No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL HOWARD,

Petitioner,

v.

RENEE BAKER, Warden,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

Jonah J. Horwitz*
Deborah A. Czuba
FEDERAL DEFENDER SERVICES OF IDAHO, INC.
702 West Idaho Street, Suite 900
Boise, Idaho 83702
Jonah_Horwitz@fd.org
208-331-5530

***Counsel of Record**

QUESTION PRESENTED

1. Is the Sixth Amendment violated when a defendant is forced to accept representation by lawyers whose supervisor have a longstanding social and familial relationship with the victim and whose colleague openly wishes to see their client executed, despite timely requests for substitution by the attorneys and the defendant?

PARTIES TO THE PROCEEDINGS BELOW

In addition to those listed in the caption, the parties to the proceedings below included former Wardens E.K. McDaniel, William Gittere, and Timothy Filson, as well as the Nevada Attorney General in his official capacity.

RELATED PROCEEDINGS

I. Federal Court

A. Supreme Court

1. *Howard v. Nevada*, No. 14-8546, cert. denied April 27, 2015
2. *Howard v. Nevada*, No. 92-8909, cert. denied Oct. 4, 1993
3. *Howard v. Nevada*, No. 86-6937, cert. denied Oct. 5, 1987

B. U.S. Court of Appeals for the Ninth Circuit

1. *Howard v. Gittere*, No. 19-70384, dismissed Dec. 7, 2021
2. *Howard v. Baker*, No. 10-99003, affirmed Jan. 20, 2023

C. U.S. District Court for the District of Nevada

1. *Howard v. Gittere*, No. 2:19-cv-247, dismissed Nov. 3, 2021
2. *Howard v. Gittere*, No. 2:93-cv-1209, final order denying relief May 28, 2019
3. *Howard v. Godinez*, No. CV-N-91-196, closed March 11, 1992
4. *Howard v. Whitley*, No. CV-N-88-264, dismissed June 23, 1988

II. Nevada State Court

A. Supreme Court

1. *Howard v. State,* Nos. 81278 & 81270, reversed and remanded Sept. 16, 2021, remittitur issued Oct. 11, 2021
2. *Howard v. State*, No. 73223, remittitur issued Oct. 15, 2019
3. *Howard v. State*, No. 57469, remittitur issued Oct. 20, 2014
4. *Howard v. State*, No. 42593, remittitur issued Jan. 28, 2005
5. *Howard v. State*, No. 23386, remittitur issued Oct. 28, 1993
6. *Howard v. State*, No. 20368, remittitur issued Feb. 14, 1991
7. *Howard v. State*, No. 15113, remittitur issued Feb. 12, 1988

B. Clark County, Nevada District Court[1]

1. *Howard v. State*, resentencing pending
2. *Howard v. State,* No. A-18-780434-W, petition denied May 18, 2020
3. *Howard v. State*, petition denied May 15, 2017
4. *Howard v. State*, petition denied Nov. 5, 2010
5. *State v. Howard*, petition denied Oct. 21, 2003
6. *State v. Howard*, petition denied July 7, 1992
7. *Howard v. State*, petition denied April 28, 1989

NOTE ABOUT CITATIONS TO THE RECORDS BELOW

"9th Cir. Dkt." citations refer to docket entries below in *Howard v. Baker*, 9th Circuit Case No. 10-99003. References to page numbers of documents in the Excerpts of Record from that case are the "ER" page numbers located at the bottom

[1] Unless otherwise indicated, all of the listed Clark County District Court proceedings were held exclusively in case number 81C053867.

of the page, and all other pin cites are to the blue CM/ECF page numbers at the top of the document. "Dist. Ct. Dkt." citations refer to docket entries in *Howard v. Baker,* D. Nev. Case No. 2:93-cv-01209. The entirety of the related state court record was also filed in the same federal proceedings.

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Petitioner Samuel Howard respectfully submits this petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

A copy of the opinion below is attached as Appendix A, at App. 1–2, and is available at *Howard v. Baker*, No. 10-99003, 2023 WL 334011 (9th Cir. Jan. 20, 2023).

JURISIDICTIONAL STATEMENT

On January 20, 2023, the Ninth Circuit issued its decision. App. 1–2. The petition is timely filed, as Justice Kagan extended the deadline for filing to July 21, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part that every criminal defendant "shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On March 27, 1980, Dr. George Monahan was found dead in Las Vegas, Nevada. *See Howard v. State (Howard I*), 729 P.2d 1341, 1342 (Nev. 1986) (per curiam). In an indictment issued May 20, 1981, the State of Nevada charged Mr. Howard with Dr. Monahan's murder. 9th Cir. Dkt. 119-08 at 1446–48. The Clark County Public Defender ("CCPD") was appointed to represent Mr. Howard on his

murder charges at an arraignment held on November 30, 1982.[2] *Id.* at 1437. Mr. Howard was introduced to his attorneys through one of the office's supervisors, Terrence Jackson, with Michael Peters alongside him. At the arraignment, Mr. Jackson's very first words to the court were:

> Your Honor, I would like to make some representations to the Court. Mr. Howard qualifies financially. The representations I would like to make deal with my relationship to the victim. He was my dentist for fifteen years. My parents both knew Dr. Monahan well. I don't know if that presents a conflict. I will not take the case, but as the team leader on the team who often supervises some of the other attorneys—

Id.

Without giving Mr. Jackson the opportunity to elaborate on any potential ramifications this conflict could have had for other attorneys in the office, the judge perfunctorily advised him to "just [not] supervise this one, sir." *Id.*

Mr. Howard moved to substitute counsel in a pro se motion dated December 23, 1982. Dist. Ct. Dkt. 336-14. In his motion, Mr. Howard pointed to the fact that the victim "was a personal friend and the dentist of members of the" CCPD. *Id.* at 3. Mr. Howard consequently did not "believe that he could or would be represented adequately by any counsel of the Public Defender's Office." *Id.*

The substitution motion was heard on December 30, 1982. At the hearing, Mr. Peters attended with a second attorney, Marcus Cooper. Mr. Peters informed the court that in the month following the arraignment, he had met with Mr. Howard twice. 9th Cir. Dkt. 119-08 at 1424. He stated that Mr. Howard had been

[2] The delay between the indictment and the appointment of counsel stemmed from facts concerning unrelated charges and extradition proceedings, which are not relevant here.

"unwilling" to talk to him at these meetings and admitted that he had been unable to work on the case or to meet with his client further to discuss it. *Id.* Mr. Peters alerted the judge that his relationship with Mr. Howard "may be at loggerheads, it may be an irreconcilable breakdown in communications at this point." *Id.* Despite this information, the judge conclusorily determined that he "[had] not heard anything . . . which establishes in my mind any irreconcilable conflict between the defendant and the public defender" and ordered the CCPD to remain on the case. *Id.* at 1425. At the same time, the trial court admonished counsel in the presence of Mr. Howard that "your client probably should feel a little disgusted with the fact that he has not had a heck of a lot of communication with you people." *Id.*

At an afternoon session on the same day—December 30, 1982—the trial court invited Mr. Howard to explain his reasons for wanting his "attorney released." *Id.* at 1416. However, the court then proceeded to repeatedly interrupt Mr. Howard's answer, cutting him off five times and never allowing him to speak more than three sentences at once. *Id.* at 1417–21. Nevertheless, Mr. Howard was able to articulate that his misgivings with counsel stemmed in part from the fact that the victim "was directly a friend with the public defenders here." *Id.* at 1418. Mr. Howard summed up his position: "I couldn't possibly trust Mr. Peters or anyone related with the public defender's office here in Clark County." *Id.* at 1420.

On January 4, 1983, another hearing took place. At the hearing, Mr. Howard was represented by George Franzen, an attorney from the CCPD. Mr. Franzen informed the court then that counsel were not prepared for trial as their

investigation had not "even gotten off the ground." *Id.* at 1410. By Mr. Franzen's account, Mr. Howard had "refused to discuss the case with" counsel because he did not trust them. *Id.* at 1411.

On January 7, 1983, the State filed its notice of intent to seek the death penalty. Dist. Ct. Dkt. 336-23. Three days later, on January 10, 1983, Mr. Cooper orally renewed his motion to withdraw from the case during a hearing in court. 9th Cir. Dkt. 119-08 at 1394. Before he could even explain why, the trial court interrupted him to state that the "motion is denied and was denied then." *Id.* Mr. Cooper nonetheless insisted on elaborating. Although he began by characterizing the problem as stemming from Mr. Jackson's longtime familiarity with the victim, it quickly became clear that the conflict was more extensive. Most alarmingly, Mr. Cooper informed the court that one of his colleagues, Dave Gibson, had "expressed his hope that [Mr. Howard] be executed." 9th Cir. Dkt. 119-08 at 1394. Counsel added that Mr. Howard "does not trust the lawyers in the public defender's office, partially because of that relationship with Doctor Monahan." *Id.* at 1395. As a result, Mr. Howard had "continually refused . . . to discuss this case with us" and there was "no meaningful attorney/client relationship." *Id.* Without acknowledging the disturbing revelation about Mr. Gibson or inquiring into how widespread similar sentiments may have been within the office, the judge denied the attorneys' motion to withdraw, giving no reason. *Id.*

The judge also took it upon himself to remark that defense counsel's representation had been provided "without any diligence and apparently

incompetently." *Id.* at 1384. He added that defense counsel's "conduct in this case is totally not understood by this Court. I don't know what would cause an attorney to allow this case to get this bungled up." *Id.* The judge further commented that he was "really shocked" by counsel's behavior. *Id.* As the judge elaborated, he was "more concerned about the administrative mores in the office of the public defender that would allow this to exist." *Id.* In fact, the judge had seen a lack of preparedness from the CCPD "on many, many other occasions." *Id.* at 1395. The judge concluded that "any citizen should be offended by this lack of adequate representation." *Id.* at 1385.

While he refused to remove counsel from the case, the trial judge expanded his firewalling order such that *no one* from the CCPD could have any involvement in the case except for the two designated attorneys. *Id.* at 1383. The trial court singled out the public defender himself—i.e., the head of the office—as being covered by the exclusion. *Id.* In support for his approach, the trial judge stated that he did not "want anymore of this garbage of coming back before the court that one deputy doesn't like the defendant or whatever." *Id.*

On April 8, 1983, Mr. Howard sent a letter to the trial court again asking for the removal of counsel. Dist. Ct. Dkt. 337-20. Mr. Howard reiterated in the letter that defense counsel "couldn't and wouldn't represent me effectively simply because the victim . . . in this case was a friend of the" CCPD. *Id.* at 3.

The trial began on April 11, 1983. At the outset, defense counsel renewed their motion to withdraw from the case. In arguing the motion, Mr. Franzen

advised the court that there was an ongoing "breakdown in communications" between counsel and client dating from the "inception of our relationship." 9th Cir. Dkt. 119-08 at 1184. The court declined to even respond to counsel's comments and plunged forward into the trial with Messrs. Cooper and Franzen representing Mr. Howard. *Id.* at 1185.

During the trial, two immediate family members of the victim testified at length with significant testimony about the events leading up to the crime. Dist. Ct. Dkt. 337-25 at 94–152; 9th Cir. Dkt. 119-08 at 1109–44. At the close of the guilt phase, Mr. Howard was convicted of first-degree murder and related charges on April 22, 1983. 9th Cir. Dkt. 119-05 at 838. The proceedings moved into the penalty phase on May 2, 1983. As the sentencing began, the defense again renewed their motion to withdraw based on "irreconcilable differences." Dist. Ct. Dkt. 338-15 at 7. As before, the trial court denied the motion. *Id.* at 12. The penalty phase continued with the same counsel and Mr. Howard was sentenced to death. Dist. Ct. Dkt. 338-21 at 50.

In the direct appeal that followed, the CCPD initially stayed on as Mr. Howard's counsel. However, on November 8, 1984, the CCPD moved to withdraw from the appeal, describing how Mr. Howard's "initial dissatisfaction, distrust and concern" with counsel had never abated. Dist. Ct. Dkt. 340-6. Counsel also implied that Messrs. Jackson and Gibson were not the only ones in their office with antipathy toward their client. *Id.* at 15 (making reference to Mr. Jackson and "[o]ther members of the office" who had "expressed dislike of the defendant"). In

their withdrawal papers, the CCPD additionally noted that Mr. Jackson was the one who assigned the trial attorneys to the case. *Id.* at 18. The Nevada Supreme Court granted the motion to withdraw on January 9, 1985. Dist. Ct. Dkt. 340-9. With new counsel appointed, the appeal moved forward.

On December 15, 1986, the Nevada Supreme Court affirmed the judgment on appeal. *See Howard I*, 729 P.2d 1341. The first claim addressed by the court was that Mr. Howard's Sixth Amendment rights were transgressed because "he had no trust in counsel's representation." *Id.* at 1342. Rejecting the claim, the court asserted that Mr. Howard's "claims do not objectively justify Howard's distrust of his attorney[s]" because the problematic lawyers were walled off from the case. *Id.*

A post-conviction proceeding followed in state district court, which occasioned an evidentiary hearing on August 25, 1988. At the hearing, Mr. Franzen testified that Mr. Howard "was not cooperating with the defense of his case and he did not wish to speak with us, and, indeed, he did not," starting at the beginning of the relationship and continuing "throughout the pendency of this case." Dist. Ct. Dkt. 342-13 at 4, 18–19. Mr. Howard also testified at the post-conviction hearing. While discussing the conflict issue, Mr. Howard asked rhetorically: "And Mr. Cooper and Mr. Franzen, why would they want to help a convicted murderer to get off and they have to answer to their boss." 9th Cir. Dkt. 119-05 at 799. The trial court denied the post-conviction petition on July 5, 1989. Dist. Ct. Dkt. 342-25.

On November 7, 1990, the Nevada Supreme Court affirmed the denial of post-conviction relief. *See Howard v. State (Howard II)*, 800 P.2d 175 (Nev. 1990).

In subsequent litigation, the Nevada Supreme Court ultimately vacated Mr. Howard's death sentence but left his convictions intact. *See Howard v. State (Howard III)*, 495 P.3d 88 (Nev. 2021) (en banc).

Separately, Mr. Howard's federal habeas proceedings began with the filing of his petition on January 12, 1994. 9th Cir. Dkt. 119-10 at 1793. The district court eventually denied all claims. As pertinent here, the district court rebuffed the constructive-denial-of-counsel claim at issue here on December 28, 2009. Dist. Ct. Dkt. 294. On appeal, the Ninth Circuit did as well, in an opinion rendered January 20, 2023. App. 1.

REASONS FOR GRANTING THE WRIT

I. An egregious Sixth Amendment violation occurred at trial.

A severe constitutional error infected Mr. Howard's trial when he was saddled with attorneys whose office had deep ties to the victim and hostility to their own client, against the wishes of all involved and for no practical reason. Summary reversal is in order because "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Pavan v. Smith*, 582 U.S. 563, 567–68 (2017) (Gorsuch, J., dissenting) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)).[3]

There are no procedural impediments to summary reversal. When Justices of this Court have expressed reluctance to intervene in federal habeas matters, it is

[3] Unless otherwise noted, in this petition, all internal quotation marks and citations are omitted, and all emphasis is added.

because the stringent requirements set by the Antiterrorism and Effective Death Penalty Act (AEDPA) prevent a straightforward application of the law. *See, e.g.*, *Peede v. Jones*, 138 S. Ct. 2360, 2361 (2018) (Sotomayor, J., respecting the denial of certiorari) ("Considering the posture of this case, under which our review is constrained by the [federal habeas standard of review], I cannot conclude the particular circumstances here warrant this Court's intervention," even though the lower court's approach was "deeply concerning."); *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) (Ginsburg, J., concurring) (remarking that the issue presented deserved a "full airing" but that given AEDPA's restrictions it was not a good vehicle for such an airing in its current posture).

Here, there is no dispute that Mr. Howard's is one of the increasingly rare cases in which pre-AEDPA law applies, since he filed his petition before the passage of the Act. *See* 9th Cir. Dkt. 119-10 at 1793. Thus, the Court need only conduct an independent examination of the federal constitutional principles at play, without having to deal with more complicated questions concerning comity and deference. *See, e.g.*, *Bradshaw v. Stumpf*, 545 U.S. 175, 182–88 (2005) (remanding in a pre-AEDPA case). Additionally, Mr. Howard's constitutional claim was incontrovertibly exhausted in the proper fashion in the state courts. *See Howard I*, 729 P.2d at 1342 (addressing the issue on the merits).

In sum, the legal question is squarely presented, there are no obstacles to its consideration, and it was wrongly decided below in a serious case involving a first-degree murder conviction. Under those circumstances, summary reversal is

warranted. *See Burns v. Mays*, 143 S. Ct. 1077, 1080 (2023) (Jackson, J., dissenting) (describing how "[t]he Court's failure to act" was "disheartening because th[e] case reflects the kind of situation where the Court ha[d] previously found summary action appropriate," i.e., one in which "[t]he relevant facts are not in dispute, and the decision below clearly conflicts with settled law of this Court on an important matter").

Turning to the substantive constitutional issue, the Sixth Amendment gives criminal defendants the right to counsel with undivided loyalty. *See Wood v. Georgia*, 450 U.S. 261, 272 (1981). When circumstances outside the reasonable control of the defendant objectively prevent a functional attorney-client relationship, the accused's ability to assist in his own defense is compromised, and the Sixth Amendment is flouted. *See Riggins v. Nevada*, 504 U.S. 127, 144 (1992); *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984); *Geders v. United States*, 425 U.S. 80, 91 (1976). These principles were not fulfilled in Mr. Howard's case, where he reasonably lost all confidence in his attorneys and where the trial judge still denied multiple timely requests for substitution on no basis except sheer stubbornness.

As the facts recited above in the statement of the case reflect, any defendant in Mr. Howard's shoes would have had serious reservations about his attorneys. Mr. Howard was a poor black man from another part of the country facing capital charges and he was *introduced* to his lawyers by learning that their supervisor had a long relationship with the victim. *See Howard v. State*, No. 67469, at *4 (Nev.

July 30, 2014) (recognizing the "plethora of mitigation evidence" associated with Mr. Howard, including that he watched his father kill his mother and sister when he was three, that he was sent to a state home in Alabama rife with "significant physical, sexual, and emotional abuse by the staff and other children," and that he was "deployed to Vietnam as a minesweeper" with the Marines "and subsequently experienced significant stress and trauma from sweeping for mines and living under the constant threat of sniper fire").

What reason would a defendant in such circumstances have for believing in his attorneys? Later developments only cemented Mr. Howard's reasonable skepticism of his counsel. About a month after the ill-fated introduction to his counsel, Mr. Howard was told that one of their coworkers wished to see him executed. 9th Cir. Dkt. 119-08 at 1394. It is difficult to imagine circumstances in which distrust by a defendant would be more legitimate.

Nor would any of the other circumstances have placated a reasonable defendant. To the contrary, every event that occurred at trial would have reinforced any defendant's animosity towards counsel.

A. Mr. Howard had no reason to trust trial counsel.

First, the trial court itself did everything in its power to destroy any possible faith Mr. Howard might otherwise have maintained in counsel. Over the course of a number of different hearings, the judge sternly chastised trial counsel in Mr. Howard's presence for mishandling the case. A sampling of such rebukes includes:

- Mr. Howard "probably should feel a little disgusted" with counsel's lack of communication.

- Counsel had handled the case "without any diligence and apparently incompetently."
- The trial court was "shocked" at how "bungled up" counsel had allowed the case to become.
- "[A]ny citizen should be offended by this lack of adequate representation."
- The judge had seen the CCPD display a lack of preparedness "on many, many other occasions."

9th Cir. Dkt. 119-08 at 1425, 1384, 1385, 1395.

Importantly, the trial court attributed counsel's failings to their office as a whole, stating that it was "more concerned about the administrative mores in the office of the public defender" than anything else. *Id.* at 1384. Any defendant listening to the authority figure in the courtroom castigating the public defender's office in such severe terms would not regard the office as fit for his case.

B. The trial court did not conduct the required inquiry.

Second, there was never any attempt by the trial court to inquire into the conflict or resolve it in any fashion. When a trial court learns of a potential conflict between defendant and attorney, it has an obligation under the Sixth Amendment "to inquire further." *Wood*, 450 U.S. at 272. The trial court here did not satisfy its duty to inquire, and the weak remedial measures taken would only have deepened a reasonable defendant's hostility to the office.

Far from undertaking any meaningful inquiry, the trial court went out of its way to demonstrate a persistent desire to learn *as little* as possible about the

conflict. It cut off every person who tried to explain the conflict based on nothing more than a rigid predetermination to keep counsel on the case.

Upon learning of the conflict, the trial court's first reaction was to interrupt the attorney who was describing the situation and instruct him to steer clear of the case, without any effort to explore the matter. 9th Cir. Dkt. 119-08 at 1437. When the subject came up next, the judge responded to counsel's disclosure of "an irreconcilable breakdown" between attorney and client by summarily ordering the CCPD to stay on the case. *Id.* at 1424–26. The trial court took the same approach with Mr. Howard himself. Mr. Howard could hardly get out a sentence or two in describing the conflict before the trial court interjected to move him along. *Id.* at 1417–21. The trial court silenced Mr. Howard no fewer than five times, and never allowed him to speak more than three sentences at once. *Id.* And finally, after being notified that a CCPD attorney had openly supported Mr. Howard's execution, the trial judge denied counsel's motion to withdraw without any articulated justification, while asking no questions about the extremely troubling development. *Id.* at 1394–95. Instead, the trial court simply declared that the "motion is denied and was denied" earlier. *Id.* Worst of all, the trial court attempted to prevent counsel from even *bringing up* the fact that a colleague supported Mr. Howard's execution. *Id.*

A fait accompli is not an inquiry, and these are not the actions of a judge invested in establishing an adequate basis for making an informed ruling on a

grave issue in a capital case. They are the actions of a judge committed to keeping counsel on a case at all costs and for no apparent reason other than obstinacy.

The trial court's only action in response to the conflict made things far worse. It specified that the public defender himself along with every single other employee of the office was forbidden from touching the case. *Id.* at 1383. In other words, the only two members of the office who were allowed to be involved in Mr. Howard's defense were Messrs. Cooper and Franzen. The question a reasonable defendant would ask in those circumstances is how he could possibly be comfortable with an office that just had 99% of its staff ordered off the case. If it was necessary to take such an extraordinary step with respect to the CCPD as a whole, surely—from Mr. Howard's perspective—there was something profoundly wrong with the CCPD as a whole being on the case to begin with.

A proper inquiry by the trial court would have posed a number of serious questions. For starters, the record discloses almost nothing about Mr. Gibson, the public defender who "expressed his hope that [Mr. Howard] be executed." *Id.* at 1394. Who was Mr. Gibson? What was his position? Did he work closely or socialize with trial counsel? Did he or Mr. Jackson, the supervisor, know the victim's family well in addition to the victim himself? Two immediate family members of the victim offered extensive and essential testimony at the guilt-phase portion of Mr. Howard's trial. Dist. Ct. Dkt. 337-25 at 94–152; Dist. Ct. Dkt. 338-2 at 87–123. It is quite understandable that a defendant would be skeptical about the

capacity of his attorneys to zealously cross-examine grieving witnesses who were close with members of (and a supervisor in) the lawyers' office.

Perhaps most problematic of all, the public defenders intimated on appeal that Messrs. Jackson and Gibson were not the only ones in the office hostile to Mr. Howard. Dist. Ct. Dkt. 340-6 at 15 (referring to Mr. Jackson and "[o]ther members of the office" who had "expressed dislike of the defendant"). Who were these other people? Did they have connections to the victim? What were their ties to trial counsel?

These, and others like them, are all eminently reasonable questions. Not one of these questions was ever asked by the trial judge, let alone answered. The trial court fell far short of its constitutional duty to make a reasonable inquiry into the conflict.

C. The substitution requests were timely.

There is no question that the effort to remove the CCPD from the case was timely. *See Holloway v. Arkansas*, 435 U.S. 475, 486–87 (1978) ("When an untimely motion for separate counsel is made for dilatory purposes, our holding does not impair the trial court's ability to deal with counsel who resort to such tactics.").

The conflict between Mr. Howard and the CCPD was immediately apparent the instant the office was appointed, as was made clear by Mr. Jackson's opening remarks to the court at the arraignment on November 30, 1982, when it was revealed that Dr. Monahan was a family friend of Mr. Jackson's. 9th Cir. Dkt. 119-08 at 1437. Mr. Howard then filed a motion to substitute counsel on December 23, 1982, *id.* at 1416, and his trial was eventually continued to April 11, 1983, three

and a half months later, *id.* at 1179. Even if the first opportunity to substitute counsel is taken to be Mr. Howard's motion, rather than the arraignment, that still gave the court ample time to remove the CCPD from the case and appoint private counsel for Mr. Howard. His attorney "[had not been] available to work on the case" from the time he had been appointed the month before, *id.* at 1422, and so there would have been no delay involved in getting new counsel up to speed.

D. Prejudice is presumed.

When the relationship between attorneys and client breaks down to such an extent that the defendant can be said to effectively have no functioning counsel at all, prejudice is presumed and reversal is appropriate. *Cf. Perry v. Leeke*, 488 U.S. 272, 278 (1989). That is based on "the fundamental importance of the criminal defendant's constitutional right to be represented by counsel." *Id.*; *see Entsminger v. Iowa*, 386 U.S. 748, 751 (1967) (examining the right to counsel who operates "in the active role of an advocate"). Such a breakdown occurred here, making reversal necessary without any further analysis of prejudice.

There were frequent attestations by both Mr. Howard and every single one of the relevant public defenders over the entire lifespan of the case that no real attorney-client bond was ever formed, and no real communication ever took place. On December 30, 1982, a month after his appointment, the initial lead counsel, Mr. Peters, apprised the court that Mr. Howard had "really been unwilling to discuss the case." 9th Cir. Dkt. 119-08 at 1424. Several days later, on January 4, 1983, the public defender who ultimately became second-chair trial counsel, Mr. Franzen, noted that Mr. Howard had "refused to discuss the case with us" or share "any

knowledge of the case." *Id.* at 1411. Lead trial counsel, Mr. Cooper, echoed the sentiment on January 10, 1983, stressing that Mr. Howard did "not trust" the public defenders and that he had "continually refused[] to discuss [the] case with us." *Id.* at 1395. On the day trial began, April 11, 1983, counsel confirmed that nothing had ever changed, and there "never was any communications." *Id.* at 1184. When the penalty-phase began, on May 2, 1983, counsel again commented on the "irreconcilable differences" between them and Mr. Howard. 9th Cir. Dkt. 128-03 at 504. On direct appeal, on November 8, 1984, the CCPD moved to withdraw from the appeal on the ground that there was still no functioning relationship. Dist. Ct. Dkt. 340-6. Counsel's account was the same by the time of the evidentiary hearing in state court on the initial post-conviction petition, where Mr. Franzen testified under oath that Mr. Howard "was not cooperating with the defense of his case and he did not wish to speak with us, and, indeed, he did not," all because "he did not trust us," leading to a lack of cooperation "throughout the pendency of this case." 9th Cir. Dkt. 119-05 at 731, 740, 745–46.

Because there was never any real relationship between Mr. Howard and counsel, he was effectively denied any representation whatsoever. Prejudice is consequently presumed. It follows that Mr. Howard should finally be afforded the fair trial that he has so far been denied.

II. The lower federal courts erred in denying relief.

The decisions denying the claim below are indefensible. Mr. Howard will first address the Ninth Circuit's reasoning and then the district court's.

A. The Ninth Circuit's opinion was erroneous.

The Ninth Circuit made three key missteps in its decision below: 1) portraying Mr. Howard as obstructing counsel before the conflict arose; 2) accusing Mr. Howard of concocting the conflict; and 3) relying on the trial court's firewalling order as a solution for the problem. Mr. Howard takes each in turn.

1. The panel's chronology was mistaken.

On the first point, it was the Ninth Circuit's view that Mr. Howard's "refusal to cooperate with counsel began before most of the facts giving rise to the alleged distrust occurred." App. 1. But what the panel failed to acknowledge—let alone engage with—was the undisputed fact that Mr. Howard reasonably doubted counsel from the moment he met them. For it was at that moment (at the November 30, 1982 arraignment) that Mr. Howard was put on notice that a supervisor in the office had been a patient of the victim's dentistry's practice for fifteen years and that his parents "both knew [him] well." 9th Cir. Dkt. 119-08 at 1437.

Although it is true that *further* reasons to distrust the public defenders emerged later, that does not change the fact that Mr. Howard was already justifiably suspicious of them. Indeed, Mr. Howard pointed to Mr. Jackson's comments as a major source of his discontent in his earliest request for substitution, which was made in a pro se motion dated December 23, 1982. Dist. Ct. Dkt. 336-14 at 3. Both he and his trial attorneys themselves continued to consistently identify Mr. Jackson's familiarity with the victim as a critical sticking point in the lawyer-client rapport throughout the proceedings in the trial court. 9th Cir. Dkt. 119-08 at 1418 (Mr. Howard stating on December 30, 1982 that the victim "was directly a

friend with the public defenders here"); Dist. Ct. Dkt. 337–20 at 3 (Mr. Howard emphasizing the Mr. Jackson problem in the first paragraph of a letter seeking substitution dated April 8, 1983); 9th Cir. Dkt. 119-08 at 1422 (Mr. Peters, one of Mr. Howard's public defenders, describing Mr. Jackson's "friendship with" the victim as a primary basis for animosity during a colloquy with the trial court on December 30, 1982).

These uncontroverted facts make it constitutionally irrelevant that *some* "of the facts giving rise to the alleged distrust occurred" after Mr. Howard declared his antagonistic position toward trial counsel. App. 1. By the time of those later events, Mr. Howard was already poisoned against the public defenders—he was poisoned against them from the day he met them. Contrary to the panel's reasoning, it hardly makes Mr. Howard's conduct unreasonable that his initial wariness of trial counsel was subsequently *reinforced* by the public defenders' later behavior, including their unsolicited announcement in open court that at least one other colleague of theirs was also close with the victim and had "expressed his hope that our client be executed." 9th Cir. Dkt. 119-08 at 1394.

The panel's unexplained focus on the later events would only make sense if Mr. Howard's original adverse reaction to Mr. Jackson's comments was unwarranted. But the panel never offered the implausible contention that a defendant acts unreasonably when he lacks confidence in an office that is introduced to him at the moment of appointment through a supervisor whose first words are to associate himself and his family with the victim. It would be difficult

to defend such a perspective. Mr. Howard was facing first-degree murder charges and a possible death sentence. At the instant he first laid eyes on his counsel, it was to hear from an attorney that he was a supervisor in the office and that he and his family had a longstanding relationship with the victim. What defendant would not be troubled after meeting his counsel—the individuals tasked with saving his life—under those circumstances?

2. Mr. Howard did not manufacture the conflict.

While the panel insisted that "the district court could reasonably conclude that Howard manufactured the alleged conflict," App. 1, he was not responsible for any of the above. Mr. Howard did not somehow induce the trial court into appointing him lawyers who worked under a manager who had a long association with the victim. Mr. Howard did not conjure up a colleague of trial counsel who was speaking publicly in support of an execution. And Mr. Howard did not prevent the trial court from taking the easy, simple, and obvious step of excusing defense counsel when the lawyers and the client repeatedly asked for that remedy at a time where it would have literally had no impact on the case. *See, e.g.*, *Koza v. Eighth Jud. Dist. Ct.*, 665 P.2d 244, 245 (Nev. 1983) (per curiam) (noting that the trial court appointed private counsel in a capital case in which the CCPD was conflicted out of representing the defendant). The extremely unusual factors that collectively violated Mr. Howard's Sixth Amendment rights were outside his control, and the panel misapprehended the facts in ruling otherwise.

Without discussing the record, the panel characterized Mr. Howard as having "selectively chose[n] when to cooperate with his counsel." App. 1. In truth, there is

no substantial evidence that Mr. Howard ever meaningfully collaborated with trial counsel and ample proof to the contrary. Quite to the contrary, as demonstrated above, Mr. Howard and all of his lawyers uniformly confirmed over the course of the entire proceedings that no communication had ever occurred from the "inception of [the] relationship" to its end. App. 17.

Mr. Howard's lack of contumacy is also highlighted by the fact that he cooperated fully with numerous subsequent attorneys. For instance, although he refused to sign releases for his trial lawyers, *see* App. 16, Mr. Howard did so for several lawyers from other offices, *see* Dist. Ct. Dkt. 377-36. Mr. Howard even signed a release for Patricia Erickson, who did such a poor job with the case that she was removed by the district court for having demonstrated a "lack of effort," "abdicat[ing] her administrative responsibilities," and performing "little or no substantive work on Mr. Howard's behalf" while repeatedly blowing deadlines (and who later admitted that she "detested" Mr. Howard), all of which led the judge to refer her to the Nevada State Bar Association for possible sanctions. *See* Dist. Ct. Dkts. 218, 222. Thus, Mr. Howard's actions demonstrate that it was a sincere and reasonable distrust in the CCPD that led to his lack of cooperation with them and not any gamesmanship on his part.

3. The trial court's firewalling order was inadequate.

The Ninth Circuit likewise erred in concluding that the trial court's firewalling approach was sufficient to address the conflict. App. 1. Although one concern for a reasonable defendant in Mr. Howard's position would be the prospect of a supervisor meddling directly in the case, and that concern would conceivably be

addressed by the firewalling, it is not the only concern. Most importantly, throughout the trial and afterwards the defense lawyers would presumably be reporting to Mr. Jackson as their supervisor with respect to every other case, and would continue to be his subordinates. Consequently, the reasonable defendant would wonder what sort of problematic incentives the lawyers might have. Would they feel comfortable fighting aggressively for the acquittal of a defendant charged with murdering their boss's dentist and family friend? What ramifications might the lawyers face if they were to win? Would Mr. Jackson be able to punish them through their case assignments? Would he be able to demote them? Could he fire them? Would he be able to reduce their compensation? Would they face social sanctions? Notably, Howard framed the conflict in precisely those terms in post-conviction, asking why counsel would "want to help a convicted murderer to get off and they have to answer to their boss." 9th Cir. Dkt. 119-05 at 799.

And what about the assignment of the case to the lawyers to begin with? The public defenders later averred that Mr. Jackson was the one who tapped lead trial counsel for the matter. Dist. Ct. Dkt. 340-6 at 18. What considerations might motivate Mr. Jackson to select certain subordinates over others in choosing the attorneys who would represent a man charged with killing an old acquaintance and family friend? Did the supervisor delegate the case to less skilled or experienced lawyers because he wished to make a conviction more likely?[4]

[4] Significantly, neither of Howard's attorneys had ever taken a capital case to trial before. *See* 9th Cir. Dkt. 119-05 at 736; Dist. Ct. Dkt. 377–13 at 2.

More broadly, the Ninth Circuit's approach fails to appreciate the vantage point of Mr. Howard himself. Mr. Howard was a poor black man facing capital murder charges in an unfamiliar state. His contact with the office leading up to that point had consisted of a supervising attorney discussing his close friendship with the victim; a second colleague rooting for an execution; and none of the attorneys he dealt with being willing to establish a relationship with him. While it is easy for the Ninth Circuit to declare itself satisfied by the firewall order, undersigned counsel respectfully submit that any defendant in Mr. Howard's own shoes would have been just as distrustful of the CCPD as a whole. As Mr. Howard himself put the point, he "couldn't possibly trust . . . *anyone* related with the public defender's office." 9th Cir. Dkt. 119-08 at 1420. Setting aside the benefit of 20-20 hindsight and the comfort of Monday morning quarterbacking, almost every other defendant would have said the same under the circumstances.

B. The federal district court's order is off-base.

The federal district court's reasoning was no more persuasive. In denying this claim below, the federal district court found that the record suggested Mr. Howard was "trying to manipulate the proceedings" by invoking his right both to a speedy trial and to the effective assistance of counsel. 9th Cir. Dkt. 119-02 at 52–53. Such reasoning ignores the structure of the judicial system: Mr. Howard did have a right to both, and it is unfair to belittle his interest in vindicating both guarantees as somehow underhanded. The district court's intimation that Mr. Howard was obligated to sacrifice one of these rights in order to have the benefit of

the other is inappropriate. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.").

Furthermore, the speedy-trial issue is a red herring. For one thing, it was only the trial court's own failure to promptly deal with substitution that arguably made the speedy-trial right an issue in the first place. Mr. Howard first moved to substitute counsel on December 23, 1982, only a month after his arraignment, when he already knew that his attorneys' boss had several personal ties with the victim, at which point there was already no trust and no communication present. 9th Cir. Dkt. 119-08 at 1416–24. Counsel themselves renewed the motion to withdraw on January 10, 1983, on the basis of the same problems, and at a time when they were "totally unprepared to proceed to trial." *Id.* at 1395. Had the court replaced counsel then, as it should have, there would have been no cost to pay in terms of familiarity with the case, because the defense lawyers themselves had none by their own admission. The fact that the conflict persisted until trial was an inevitable consequence of the judge's refusal to remove the attorneys at a time when it could easily have been done.

In addition, the trial judge's tacit assumption was that he was somehow obligated to prioritize Mr. Howard's speedy-trial rights over his entitlement to non-conflicted counsel. The assumption is backwards. Speedy-trial timelines are extendable in Nevada state court upon a mere showing of good cause, and it is not a demanding standard. *See Huebner v. State*, 731 P.2d 1330, 1332 (Nev. 1987)

(finding good cause where the scheduled trial date conflicted with a testifying officer's vacation plans). A defendant's waiver of speedy-trial rights "can be expressed by counsel," *Furbay v. State*, 998 P.2d 553, 555 (Nev. 2000), even without the defendant's endorsement, *see Schultz v. State*, 535 P.2d 166, 167 (Nev. 1975). It is likewise black-letter law that attorneys are permitted to suspend their clients' speedy-trial rights even over the defendant's objection. *See State v. McHenry*, 682 N.W.2d 212, 224 (Neb. 2004) (collecting cases). The trial judge would have been well within his rights to continue the case, regardless of Mr. Howard's preferences, in order to accommodate his Sixth Amendment right to an attorney with whom relations had not deteriorated beyond repair—especially if it had been the kind of modest continuance that was readily available.

What is more, the trial judge *did* eventually waive the speedy-trial date. 9th Cir. Dkt. 119-08 at 1386. With that in mind, the speedy trial timeline clearly did not prevent the judge from assigning new counsel. Quite to the contrary, if the trial judge was going to waive the speedy-trial deadline, he easily could have appointed new counsel at the same time.

Without doubt, one could sensibly criticize Mr. Howard's desire to move forward to a trial in a few months with brand-new attorneys as being unrealistic. But that is a criticism of Mr. Howard's position *on the speedy-trial right*. It is not a criticism of his position on his Sixth Amendment right to counsel with whom he had a functioning relationship. On that right, Mr. Howard had an eminently logical attitude: that it was improper to impose upon him attorneys with an office so

thoroughly compromised in its representation. Mr. Howard also believed that it did not matter how long the CCPD had to prepare, because they would do a poor job regardless. 9th Cir. Dkt. 119-08 at 1411. That too was rational, especially in light of the fact that the judge himself consistently berated trial counsel for their "lack of adequate representation." *Id.* at 1385.

In short, because the trial court refused to accommodate Mr. Howard's well-founded request, it violated his Sixth Amendment rights.

CONCLUSION

The decision below should be summarily reversed. Alternatively, the petition for certiorari should be granted and the case set for merits briefing and oral argument.

Respectfully submitted this 26th day of June 2023.

/s/ Jonah J. Horwitz
Jonah J. Horwitz*
Deborah A. Czuba
Capital Habeas Unit
Federal Defender Services of Idaho
702 West Idaho Street, Suite 900
Boise, Idaho 83702
Telephone: 208-331-5530
Facsimile: 208-331-5559

*Counsel of Record