 216, ¶ 9). Inetta confirmed that Jones believed this (Ex. 214, ¶ 10).

In addition, between 2001 and 2008, Jones also believed that his case was on a stay in the Nevada Supreme Court. Jones informed our investigator that another inmate named Dutch had told him this (Ex. 216, ¶ 9). Inmate Zellis actually believes that it was Odoms, the inmate who worked on the 2001 case, that told Jones this (Ex. 215, ¶ 11). This would make sense as Odoms was the one who was working on Jones' case in 2001 (see Ex. 96). Moreover, Jones was transferred away from Odoms while the appeal from the denial of this petition was pending in Nevada Supreme Court. On July 21, 2001, while the appeal from the petition was still pending, Jones was transferred from Ely State Prison ("Ely") to High Desert State Prison ("HDSP") (Ex. 193 at 4). Odoms and Jones had been at Ely together (Ex. 210, ¶ 3). Odoms acknowledged that, once Jones was transferred to High Desert, he and Jones were at separate prisons for several years (Ex. 210, ¶ 2). The appeal was not decided until November 21, 2001 (Ex. 125). As such, there is reason to believe that Jones may have never even been informed of the conclusion of the 2001 petition, which could have led him to believe it was still pending. At the very least, he was not in the same facility with the inmate who had litigated this petition for him and would have been best-situated to read and explain the opinion to him. Critically, in a letter dated December 20, 2004, the Nevada Supreme Court informed Jones that one of his appeals was still pending in the court (Ex. 198). This would be consistent with Jones' mistaken belief that his case was on a stay in the Nevada Supreme Court.

As a result of these misconceptions about sanctions and a stay, it is not surprising that it was not until Jones reconnected with Odoms in 2008, once Jones had been transferred to Northern Nevada Correctional Facility ("NNCC"), that something was filed on his behalf. In November 2007, Jones was transferred to NNCC (Ex. 193 at 10). Odoms then referred Jones to Eric "Termite" Douglas (Ex. 216, ¶ 13). Shortly thereafter in February 2008, Termite filed the motion to correct

illegal sentence (Ex. 133). And then it was Odoms who continued to litigate the case in state court after Douglas was released in July 2008 (Ex. 210, ¶ 5).

The fact that a familiar name, Odoms, pops up at multiple times in the timeline is crucial to the diligence analysis here. Jones was ashamed of his inability to read (Ex. 209, ¶ 3; Ex. 214, ¶ 3). He did not want other inmates to know about this disability (Ex. 214, ¶ 3). He went so far as pretending to read in front of other inmates (Id.). Jones would only open up to some inmates and share with them the knowledge that he could not read (Id.). As he told Dr. Kotler, he considered himself a "loner" and would not share his feelings with others (Ex. 211 at 12). Such feelings would have a clear impact on whether he could take advantage of legal assistance during the relevant time period. His shame over his cognitive limitations would limit his desire to ask strangers for help. Thus, it is not surprising that Jones would typically gain assistance from inmates with whom he had forged a relationship and were aware of his case without Jones having to explain it.

Another critical factor here was that Jones ended up as prey to unscrupulous law clerks who sought to take advantage of Jones' cognitive limitations. Jones is considered "'penitentiary rich'" (Ex. 209, ¶ 5). Zellis stated, "Lots of inmates took money to file documents on behalf of Mr. Jones. They just wanted the money. . . . Many of them knew Mr. Jones had a lot of money on his books and he was taken advantage of" (Ex. 215, ¶ 5). Blake agreed that Jones is "taken advantage of because of his good nature" (Ex. 208, ¶ 4). Odoms stated, "some inmates take advantage of his kind nature and big heart" (Ex. 210, ¶ 6). Douglas said something similar: "Mr. Jones was frustrated because he was taken advantage of a lot. He knew he was being taken advantage of, but was not in a position to do anything about it. He depended on others to help him proceed with his case" (Ex. 213, ¶ 9). Jones confirmed that "he had no choice but to put faith in them. If not them, he would have no one to work on his legal filings" (Ex. 216, ¶ 5).

Seely was emphatic that Jones was the victim of these other inmates. He stated, "There are many case hustlers that have worked on Mr. Jones case. John Odoms and Eric Douglas (aka termite) juiced Mr. Jones for money. They worked on his case solely for financial gain and did not do right by Mr. Jones (Ex. 207, ¶ 3). Inetta confirmed that many inmates took advantage of Jones and received money in exchange for working on his case (Ex. 214, ¶ 7-8). They knew that he had

money and knew that he could not read or write (Id., ¶ 8). Overall, Inetta sent over $3,000 to several inmates for providing assistance with Jones' case (Id., ¶ 12). This included money sent to Odoms, Zellis, and Douglas, among others (Id., ¶¶ 9, 11, 12). Odoms would also receive "food and other amenities," at least six hundred dollars in canteen, as payment for his work (Id., ¶ 11).

The manner in which these inmates took advantage of Jones clearly has an impact on diligence and whether Jones was able to use available legal assistance. Jones would be hesitant to seek assistance from others knowing that inmates would just take advantage of him. Indeed, even inmates that he trusted took a significant amount of money from him. As the Ninth Circuit stated in Bills, "[T]he availability of jailhouse assistance could also cut the other way. If legal help is available only because a prisoner has to resort to bribery or succumb to extortion, and a prisoner does not do so, a court would not find a lack of diligence." Bills, 628 F.3d at 1101. Once again, it is not surprising that help on his case at both the beginning and the end of the relevant time period was from the same inmate, who Jones had trusted, even though others believed that this same inmate was taking advantage of Jones.

Further limiting Jones' ability to seek and obtain assistance were factors relating to his confinement. As early as 1997 when Zellis was working on his case, Jones' file was a mess. According to Zellis, "I only received bits and pieces of Mr. Jones file. It was scattered from being transferred around so many inmates working on the case before me. I worked with what I had" (Ex. 215, ¶ 4). Zellis added that the file went to Red Devil after he was done working on the case (Id., ¶ 8). Unfortunately, Red Devil "ended up in the hole and when the corrections staff shook down his cell, Mr. Jones paperwork got scattered and lost again" (Id.). Critically, "[w]hatever paperwork was left went to John Odoms" (Id.). Once again, the inmate who worked on Jones' case at the beginning and at the end of the relevant time period was the one who possessed his legal paperwork.

Moreover, Jones' ability to seek assistance was greatly hindered by the time he spent in segregated confinement as well as the number of times he was transferred. At the time Jones filed his first timely federal habeas petition, he was housed at Nevada State Prison ("NSP) (Ex. 222 at NDOC(IR2)0036 and 0053). On December 12, 1997, while his federal petition was pending, he was transferred to Southern Desert Correctional Center ("SDCC") (Id.). In April 1998, he was

transferred back to NSP (Ex. 222 at NDOC(IR2)0035 and 0052). Jones spent a week in segregation before he was transferred back to SDCC on May 7, 1998 (Ex. 221 at NDOC(IR1)0070; Ex. 222 at NDOC(IR2)0035, 0050 and 0052). It appears that upon his transfer to SDCC, he was in administrative segregation during May and June 1998 (Ex. 221 at NDOC(IR1)0050, 0067 and 0068). It is not clear when this confinement ended.

Between July 31, 1999, and September 13, 1999, Jones was in disciplinary segregation (Ex. 193 at 1; Ex. 221 at NDOC(IR1)0023, 0058, 0060-0061). From either November 24, 1999, until December 30, 1999, Jones was in administrative segregation awaiting a hearing on disciplinary charges (Ex. 221 at NDOC(IR1)0084; Ex. 193 at 1). From December 31, 1999, to March 29, 2000, Jones was in disciplinary segregation as a result of a hearing on December 31, 1999 (Ex. 221 at NDOC(IR1)0023, 0053-0054). On March 29, 2000, he was transferred from SDCC to Ely (Ex. 193 at 1; Ex. 221 at NDOC(IR1)0024-0025; Ex.222 at NDOC(IR2)0031, 0048-0049; Ex. 192 at 3). Between March 29, 2000, and May 25, 2000, Jones was housed in Unit 6 at Ely (Ex. 192 at 2-3). On May 25, 2000, Jones was transferred to Unit 7, which, upon information and belief, was a lockdown unit, until December 20, 2000 (Id.).[9]

Thus, for a large portion of the time in between the dismissal of his first habeas petition (February 9, 1999) and the filing of his state petition (November 16, 2000), Jones was in segregated housing. In addition, he was transferred between facilities. This clearly would have an impact on his ability to pursue his rights during that time. Jones was dependent on other inmates to assist him with his case. However, the transfers and segregated housing would limit his access to direct contact with inmate who could assist him with his case and would also prevent him from even having enough time in one place to establish a working relationships with an inmate who could help him.

[9] The Offender Movement History Report details the units in which Jones was housed from January 1, 1999, until today (Ex. 192). However, the document does not indicate what type of unit it was. Many of the allegations as to segregated housing in this response are based on other documents, which are not as precise as the Movement History Report. It is uniquely within Respondents' control to clarify which of the units were segregated units. Jones reserves the right to seek this information from Respondent. Jones believes that this information would likely show that Jones was in segregated housing for even more days than those alleged in this response.

This pattern continued in the time between 2001 and 2008. On July 21, 2001, Jones was transferred from Ely to HDSP while his second state post-conviction petition was pending in the Nevada Supreme Court (Ex. 193 at 4; Ex. 192 at 2). Shortly after the state petition proceedings ended in December 2001, Jones was moved into administrative segregation on March 23, 2002, to await a hearing on a disciplinary ticket (Ex. 193 at 4). After a hearing on April 2, 2002, he was sentenced to 90 days in disciplinary confinement (Ex. 221 at NDOC(IR1)0045-0046; Ex. 193 at 4). On December 7, 2004, he was transferred from HDSP to SDCC (Ex. 193 at 6; Ex. 192 at 2). Between approximately July 1, 2005, and August 1, 2005, Jones was in disciplinary segregation (Ex. 193 at 7; Ex. 192 at 2). On October 13, 2005, Jones was put back into segregation until his transfer to Ely on October 26, 2005 (Ex. 193 at 8; Ex. 222 at NDOC(IR2)0075; Ex. 192 1-2). At Ely, he was housed in Unit 7, a lockdown unit, from October 26, 2005, until February 24, 2006 (Ex. 192 at 1-2). On August 17, 2007, he was transferred to Nevada State Prison (Ex. 193 at 10; Ex. 192 at 1). Shortly thereafter, on October 31, 2007, he was transferred to NNCC, where he remains today (Ex. 193 at 10; Ex. 192 at 1). Thus, during this time, Jones was moved between facilities on four occasions and spent many days in disciplinary confinement, limiting his ability to seek help with his legal case.

It should also be noted that two inmates who did help him on his case were released soon after they filed a legal proceeding on Jones' behalf, another factor that had an impact on how Jones was able to litigate his legal claims (see Ex. 215, ¶ 8; Ex. 213, ¶ 4).

Nevertheless, despite all of these impediments, Jones did take numerous steps during the relevant period of time to pursue his legal rights. Most important, in 2003, Jones took a class entitled the "The Law and You" (Ex. 193 at 5 and 6; Ex. 216, ¶ 6; Ex. 214, ¶ 4). It represented a diligent attempt to educate himself about his legal case . Unfortunately, Jones' cognitive limitations prevented him from being able to adequately educate himself about his legal case. He admits that he did not understand anything in the class (Ex. 216, ¶ 6). He was the only one not to receive a certificate (Id., ¶ 6). The class left him frustrated and embarrassed, feelings that would limit his ability and desire to pursue help with his case (Ex. 216, ¶¶ 6, 19; Ex. 214, ¶ 4). Throughout his time in prison, he made attempts to learn legal terms from other inmate law clerks, but he was simply

unable to understand them (Ex. 216, ¶ 7; see also Ex. 208, ¶ 3). He also sought to learn information about his legal case from the court. In a letter dated December 20, 2004, the Nevada Supreme Court responded to a letter from Jones asking about the status of his appeals (Ex. 198).

From documents that were filed in court in September 2005, it is clear that Jones did reach out to the law library at SDCC (03-CR 51, 52; Ex. 130, 131). On November 12, 2009, he submitted a request to the law library for "N.R.S. 177.055 (1977) Ed." to help him prepare a "Habeas . . . Corpus" (Ex. 205). However, as Dr. Kotler explained, Jones had a limited ability to seek assistance from the law library. She explained:

> While Mr. Jones may be able to request materials he believes are relevant to his case, such requests may be based on his incomplete or inaccurate understanding of his case, or a misinterpretation of information or misinformation given to him by other nonlegal sources (e.g., fellow inmates). As noted above, Mr. Jones may be susceptible to the influence of others and suggestible due to his limited intellectual abilities and deficits in discriminating relevant from irrelevant information.

(Ex. 211 at 5). Indeed, the 2009 request noted above asked for a statute discussing the mandatory review of a death sentence on appeal, and had nothing to do with habeas corpus.

There is also evidence that Jones took active steps to learn information about his legal case between 2001 and 2008. For example, Jones sent a letter to the Nevada Supreme Court in 2004 asking for a status update of his appeals (Ex. 198). In January 2005, Inetta sent letters on his behalf to the North Las Vegas Justice Court and Clark County Clerk seeking documents in Jones' case (Ex. 199; see also Ex. 200).

The most consistent step that Jones took to demonstrate his diligence during the relevant time period was his repeated attempts to obtain education to help him overcome his cognitive limitations. It must be emphasized that diligence here must be viewed in light of Jones' individual situation, taking into account his cognitive impairments. Jones has mental retardation and, according to the expert, most likely a learning disorder. His inability to read and write has been a source of shame and embarrassment. He repeatedly sought education to better himself. He had a good faith belief that he could educate himself (See, e.g., Ex. 216, ¶¶ 8 and 10). Learning how to read would have been a way for him to free himself from the dependency of the predatory law clerks and relieve him

of the shame associated with his inability to read and write. At the very least, it would have potentially put him in a better position to seek help with his case. However, Dr. Kotler explained that, while Jones is aware of his limitations, he has "limited insight into how these limitations might affect his functioning" (Ex. 211 at 14). It means that despite his good faith attempts, his situation was not going to improve. And, as his teacher Robison indicated, his ability to read remained at a very low level even after spending a year in her class (Ex. 216, ¶ 15). But this does not render his attempts to educate himself meaningless. To the contrary, they show that he diligently sought to improve himself so he could do things on his own even in the face of enormous obstacles.

Jones has an extensive history of seeking education while in the Department of Corrections, including during the relevant time period. For example, on April 8, 2000, Jones submitted a kite while at Ely seeking to enroll in school (Ex. 219 at NDOC(IL1)0004; Ex. 221 at NDOC(IR1)0093). On April 10, 2000, the prison responded that it would forward his request to the education department (Ex. 219 at NDOC(IL1)0004; Ex. 221 at NDOC(IR1)0093). On April 18, 2000, Jones asked to be moved to a different unit at Ely so that he can go to school (Ex. 193 at 2; Ex. 222 at NDOC(IR2)0031 and 0048). The prison denied this request with a review in 30 days (Id.). In May 2000, Jones was told that he can contact the school concerning his attempts to obtain education (Ex. 193 at 2). It appears that, by September 2000, he did begin to attend education classes (Id. ("Non personal PTA per education")). He also appears to have remained in education classes in November 2000 (Ex. 193 at 3: "ESP casework non person Jones is classified this date as PTA"). In March 2001, Jones applied to become a barber. In his application, he indicated that he was in "part time school" (Ex. 221 at NDOC(IR1)0089).

In January 2002, Jones was enrolled in "Hooked on Phonics," a class used to teach children how to read (Ex. 193 at 4). In June 2002, he indicated in a special classification review document that he was still enrolled in "Hooked on Phonics" (Ex. 222 at NDOC(IR2)0012-0013). In September 2002, he remained in education programs (Ex. 193 at 5). On a January 3, 2003, response to an appeal from a grievance from Jones about being locked down in his cell, a prison administrator noted that Jones was "a student" so he could use that time to "study" (Ex. 195). As mentioned before, in 2003, he took "The Law and You" course (Ex. 193 at 5-6; Ex., 6; Ex. 214, ¶ 4). In October 2004,

Jones asked for a transfer to SDCC so that he could continue his programming and "take advantage of all the opportunities for self improvement" (Ex. 193 at 6). He was transferred to SDCC in December 2004 (Ex. 193 at 6). During 2005, Jones participated in the OASIS program, which provides inmates the opportunity "to understand their thinking, acting, and feeling so they have the tools to develop and maintain lifestyle changes necessary to be productive citizens" (Ex. 206 at 3).[10] This program only appears to be available at SDCC and NNCC (Id.). On November 28, 2005, after he had been transferred from SDCC to Ely, Jones made a request to buy a tape player for his "Hooked on Phonics" (Ex. 222 at NDOC(IR2)0117; see also Ex. 218 at NDOC(Ed)0001). In January 2006, Jones submitted a similar request asking how to order the tape player (Ex. 222 at NDOC(IR2)0116).

Critically, in August 2006, Jones submitted a medical kite requesting a psychiatric examination to determine whether he had a mental disorder (Ex. 203). Jones stated that he was told in the past by a psychiatrist that one side of his brain was "dead in terms of comprehending things" (Id.). This request was denied because he had not shown a clinical need; he was advised to "kite" the psychologist assigned to his unit if he was feeling stress (Id.). Another kite written in August 2006 also asked for a psychiatric evaluation "concerning his disability to 'comprehend the english language as far as reading and writing,' and 'dislecia [sic] problem'" (Ex. 202). The request was rejected but he was told that he could receive help from education (Id.). In a September 2006 memo, the principal of the Ely State Prison school stated that he received a call from Inetta in which she said that Jones had dyslexia and that the medical department had told him to go to school (Ex. 222 at NDOC(IR2)0091). She added that he could barely read and write (Id.). In November 2006, Jones returned to education programming and remained in this programming at least until January 2007 (Ex. 193 at 9).

In August 2007, Jones was transferred to NNCC (Ex. 193 at 10). At that time, it was noted that he needed education (Id.). In November 2007, he was assigned to full-time academics (Id.). In

[10] This is quoted from NDOC Inmate Programs Overview, Ex. 206, and available at http://www.leg.state.nv.us/Interim/75th2009/Exhibits/AdminJustice/E033010F.pdf.

mid-November 2007, he was assigned to a senior structured living program (Id.). As a result, in December 2007, he was attending classes part-time, which continued at least until June 2008 (Id.). Between 2008 and 2012, Jones was enrolled in "Beginning Literacy" courses (Ex. 218 at NDOC(Ed)0001).

As can be seen, Jones consistently sought to learn how to read, which would have potentially helped him litigate his case. Unfortunately, Jones' cognitive difficulties prevented him from obtaining these skills. Nevertheless, Jones tried to take this step despite the obstacles in his way. It shows reasonable diligence for an individual with his particular cognitive limitations.

The above factors demonstrate that Jones, through no lack of diligence on his part, was prevented from filing his habeas petition in a timely manner as a result of the district court's erroneous handling of his timely filed petition and his cognitive limitations. The extraordinary circumstances beyond his control support a finding of equitable tolling.

C. The Court must hold an evidentiary hearing to resolve any factual disputes.

In this Response to the Order to Show Cause, Jones has set forth a detailed proffer, in which he makes specific factual allegations explaining why he is entitled to equitable tolling. As explained above, these allegations if true are sufficient to establish good cause and equitable tolling.

At this stage of the proceedings, Jones' allegations are assumed to be true. See generally Marchibroda v. United States, 368 U.S. 487, 493-96 (1962); Blackledge v. Allison, 431 U.S. 63, 75-6 (1977); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (facts must be "accepted as true" under the Federal Rules of Civil Procedure.) Should the State dispute any of these facts, this Court must hold an evidentiary hearing to both develop and resolve these procedural issues. See Mendoza v. Carey, 449 F.3d 1065, 1067 (9th Cir. 2005) ("We agree that an evidentiary hearing is required because Mendoza has *alleged* facts which, if true, could entitled him to equitable tolling.") (emphasis added); Buffalo v. Sunn, 854 F.2d 1158, 1165 (9th Cir. 1988) ("A district court conducting federal habeas review should not ordinarily attempt to resolve contested issues of fact based on affidavits alone unless there is other evidence in the record dispositive of the issue or unless the state court has made the relevant factual findings."); Roy v. Lampert, 465 F.3d at 973 (holding that petitioners' "sufficient allegations" regarding their diligence were enough to "entitle them to an evidentiary

hearing."), id. at 974, n.6 (noting that the district court "should have ordered an evidentiary hearing" to resolve dispute over petitioners' allegations). An evidentiary hearing is of particular importance when, as here, issues pertaining to equitable tolling raise facts that occurred out of the courtroom or off the record. See Whalem/Hunt v. Early, 233 F.3d at 1148 (recognizing that determinations of whether there are grounds for equitable tolling are highly fact dependent).

Likewise, issues that hinge on the credibility of a witness should be resolved by an evidentiary hearing. See Raines v. United States, 423 F.2d 526. 529-530 (4th Cir. 1970) ("When the issue is one of credibility, *resolution on the basis of affidavits can rarely be conclusive*, but that is not to say they may not be helpful.") (emphasis added), *cited in* Rule 7 advisory committee notes; Bauman v. DaimlerChyssler Corp, 579 F.3d 1088, 1094 (9th Cir. 2009) (district court can dismiss plaintiff's case for lack of personal jurisdiction, based on pleadings alone, only when plaintiff has failed to make a prima facie showing); id. at 1094 ("Conflicts between the facts contained in the parties' affidavits must be resolved in plaintiff's favor.") (citation and internal punctuation omitted).

IV.

PRAYER FOR RELIEF

Accordingly, petitioner respectfully requests that this Court:

1. Issue a writ of habeas corpus to have Robert Jones brought before the Court so that he may be discharged from his unconstitutional confinement;

2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this amended petition and any defenses that may be raised by Respondents; and

3. Grant such other and further relief as, in the interests of justice, may be appropriate.

DATED this 16th day of June, 2015.

Respectfully submitted,

By: /s/ *Jonathan M. Kirshbaum*
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury under the laws of the United States of America and the State of NEVADA that the facts alleged in this petition are true and correct to the best of counsel's knowledge, information, and belief.

By: /s/ *Jonathan M. Kirshbaum*
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on June 16, 2015, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Victor H. Schulze, II
Senior Deputy Attorney General
Special Prosecutions Division
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101

/s/ Susan Kline
An Employee of the Federal Public Defender,
District of Nevada

District Court

CLARK COUNTY, NEVADA

FILED
APR 10 2 21 PM '87
CLERK

THE STATE OF NEVADA, Plaintiff,

-vs-

ROBERT CHARLES JONES
ID#475178 Defendant.

CASE NO. C43949

DEPT. NO. II

JUDGMENT OF CONVICTION (JURY TRIAL)

WHEREAS, on the 29th day of January, 19 79, the Defendant ROBERT CHARLES JONES, entered a plea of not guilty to the crime of MURDER, committed on the 29th day of September, 19 78, in violation of NRS 200.010, 200.030, and the matter having been tried before a jury, and the defendant being represented by counsel and having been found guilty of the crime of FIRST DEGREE MURDER: and

WHEREAS, thereafter, on the 23rd day of March, 19 87, the defendant being present in Court with his counsel SHARON GWIN AND ROBERT THOMPSON, Deputy Public Defenders and BILL A. BERRETT, Deputy District Attorney, also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and sentenced Defendant

REX BELL
DISTRICT ATTORNEY
CLARK COUNTY COURTHOUSE
200 SO. THIRD STREET
LAS VEGAS, NEVADA 89155

DA-14

to life in the Nevada State Prison without the possibility of parole for Murder in the First Degree.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 9th day of April, 1987, in the City of Las Vegas, County of Clark, State of Nevada.

DA#79-43949/dh
NLVPD DR#78-09529

DISTRICT JUDGE

DA-14a