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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APPLICATION TO EXTEND THE TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

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To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Applicant Samuel Howard, through undersigned counsel and pursuant to Supreme Court Rules 13.5, 22, and 30.3, moves for a sixty-day extension of time in which to file his petition for writ of certiorari, up to and including July 21, 2023. Absent an extension of time, the petition for writ of certiorari would be due on or before May 22, 2023. This application is being filed more than ten days before that date and no previous extensions of time have been requested.

The judgment for which review is sought is *Howard v. Baker*, No. 10-99003, 2023 WL 334011 (9th Cir. Jan. 20, 2023) (attached as Exhibit 1). The Ninth Circuit denied Mr. Howard's petition for panel rehearing and rehearing en banc on February 21, 2023 (attached as Exhibit 2). This Court will have jurisdiction over any timely-filed petition for certiorari in this case pursuant to 28 U.S.C. § 1254(1).

REASONS JUSTIFYING AN EXTENSION OF TIME

1. The undersigned attorney is lead counsel for Mr. Howard and will have primary responsibility for drafting the certiorari petition in this case.

2. Undersigned counsel's work obligations prevent him from adequately preparing the petition for certiorari by the current deadline.

3. Unless otherwise noted, all of the following cases are capital and all of the referenced dates are in 2023.

4. Since the Ninth Circuit denied the petition for rehearing below, counsel has had the following obligations.

5. On February 24, 2023, the State obtained a death warrant for counsel's client Gerald Ross Pizzuto, Jr., scheduling his execution for March 23, 2023. The undersigned is lead counsel for Mr. Pizzuto in his lethal-injection litigation, i.e., *Pizzuto v. Tewalt*, D. Idaho, No. 1:21-cv-359. The death warrant required a substantial amount of time-sensitive work on the case, including the filing of a motion for a stay of execution on February 28, 2023. There are only four attorneys in counsel's office and the undersigned therefore had extensive responsibilities with respect to Mr. Pizzuto's other execution-related litigation as well, including in his latest habeas proceedings in *Pizzuto v. Richardson*, D. Idaho, No. 1:22-cv-452, and in his conditions-of-confinement proceedings in *Pizzuto v. Tewalt*, D. Idaho, No. 1:23-cv-081.

6. On April 13, counsel filed a motion to compel discovery in the lethal-injection case noted above, which raised a series of issues of first impression concerning a new execution-secrecy statute that has never been litigated before.

7. On April 25, the undersigned filed a twenty-page motion for a stay pending state-court litigation in *Row v. Clement*, 9th Cir., No. 23-99004.

8. Counsel's significant upcoming deadlines are as follows.

9. The undersigned has a certiorari petition due at the U.S. Supreme Court on July 7 in a challenge to the Ninth Circuit's decision in *Creech v. Richardson*, 59 F.4th 372 (9th Cir. 2023). It challenges a forty-four page published

opinion in a capital case with a lengthy procedural history encompassing two separate death-penalty sentencings and numerous state and federal actions over the course of more than forty years. *See generally id.* at 376–82. The petition deadline has already received the maximum sixty-day enlargement and cannot be extended again.

10. Undersigned counsel is Chair of the Amicus Committee for the Idaho Association of Criminal Defense Lawyers. In that capacity, counsel has spent an extensive amount of time over the last two weeks researching and drafting an amicus brief in support of the appellant's petition for rehearing in *Hooley v. State*, Idaho Sup. Ct., No. 48846, a non-capital case. Counsel expects the brief to be due approximately May 4 but anticipates filing earlier for strategic reasons.

11. In addition to those obligations, counsel has continuing duties to oversee investigations and conduct legal research in his other cases, all of which are capital.

12. During the relevant time period, Mr. Horwitz has taken or will take at least five trips, including to Las Vegas for settlement negotiations in a first-degree murder case; to San Quentin, California for critical settlement-related discussions with a client; to Virginia for training; to Seattle for oral argument; and to Chicago to observe Passover with family, all of which further restricts the amount of time Mr. Horwitz has available to devote to the certiorari petition.

13. The anticipated certiorari petition in this first-degree murder case will present at a minimum a serious constitutional question about whether Mr.

Howard's Sixth Amendment rights were violated when he was forced to go to trial with attorneys under a supervisor who was friends with the victim and at an office with a colleague who expressed a wish that Mr. Howard be executed, all despite repeated and timely requests for substitution by both Mr. Howard and the trial attorneys.

Accordingly, Mr. Howard respectfully requests that the Court grant him an additional sixty days in which to file his petition for writ of certiorari.

Respectfully submitted this 26th day of April 2023.

/s/ Jonah J. Horwitz

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EXHIBIT 1

NOT FOR PUBLICATION

FILED

JAN 20 2023

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL HOWARD, Petitioner-Appellant, v. RENEE BAKER, Warden, Director of Nevada Department of Corrections, Respondent-Appellee.	No. 10-99003 D.C. No. 2:93-cv-01209-LRH-LRL MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted January 9, 2023
Pasadena, California

Before: WATFORD, FRIEDLAND, and BENNETT, Circuit Judges.

Samuel Howard appeals from the district court's denial of his pre-Antiterrorism and Effective Death Penalty Act habeas petition. We have jurisdiction under 28 U.S.C. §§ 1291, 2253, and we affirm. We decline Howard's request to expand the certificate of appealability ("COA").

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

1. The district court rejected, but certified for appeal, Howard's claim that his lack of communication with and distrust in his attorneys from the public defender's office amounted to a constructive denial of counsel based on an irreconcilable conflict. In rejecting Howard's claim, the district court found that the alleged conflict "was one of Howard's own making" and that Howard's "refusal to cooperate with counsel was unreasonable."[1] These findings were not clearly erroneous given the record. *See Crittenden v. Chappell*, 804 F.3d 998, 1006 (9th Cir. 2015).

Howard's refusal to cooperate with counsel began before most of the facts giving rise to the alleged distrust occurred. Howard's counsel complied with the court's orders that prohibited any attorneys in the public defender's office with personal conflicts to be involved in the case. And the record supports that Howard selectively chose when to cooperate with his counsel. Based on these circumstances, the district court could reasonably conclude that Howard manufactured the alleged conflict.

[1] We also note that the Nevada Supreme Court stated that the facts did not "objectively justify Howard's distrust of his attorney." *Howard v. State*, 729 P.2d 1341, 1342 (Nev. 1986) (per curiam). Howard argues that such statement was not a factual finding subject to deference. *See Burton v. Davis*, 816 F.3d 1132, 1140 & n.4 (9th Cir. 2016). We need not decide whether the Nevada Supreme Court's statement was a factual finding given the district court's clear factual findings.

Because the district court reasonably found that the alleged conflict was of Howard's own making, Howard was not constructively denied counsel. *Daniels v. Woodford*, 428 F.3d 1181, 1197–98 (9th Cir. 2005). Instead, the dispositive question is: "Did counsel provide constitutionally adequate counsel according to the standards established in *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]?" *Michaels v. Davis*, 51 F.4th 904, 939 (9th Cir. 2022). As Howard makes no argument that his attorneys were constitutionally inadequate, we affirm the district court's denial of this claim.

2. The district court also rejected, but certified for appeal, Howard's claim that his trial counsel was ineffective for failing to object to the premeditation instruction, which failed to define deliberation as a distinct element of first-degree murder.[2] Howard's claim fails because, even assuming this was an error on counsel's part, Howard cannot show the required *Strickland* prejudice: "that there is a reasonable probability that, but for [the error], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

[2] The precise issue before the district court was whether *Martinez v. Ryan*, 566 U.S. 1 (2012), excused the procedural default of this trial-level ineffective assistance claim. Instead of conducting a strict *Martinez* analysis, the district court determined that the ineffective assistance claim failed on the merits under *Strickland*. Because we agree, and because a successful *Martinez* claim requires a showing of a reasonable probability that the ineffective assistance claim would have succeeded under *Strickland*, Howard necessarily cannot satisfy *Martinez*. *See Runningeagle v. Ryan*, 825 F.3d 970, 982–83 (9th Cir. 2016).

There is no reasonable probability that the result would have been different had the court provided a separate deliberation instruction, as the record makes clear that the jury convicted Howard under the alternative felony murder theory. *See Riley v. McDaniel*, 786 F.3d 719, 726 (9th Cir. 2015) (an instructional error can be considered harmless if the court is "reasonably certain that the jury *did* convict him based on the valid felony murder theory" (cleaned up) (quoting *Babb v. Lozowsky*, 719 F.3d 1019, 1035 (9th Cir. 2013), *overruled on other grounds by White v. Woodall*, 572 U.S. 415, 421 (2014))).

The evidence that Howard killed the victim during a robbery was overwhelming. Indeed, it was so strong that the prosecutor focused almost exclusively on the felony murder theory during closing. The jury also returned a special verdict during the penalty phase that found the "murder was committed while the defendant was engaged in the commission of any robbery."[3] Given the record, we are reasonably certain that the jury convicted Howard under the felony murder theory. Thus, Howard's ineffective assistance claim fails for lack of prejudice.

[3] Although the Nevada Supreme Court held that this finding could not be used as an aggravating circumstance supporting Howard's death sentence, *see Howard v. State*, No. 57469, 2014 WL 3784121, at *6 (Nev. July 30, 2014), it still supports that the jury convicted him under the felony murder theory. The Nevada Supreme Court has since vacated Howard's death sentence. *See Howard v. State*, 495 P.3d 88 (Nev. 2021).

3. Howard seeks to expand the COA to include two uncertified issues: (1) whether the premeditation instruction was unconstitutional; and (2) whether *Martinez* excuses the procedural default of his claim that counsel was ineffective for failing to challenge Howard's competency to stand trial. *See* 9th Cir. R. 22-1(e).

As to the first uncertified issue, the district court determined in 2008 that the claim was procedurally barred from review. Even so, Howard contends that we can consider the merits of the claim because the Nevada Supreme Court addressed the merits in an intervening 2014 decision. *See Howard*, 2014 WL 3784121. We disagree. Even were we to construe part of the Nevada Supreme Court's decision as a merits determination, the court separately determined that the claim was barred under state procedural rules. *Id.* at *1–2. For that reason, we are barred from considering the claim. *See Loveland v. Hatcher*, 231 F.3d 640, 643–44 (9th Cir. 2000).

We also decline to expand the COA to include the second uncertified issue. As the district court correctly determined, even if counsel erred by failing to challenge Howard's competency, Howard cannot establish the requisite *Strickland* prejudice. No reasonable jurist would find that conclusion debatable given Howard's failure to produce any persuasive evidence that he would have been

found incompetent to stand trial. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

AFFIRMED.

EXHIBIT 2

FILED

FEB 21 2023

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL HOWARD, Petitioner-Appellant, v. RENEE BAKER, Warden, Director of Nevada Department of Corrections, Respondent-Appellee.	No. 10-99003 D.C. No. 2:93-cv-01209-LRH-LRL District of Nevada, Las Vegas ORDER

Before: WATFORD, FRIEDLAND, and BENNETT, Circuit Judges.

Petitioner-Appellant filed a petition for panel rehearing and a petition for rehearing en banc. Dkt. No. 147. The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.