

No. _____

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

BRUCE BIRCH, Petitioner,

v.

RENEE BAKER, Warden, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit incorrectly applied this Court's decision in *Johnson v. Williams*, in concluding that the state court adjudicated Birch's conflict of interest claim on the merits where, by the very terms of its decision, the state court was not addressing a constitutional conflict of interest claim, allowing Birch to overcome the presumption of a merits adjudication?

2. Whether an actual conflict of interest existed between Birch and his attorney after Birch spit in his attorney's eye and then stabbed him at trial, which resulted in Birch being charged with new crimes and making his attorney a witness against him, and which affected his attorney's performance, as the attorney made numerous negative comments about Birch at sentencing resulting in Birch being sentenced to life without parole on non-violent property crimes?

LIST OF PARTIES

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

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In The
Supreme Court of the United States

October Term, 2017

Bruce Birch,
Petitioner,

v.

Renee Baker, Warden
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Petitioner Bruce Birch respectfully requests that a writ of certiorari issue to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit. *See* Appendix B.

Birch's attorney operated under an actual conflict of interest that had an adverse effect on his representation of Birch. Birch physically assaulted his attorney, Robert Bruce Lindsay, on two occasions: Birch spit in Lindsay's eye at a pretrial court date and then he stabbed him in his hand during the first of his two trials. In response, Lindsay acknowledged his fear and animosity towards Birch. He told the court that Birch had to understand the consequences of his actions. These expressed personal feelings overwhelmed Lindsay's ability to zealously and single-mindedly represent Birch. Moreover, Birch was charged with both incidents, creating a clear

conflict of interest, as his attorney became a witness against him. This conflict had an adverse effect on Lindsay's representation. This became particularly acute at sentencing as Lindsay made numerous negative comments about his own client, including describing him as incorrigible. Birch was sentenced to life without parole for two minor, non-violent property crimes.

The Ninth Circuit rejected the conflict of interest claim under 28 U.S.C. § 2254(d)(1), concluding that there was no clearly established Supreme Court precedent that a defendant's repeated physical assaults on his attorney, which resulted in charges against the defendant, could establish an actual conflict of interest. *See* Appendix A. However, the statute requires that, for § 2254(d) deference to apply, there must be an adjudication on the merits in state court on the constitutional issue. Here, there was no such adjudication. In concluding that there was an adjudication on the merits, the Ninth Circuit misapplied this Court's decision in *Johnson v. Williams*, 133 S. Ct. 1088 (2013), which established a rebuttable presumption that a state court decision addressed a constitutional claim on the merits.

In fact, this is a quintessential situation, specifically identified in *Johnson*, where a federal court can find that the presumption of a merits adjudication has been rebutted. Birch specifically raised this constitutional claim on direct appeal. But, as even Respondent acknowledged, the state court was silent on this issue. Rather, the state court only addressed a somewhat-related substitution of counsel issue. But by the very terms of the opinion, the state court was not addressing a constitutional

claim. In rejecting this other claim, the state court utilized an abuse of discretion standard. Under the state court's own precedents, that type of standard is used for state law claims while the court engages in a *de novo* review for constitutional claims. This means that the state court necessarily overlooked the constitutional claim because it only addressed a state law issue under a more restrictive standard. This overcomes the presumption that there was an adjudication on the merits.

Under a *de novo* review of this claim, there was an actual conflict of interest. Lindsay's loyalties were divided between his duty to represent Birch and his own personal interests. The in-court assaults had a direct impact on Lindsay's ability to represent Birch. Lindsay's personal fear and animosity towards Birch overwhelmed his ability to zealously and single-mindedly represent his client. Lindsay directly expressed those concerns and anxieties in court, describing Birch's actions as "criminal" and relating his "real concern" about future attacks. He complained that Birch had to understand there were consequences to his actions. Those comments are understandable. It is illogical to conclude that an ethical or rational attorney could put those incidents out of his mind and remain as counsel for the individual who attacked him. Just as important, Birch was charged with both incidents, creating a clear conflict of interest, as his attorney became a witness against him.

Moreover, this conflict affected counsel's performance at sentencing. The Ninth Circuit held that counsel "zealously represent[ed]" Birch at sentencing. Appendix A at 3. But there is no reasonable way to describe counsel's performance at sentencing as zealous representation. Counsel made numerous antagonistic

statements about Birch at sentencing, including an outrageous comment that, if let go, Birch would immediately go out and commit further crimes. It is not surprising that, in light of his attorney placing him in such a harsh light, Birch was sentenced to life without parole.

While this Court has yet to conclude that the situation here presents an actual conflict of interest, the facts here demonstrate precisely why it should be extended here. The issue is one of exceptional importance as it concerns an extreme malfunction in the state court system. The Ninth Circuit erroneously applied the *Johnson* presumption. The petition should be granted.

OPINIONS BELOW

The panel decision of the Ninth Circuit Court of Appeals affirming the denial of Birch's petition for a writ of habeas corpus, issued on October 16, 2017, is unpublished. *See* Appendix B.

JURISDICTION

The district court denied Birch's Petition for Habeas Corpus relief under 28 U.S.C. § 2254 on December 7, 2015. *See* Appendix C. Birch timely appealed and the Ninth Circuit granted a certificate of appealability on the relevant issue. The Ninth Circuit affirmed the denial of the petition on October 16, 2017, Appendix B, and denied Birch's timely petition for rehearing on December 1, 2017, Appendix A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. *See also* Sup. Ct. R. 13(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that all defendants are entitled to the assistance of counsel.

STATEMENT OF THE CASE

A. Pretrial Proceedings—Lindsay Is Appointed as Counsel

Birch was charged with theft-related charges in two separate informations filed in the Second Judicial District Court in Nevada based on two separate incidents: (1) under case number CR08-1585, Birch was charged with burglary for allegedly stealing five wrenches and a pair of pliers from a Sears in Reno, Nevada on February 21, 2008 (“Sears”); and (2) under case number CR08-1586, Birch was charged with possession of a stolen Ford Truck valued at less than \$2,500 in Reno, Nevada, on February 21, 2008 (“Ford Truck”).¹

On September 9, 2008, Robert Bruce Lindsay was appointed as counsel for both cases after two prior attorneys were relieved due to conflicts of interest with Birch. Lindsay represented Birch all the way through sentencing on both cases.

B. Birch Spits in Lindsay’s Face in Courtroom

The relationship between Lindsay and Birch began to breakdown soon after Lindsay’s appointment. At a court date on October 24, 2008, Lindsay stated that he has “had the inability to deal with [Birch] and that’s the simple and short of it.” Lindsay claimed that Birch “is a fairly abusive man and the things that he said to me for the last month or whatever it’s been just silly, just ridiculous,” adding that he “is a most difficult client.” He concluded, “I believe you’re going to have to appoint another lawyer for him.”

¹ Birch was charged in a third information with a property-related crime in a separate incident. That charge is immaterial to this case.

Birch spoke to the court directly. He stated that he and Lindsay were in “bitter conflict” and their “attorney-client relationship has deteriorated to the point beyond help.” According to Birch, Lindsay was unprepared and did not have necessary documents. Birch claimed Lindsay’s phone would not accept his calls. During an attorney visit on the previous night, Birch alleged Lindsay screamed at him and made threatening gestures towards him. Birch stated that when they were in court on the Sears and Ford Truck cases, “two deputies stood between us to keep us apart.” The court did not directly address Birch’s complaints about Lindsay; it simply denied the “[m]otion to withdraw counsel.”

At the motion to confirm trial hearing on the Sears and Ford Truck cases, held on January 9, 2009, Birch informed the court he was “coming into some money from my mother’s estate,” and he would know the amount in two weeks. If the amount was sufficient, he intended to either hire a new attorney or hire an investigator to prove his allegations against Lindsay to “get him off the case.” He asked for a 30-day adjournment. The court denied that request.

In response Birch stated, “How do I get him off? Do I have to spit in his face right here right now? Because I’m going to. He’s not representing me. He’s taking me down the drain.” At that point, “Commotion ensued.” Birch had spit in Lindsay’s face, with some spit landing in Lindsay’s eye. The court ordered Birch out of the courtroom. Afterwards, Lindsay informed the court, “I will do everything I can as a defense lawyer.” He assured the court that he would “try to defend him the very, very

best I can,” but he understood that Birch was “angry” with him and “it’s very, very difficult stuff.”

C. Lindsay Admits Conflict Existed As a Result of the Spitting For Which Birch Got Charged With a Crime

On January 14, 2009, an “in chambers” status hearing was held outside of Birch’s presence. Lindsay stated that he “went yesterday to have my blood tested for five, six, seven different things that are apparently very communicable by being spit in the eye, none of them much fun, from the AIDS test to the hepatitis test to about five of them I’ve never even heard of.” Citing to *United States v. Garey*, 540 F.3d 1253 (11th Cir. 2008), Lindsay argued that a defendant’s conduct can “waive[] your appointed counsel.” He argued, “they don’t have the right to abuse me out there, but the law is very clear that if you’re going to be in conflict, and that case, as I got it, is much like this”

Lindsay indicated that he had fears about how Birch would treat him in the future: “I do not want to get spit on again and he has made threats, I believe, saying that he’s going to get me no matter what, and I do not want to have my, you know, I don’t want to get knifed in the throat. I’m sorry. Those are real concerns for me.” The court did not respond to Lindsay’s concerns.

At the end of the proceeding, the bailiff, Deputy Lorrington, confirmed that, because of the spitting, he had charged Birch with “felony propelling, which is a category B felony.”

At a status hearing on January 23, 2009, Birch asked the court to relieve Lindsay. Birch stated, “He treat[s] me like a piece of crap.” He added that Lindsay

was rude and abrasive to him, saying, “I’m never going to forget this. Then he said, if I come back dirty, I’m going to have you charged.” Birch claimed that Lindsay also said, “I want you to beg me to come see you.” Birch stated Lindsay had done no investigation, filed appropriate motions, and discussed the defense with him. Birch had filed 43 complaints against Lindsay in “an attempt to get rid of him.” Birch added, “I have cirrhosis of the liver. I don’t have 10 years left.” The court did not address the request.

At this same proceeding, Lindsay accused Birch of making false allegations against him and all of his prior attorneys. He emphasized, “It’s important to know, he’s personally attacked me, he’s hepatitis C. I need it on the record. I’ve been to the doctor a few times. I’ve already had my blood drawn a few times. I’ve been told the wonderful news that the incubation period for that stuff is six months to six years and nobody really knows.” He did not deny he had made the comments to Birch. He explained he was trying to tell Birch that it was unacceptable behavior. Birch was “trying to infect me. And it’s not just rude, it’s truly criminal.”

Lindsay said that Birch “needs to know there are consequences to this little theatrical stuff he’s pulling.” “[I]n spite of the conflict we have here going,” Lindsay “intend[ed] to do as good a job as I possibly can on behalf of my client in spite of the fact that he’s done everything he can to personally offend me and personally offend my children and all of the rest of it, your Honor.”

D. Sears Trial—Birch Stabs Lindsay During Trial

The Sears and Ford Truck cases had separate trials. The Sears case went first. On the day the Sears trial began, January 26, 2009, Birch once again stated that he did not want Lindsay representing him. Lindsay did not visit him over the weekend to discuss the case. They had never discussed “one word of the defense” and Birch was facing “multiple life sentences here.” Birch explained that Lindsay was not focusing on the main defense—there was no evidence to show he had an intent to steal when he entered Sears. Birch asked to represent himself and asked for a couple of weeks to prepare. Lindsay acknowledged that he did not go to see Birch over the weekend because Birch made comments in court that were “clearly not true.” Birch asked the court for a continuance or to “get rid of Mr. Lindsay,” but the court denied the request.

After a recess at the close of the evidence, the jury returned to the courtroom and the court asked for the parties to stipulate to the presence of the jury. At that point, again “commotion ensued.” Birch had stabbed Lindsay in the hand with a sharpened pencil. The stabbing required Lindsay to go to the hospital for “immediate treatment.” When the trial resumed, Lindsay acknowledged that he was a “little upset” when the stabbing occurred, but he was “much better.” He believed that he could “remove my personal feelings from my professional responsibility.” He wanted to finish the trial. He guaranteed the court he would give the best closing possible “given the circumstances of the case.”

Birch was convicted of burglary based on shoplifting five wrenches.

E. Ford Truck Trial—Lindsay Remains as Counsel After Stabbing

Although Lindsay's fear and anxiety of a physical attack had been realized, Lindsay continued his representation of Birch at the Ford Truck trial that began the day after the Sears trial ended. Lindsay's animosity towards Birch was evident at a status conference in court before the trial began. Lindsay accused Birch of being "less than honest" and had repeatedly accused him of "things that never happened." Lindsay's desire at that point was to "protect himself" against future claims that Birch may make against him. He believed that Birch was going to "make up" allegations against him.

During the Ford trial, Birch informed the court he was "booked" on both January 27 and 28 for the stabbing. He now had "pending charges" against him, making Lindsay a witness against him. Lindsay stated that while he refused to pursue any charges, he acknowledged that he had no control over what the District Attorney's Office did. Neither Lindsay nor the prosecutor denied that Birch had been charged for the stabbing.

At the end of trial, Birch was convicted of possession of a 20-year old stolen truck.

F. Lindsay Makes Numerous Negative Comments About Birch at Sentencing

At sentencing on March 27, 2009, the court had the parties address sentencing on the separate convictions before considering whether it should impose a habitual offender enhancement. If the court determined Birch was a habitual offender, the

court had the authority to impose a maximum sentence of life without the possibility for parole.

First, Lindsay addressed the sentence on the convictions. He pointed out Birch had been before courts “literally his whole life . . . and we’re back here again.” He complained, “My problem is I have a client who has somehow managed to take these little, itty-bitty cases and turn them into— you know, he’s 53 years old. He’s looking at somehow throwing the rest of his life away over nickel, dime cases.” He also stated, “The problem is that Mr. Birch tends to want to have an orchestra every time he does something and he tends to want to be the center of a large amount of attention and he somehow has worked his way into this enormous, insane position on what are really small felonies, your Honor.”

Lindsay added, “My client goes out of his way to aggravate the system. My client goes out of his way to poke people in the eye and make sure he gets some sort of attention.” He reiterated, “Mr. Birch has somehow figured out a way to aggravate the world in a way that he’s now standing in front of you with enormous time.”

In the amended information, the State alleged that Birch was a habitual offender and listed Birch’s prior felony convictions. He had three burglary convictions, two drug convictions, a possession of stolen property conviction, an ex-felon in possession of a firearm conviction, a grand larceny conviction, and a breaking and entering conviction.

In his statement Birch explained that his prior crimes included a possession of marijuana and possession of a stolen chain valued at \$120 that he believed would not

even constitute a felony anymore. One of the burglaries was for shoplifting four Christmas cards out of a Hallmark and another was for shoplifting a bottle of vodka out of an Albertson's. He stated that he had cirrhosis of the liver and would not live ten years.

After all parties addressed the sentence on the convictions, they turned to whether Birch should instead be sentenced as a habitual offender on the Sears and Ford Truck convictions. Lindsay described his response to the habitual offender question as "pretty brief." Outside of describing the current convictions as "nickel felonies" for "small things," arguing that the victims were made whole, and mentioning Birch's age, 53 years old, Lindsay presented no mitigating evidence or arguments. Rather, Lindsay focused predominantly on platitudes about human nature and claims about misconduct by Wall Street executives.

Lindsay did not argue that the prior convictions failed to support the imposition of the maximum sentence. He did not argue that Birch had accepted responsibility in all of his prior cases. He did not argue there were no allegations that Birch had ever physically injured anyone. He did not argue that the prior convictions were predominantly non-violent property and drug crimes, and the property crimes were relatively minor, mostly shoplifting for inexpensive items.

Instead, Lindsay argued that Birch was incorrigible. He stated, "[I]f you let him go today, he's going to go down to Sears in a stolen vehicle. He's 53. He's been

in the system his whole life and if you let him go today, I guarantee you by this afternoon, they'll be out following him and they'll pick him up at Sears or whatever.”²

At the close of sentencing, the court imposed the maximum sentence available, life without the possibility of parole for the two property crimes, with the sentences running concurrently. Appendix H.

G. Direct Appeal—The Nevada Supreme Court Does Not Address Actual Conflict of Interest Claim

Birch brought separate appeals to the Nevada Supreme Court from the Sears and Ford Truck convictions. In both appeals, Birch argued (1) the trial court abused its discretion in failing to grant the request to substitute counsel; and (2) he suffered a constitutional violation due to Lindsay’s conflict of interest. These two arguments were set forth in the point heading for Ground Three of both appeals. *Id.* Within the ground, Birch set forth the legal standards for substitution of counsel claims and federal constitutional conflict of interest claims, citing the leading Nevada state cases

² Lindsay has a documented history of failing to abide by his professional responsibilities. For example, in *Middleton v. Warden*, 120 Nev. 664, 98 P.3d 694 (2004), the Nevada Supreme Court removed Lindsay as appellate counsel because of bizarre unprofessional behavior, which included deleting the last eight pages of the appellate brief he filed in order to fit the brief within the court’s page limit requirement. Lindsay’s “‘amended’ opening brief was simply the original submitted brief with the final eight pages excised[,] . . . abruptly ending the discussion of one issue and completely omitting any discussion of four other issues listed in the brief’s table of contents.” *Id.* at 696-97. The court chastised Lindsay’s disregard for “the obligations incumbent upon him as counsel for a client facing a death sentence.” *Id.* at 697. As a result of *Middleton* Lindsay received a public reprimand. In fact, the Nevada Supreme Court removed Lindsay from Birch’s appeal as a result of *Middleton*. The Nevada Supreme Court has sanctioned Lindsay in two other appeals (*see* NSC docket numbers 33643, 38126), and has threatened sanctions in at least nine others (*see* NSC docket numbers 35298, 35300, 36885, 37086, 37956, 37957, 38671, 40518/40519, 43223). *See also Bradley Dwight Heinz v. State*, 2d Jud. Dist. Ct, County Of Washoe, Case No. CR03P1571 (order dated October 5, 2011, granting habeas petition based on Lindsay’s deficient performance at trial).

that analyze the federal standard. Birch pointed out there were different standards of review for the two challenges. He asserted that with respect to the constitutional challenge, the standard was de novo review. Regarding the denial of substitute counsel, the review was for an abuse of discretion.

Citing this Court's conflict of interest cases, Birch then discussed the actual conflict of interest claim in great detail in the Reply Briefs, explaining how Birch's assaults on Lindsay created a conflict of interest. He provided several examples of how the conflict affected Lindsay's performance.

In a single order of affirmance, the Nevada Supreme Court addressed the issues from both appeals. The court did not specifically address the constitutional conflict-of-interest claim. It reviewed only the substitution of counsel claim for an abuse of discretion:

Birch argues that the district court abused its discretion in denying his motion for new counsel in all three cases. Birch was being represented by his third attorney after relationships with his prior counsel had deteriorated. Despite being spat on and attacked in court, Birch's counsel repeatedly assured the district court that despite Birch's behavior, he would zealously represent Birch. Therefore, Birch fails to demonstrate that the district court abused its discretion in this regard. *See Garcia v. State*, 121 Nev. 327, 337, 113 P.3d 836, 843 (2005).

Appendix G.

H. Federal Proceedings

Birch filed a timely 28 U.S.C. § 2254 petition raising the conflict of interest claim. Counsel was appointed and an Amended Petition was filed also raising this

claim. Appendix F. In their Answer to the petition, Respondents acknowledged that the Nevada Supreme Court’s opinion was silent on this issue. Appendix E.

In his Reply, Birch argued that the conflict of interest claim had to be reviewed *de novo* because he could rebut the presumption that the Nevada Supreme Court did not decide this claim on the merits. Appendix D.

The district court denied the petition. Appendix C. The court did not decide the question of whether Birch was entitled to a *de novo* review of the claim. Instead, the court stated that even if he was entitled to a *de novo* review, the claim failed. The court implicitly concluded that the assaults had created a conflict, but there was no “actual conflict” because Birch could not demonstrate that the conflict affected Lindsay’s performance. *Id.* In rejecting the claim, the court did not address whether the evidence of Lindsay’s repeated antagonistic comments about Birch throughout the proceedings, including the string of negative comments at sentencing, demonstrated that the conflict had affected his performance at sentencing. The district court denied a certificate of appealability.

The Ninth Circuit granted a certificate of appealability on whether Birch was denied the right to effective assistance of counsel, including whether an actual conflict of interest existed. However, the court eventually affirmed the denial of the petition. Appendix B. The court rejected the conflict of interest claim under 28 U.S.C. § 2254(d)(1), concluding that there was no clearly established Supreme Court precedent that a defendant’s repeated physical assaults on his attorney could establish an actual conflict of interest. *See Id.* However, the panel ignored the

question of whether there had been an adjudication on the merits in state court on the constitutional issue, a prerequisite to § 2254(d) deference. The court added that Lindsay “zealously represent[ed]” Birch at sentencing, despite Lindsay’s numerous negative comments towards Birch, including the statement that Birch was incorrigible. *Id.*

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT ERRED IN IGNORING THE QUESTION OF WHETHER THE STATE COURT HAD ADJUDICATED THE CONFLICT OF INTEREST CLAIM ON THE MERITS.

Throughout the § 2254 litigation, Birch has argued that there was no adjudication on the merits of the conflict of interest claim in state court. An adjudication on the merits is a statutory prerequisite before § 2254(d) deference applies. The district court acknowledged the argument and reviewed the claim *de novo*. However, the Ninth Circuit ignored the argument completely. Instead, the panel simply applied § 2254(d) deference. Ignoring this argument was inappropriate as it was a central part of Birch’s claim, extensively litigated by the parties, and a statutory prerequisite before deference applies. Moreover, this Court’s precedent establish that the presumption of a merits adjudication is not irrebuttable. A petitioner is allowed to show that the state court overlooked a claim and failed to adjudicate it on the merits. That is precisely what Birch established here.

Section 2254(d) states that a habeas petition shall not be granted regarding any claim that was “adjudicated on the merits” in the State court proceedings “unless the adjudication of the claim—(1) resulted in a decision that was contrary to . . .

clearly established Federal law, as determined by the Supreme Court of the United States” 28 U.S.C. §2254(d)(1).

If a claim was not “adjudicated on the merits” in state court, no deference is necessary under § 2254(d) and the review is *de novo*. See *Cone v. Bell*, 556 U.S. 449, 472 (2009). This Court has held that when a federal claim has been presented to state court and the state court opinion addresses some of defendant’s claims, a rebuttable presumption arises on federal habeas review that the state court adjudicated the claim on the merits. *Johnson v. Williams*, 568 U.S. 289, 300-01 (2013).

However, if a petitioner can show that under the factual and legal circumstances, the state court overlooked the claim, then the petitioner is entitled to “an unencumbered opportunity to make his case before a federal judge.” *Id.* at 303. The presumption is rebuttable if the petitioner can show that “the state standard is quite different from the federal standard” or “the state standard is less protective” than the federal standard. *Id.* at 301 (emphasis in original).

The Court rejected the notion that a claim will always be considered adjudicated on the merits, even if the state court is silent on the matter, so long as the state court issued a reasoned opinion. Such an approach—that the state courts never overlook a federal claim—“would occasionally miss the mark.” *Id.* at 302. Rather, this Court emphasized that the presumption was not “irrebuttable.” *Id.*

The Ninth Circuit failed to follow this Court’s decision in *Williams*. The court completely ignored Birch’s argument—the main argument in the appeal—that he had

rebutted the presumption of a merits adjudication. Ignoring the argument is equivalent to concluding that the presumption was irrebuttable.

That was wrong. Indeed, this is the unusual case where Birch can rebut that presumption here. In its opinion, the Nevada Supreme Court did not expressly decide the conflict of interest issue even though it had been fairly presented in Birch's opening brief. Indeed, Respondent acknowledged in the district court that the Nevada Supreme Court's decision was silent on this issue. Based on the factual context and the legal principles involved, Birch can overcome the presumption that the Nevada Supreme Court's silence on the issue was an adjudication on the merits of the conflict-of-interest claim.

It is more than apparent from the Nevada Supreme Court's decision that the standard the Nevada Supreme Court used to decide the substitution of counsel issue was both different from and less protective than the federal standard. In the Nevada Supreme Court, Birch presented the ground as both an argument that the trial court abused its discretion in failing to grant the request to substitute counsel and that he also suffered a constitutional violation due to an actual conflict of interest. Critically, Birch pointed out, under Nevada Supreme Court precedent, there were different standards of review for the two challenges—abuse of discretion for the substitution claim and de novo for the constitutional claim.

Thus, the briefs clarified that two separate types of review needed to occur. The Nevada Supreme Court had to engage in a higher level of review regarding the constitutional conflict-of-interest challenge.

However, the state court did not engage in that higher level of review. The court only reviewed the substitution of counsel claim for an abuse of discretion. The case that the court cited, *State v. Garcia*, 121 Nev. 327, 337, 113 P.3d 836, 843 (2005), solely concerned the factors a court should consider when reviewing the denial of a state law substitution motion for an abuse of discretion. In fact, the court stated twice, that it was reviewing the issue simply to determine whether the lower court “abused its discretion in this regard.” Appendix G.

Because the court only reviewed the issue for an abuse of discretion, it necessarily did not address the constitutional conflict of issue claim as that review had to be de novo. Indeed, reviewing an issue under a more restrictive state law standard was specifically identified in *Williams* as one of the ways that a petitioner can overcome the presumption of an adjudication on the merits. *See Williams*, 568 U.S. at 301.

Furthermore, the state court’s decision did not implicitly or indirectly address the conflict-of-issue claim. The state court reasoned:

Birch argues that the district court abused its discretion in denying his motion for new counsel in all three cases. Birch was being represented by his third attorney after relationships with his prior counsel had deteriorated. Despite being spat on and attacked in court, Birch’s counsel repeatedly assured the district court that despite Birch’s behavior, he would zealously represent Birch. Therefore, Birch fails to demonstrate that the district court abused its discretion in this regard.

Appendix G.

There is nothing in this analysis that addresses the conflict of interest question. The court did not discuss Birch’s claims about the basis for the conflict of

interest, namely whether counsel's personal interests diverged from Birch's, and did not discuss whether this conflict adversely affected counsel's performance, although these were alleged in the briefs. These questions were different from the substitution-of-counsel issue. The latter standard looks at whether there has been a breakdown in the attorney-client relationship such that the defendant was deprived of the assistance of counsel. *See Garcia*, 121 Nev. at 337, 113 P.3d at 843. In contrast, the conflict of interest standard looks at whether an attorney is suffering with divided loyalties that affected his performance.

These standards are independent of one another and are not interchangeable. An attorney can suffer with divided loyalties without there being a breakdown in the attorney client relationship. And there is a difference between a conflict that would result in a ground for a substitution of counsel motion and a conflict of interest due to divided loyalties. The former is a discretionary decision left to the trial court based on the court's review of the status of the interpersonal relationship between the attorney and the defendant while the latter is an objective backward-looking legal determination based solely on the existence of divided loyalties on the attorney's part and whether those loyalties affected the attorney's performance. An attorney's assurances he can continue, the only factor the state court relied upon, were only relevant to the discretionary substitution of counsel issue.

Accordingly, it is clear that the state court could not have been addressing a conflict of interest issue. And, as discussed before, by the very terms of the opinion,

it necessarily was not as the court would have needed to address that type of constitutional claim de novo.

Thus, there was no adjudication on the merits of the claim and the federal courts must engage in an independent review. The Ninth Circuit clearly erred in ignoring this necessary prerequisite to applying § 2254(d) deference.

II. THIS CASE PROVIDES THE COURT AN IDEAL OPPORTUNITY TO DECIDE WHETHER AN ACTUAL CONFLICT OF INTEREST EXTENDS TO SITUATIONS WHERE THE ATTORNEY'S PERSONAL INTERESTS DIVERGE FROM THE CLIENT'S

This case provides this Court with an ideal opportunity to determine whether a defendant's constitutional right to have an attorney free of actual conflicts of interest includes the situation where an attorney's personal interests diverge from the client's.

The Sixth Amendment right to counsel includes the right to representation free from conflicts of interest and undivided loyalties. *See Wood v. Georgia*, 450 U.S. 261, 271 (1981). To establish that counsel was ineffective due to a conflict of interest, a defendant must show a conflict of interest existed and it had an adverse effect on counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *see also Mickens v. Taylor*, 535 U.S. 162, 171-74 (2002). If an actual conflict of interest is established, the defendant need not prove Strickland actual prejudice. *Cuyler*, 446 U.S. at 349-50. This is so because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

An actual conflict is defined “by the effect a potential conflict had on counsel’s performance.” *See Mickens*, 535 U.S. at 171. The Sixth Amendment does not protect against a “mere theoretical division of loyalties,” rather, it protects against conflicts of interest that adversely affect counsel’s performance. *Id.*

To be sure, this Court has stated in dicta that the actual conflict of interest standard has been limited to dual representation situations. *Mickens*, 535 U.S. at 175. However, this Court has yet to hold that it cannot be extended to other situations and has noted that lower courts have extended this constitutional right to include conflicts between the personal interest of the attorney and those of the client. *Id.* This Court emphasized that the prophylactic rule of *Sullivan* should only apply when there exists a “high probability of prejudice” arising from the conflict and there would be “difficulty [in] proving that prejudice.” *Id.*

The conflict at issue here is precisely the type of conflict that implicates those dangers. In fact, it could not be clearer that a constitutional conflict of interest would exist in a situation where a defendant has physically assaulted his attorney. It is illogical to conclude that an ethical or rational attorney could put a physical assault, particularly the serious ones at issue in this case, out of his mind and remain as counsel for the individual who attacked him. There is a high probability of prejudice in this type of situation and nearly impossible to prove. Yet, the danger is apparent after a violent assault. There really can be no doubt that it is precisely when one would expect that the conflict would have an impact on the attorney.

Indeed, the facts here show the deleterious impact of having an attorney represent his assaulter. The assaults on Lindsay resulted in his loyalties being divided between his duty to represent Birch and his own personal interest in remaining safe. Lindsay's personal fear and animosity towards Birch overwhelmed his ability to zealously and single-mindedly represent his client. Lindsay directly expressed those concerns and anxieties in court, describing Birch's actions as "criminal" and relating his "real concern" about future attacks. He complained that Birch had to understand there were consequences to his actions. He expressed his fears openly and genuinely. It cannot be disputed that there was a high probability of prejudice as a result. Indeed, the conflict is just as consequential and immediate as the dual representation situation.

Moreover, a physical assault can create the purest form of conflict: an attorney necessarily acting as a witness against the defendant in a criminal case. That is precisely what occurred here. The undisputed facts in the state court record show that charges were brought against Birch with respect to both the spitting and the stabbing. That is a foundational conflict of interest. Those charges made Lindsay a witness against his own client with a clear interest in seeing that his attacker face consequences for his actions. The conflict of interest in such a situation could not be any more plain and the danger any more apparent.

And the obvious danger of having an attorney represent someone who physically assaulted him played out in the exact way that one would expect in Birch's case. The conflict had a clear effect on Lindsay's performance at sentencing. Lindsay

repeatedly made negative comments about Birch, including a back-breaking statement that Birch was incorrigible. For example, Lindsay made the following statements at sentencing:

- Birch had been before courts “literally his whole life . . . and we’re back here again.”
- “My problem is I have a client who has somehow managed to take these little, itty-bitty cases and turn them into – you know, he’s 53 years old. He’s looking at somehow throwing the rest of his life away over nickel, dime cases.”
- “The problem is that Mr. Birch tends to want to have an orchestra every time he does something and he tends to want to be the center of a large amount of attention and he somehow has worked his way into this enormous, insane position on what are really small felonies, your Honor.”
- “My client goes out of his way to aggravate the system. My client goes out of his way to poke people in the eye and make sure he gets some sort of attention.”
- “Mr. Birch has somehow figured out a way to aggravate the world in a way that he’s now standing in front of you with enormous time.”

These are not comments that an unconflicted, zealous advocate would make. These are comments one would expect a prosecutor to make when seeking a life-without-parole sentence.

But these negative comments were not even close to the worst comment that Lindsay made at sentencing. Lindsay’s antagonistic behavior towards Birch reached its apex when he told the court that Birch was incorrigible. He said, “[I]f you let him go today, he’s going to go down to Sears in a stolen vehicle. He’s 53. He’s been in the

system his whole life and if you let him go today, I guarantee you by this afternoon, they'll be out following him and they'll pick him up at Sears or whatever."

That is an outlandish statement for a defense attorney to make at sentencing. No zealous advocate would ever describe a client in such terms, particularly when the client is facing the most severe penalty that could be imposed outside of the death penalty. No fair system should countenance such conduct from a defense attorney.

There was an obvious and direct connection here between the conflict of interest and Lindsay's performance at sentencing. Lindsay made it clear throughout the case that he was upset about Birch's assaults. He specifically stated that Birch needed to understand that there were consequences to his actions. The multiple negative comments definitively show that Lindsay's personal feelings overwhelmed his ability to be a zealous advocate for Birch. He placed his own personal interests above those of his client. But it is not surprising he would do this. It is understandable and expected that a rational human being would harbor negative feelings against the person who stabbed him.

This was a fundamental breakdown in the criminal justice system. It provides an ideal situation for this Court to determine whether an actual conflict of interest can arise when an attorney has been physically assaulted by the defendant.

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CONCLUSION

For the foregoing reasons, Birch respectfully requests that this Court grant his petition for writ of certiorari.

Dated this 21st day of February, 2018.

Respectfully submitted,

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