No. 13–6994

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT GLEN JONES, JR.,
PETITIONER,
-vs-

CHARLES L. RYAN, Warden,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

CAPITAL CASE
EXECUTION SCHEDULED FOR OCTOBER 23, 2013

THOMAS C. HORNE
ATTORNEY GENERAL

JEFFREY A. ZICK
SECTION CHIEF COUNSEL

LACEY STOVER GARD
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
400 WEST CONGRESS, BLDG. S-315
TUCSON, ARIZONA 85701
LACEY.GARD@AZAG.GOV
CADOCKET@AZAG.GOV
TELEPHONE: (520) 628-6654

ATTORNEYS FOR RESPONDENT

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Did the district court err by dismissing Jones' Rule 60(b) motion as an unauthorized second or successive habeas petition, where the motion did not attack a defect in the integrity of the habeas proceeding but instead sought to present several substantive claims for relief that Jones concedes were not included in his habeas petition?

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Petitioner Jones has included, as an appendix to his petition, the relevant decisions below that pertain to his Rule 60(b) motion.

STATEMENT OF JURISDICTION

Respondent agrees that this Court has jurisdiction in this matter.

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Federal Rule of Civil Procedure 60(b)(6) provides:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons …. any other reason that justifies relief.

28 U.S.C. § 2244(b) provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

I. FACTS.

In its opinion affirming the district court's denial of habeas relief, the Ninth Circuit Court of Appeals recited the facts as follows:

> In 1996, six people were killed during two armed robberies in Tucson, Arizona. On May 30, the Moon Smoke Shop was robbed, where two victims were killed and a third was wounded by gunfire. On June 13, the Fire Fighters Union Hall was robbed, and four persons there were killed.
>
> The Moon Smoke Shop robbery began when two robbers followed a customer, Chip O'Dell, into the store and at once shot him in the back of the head. Four employees were in the store: Noel Engles, Steve Vetter, and Mark Naiman were behind one counter concentrating on the stock, and Tom Hardman was behind another. After hearing the gunshot, Engles and Naiman looked up to see a robber in a long-sleeved shirt, dark sunglasses, and a dark cowboy hat wave a gun at them and yell to get down. Naiman recognized the gun as a 9mm. Engles dropped to his knees and pushed an alarm button.
>
> Engles noticed a second robber move toward the back room and heard someone shout, "Get the f* * * out of there!" The gunman at the counter told Naiman to open the cash register. After Naiman did so, the gunman reached over the counter and began firing at the others on the floor. Thinking that the others were dead, Naiman ran out of the store and called 911 at a pay phone. On the floor behind the counter, Engles heard shots from the back room and then, realizing the gunmen had left the store, also ran out of the store, by the back door. Running up the alley to get help, Engles saw a light-colored pickup truck with two people in it accelerate and turn on a street into heavy traffic.

Naiman and Engles survived. Vetter also survived, although shot in the arm and face. O'Dell and Hardman were both killed by close range shots to the head, O'Dell at the entrance to the store and Hardman in the back room. Three 9mm shell casings were found in the store, one beside O'Dell and two near the cash register. Two .380 shells were found near Hardman's body. Two weeks after the robbery, Naiman met with a police sketch artist who used his description of the gunmen to create sketches of the suspects. These sketches were released to the media in an effort to catch the perpetrators. At trial, two acquaintances of Jones testified that when they saw the police sketches their first thought was that they looked like Jones.

The Fire Fighters Union Hall was robbed two weeks later. There were no survivors of the violence that befell those present there. Nathan Alicata discovered the robbery at 9:20 p.m. when he arrived at the Union Hall and discovered the bodies of Maribeth Munn (Alicata's girlfriend), Carol Lynn Noel (the bartender), and a couple, Judy and Arthur Bell. The police investigation turned up three 9mm shell casings, two live 9mm shells, and two .380 shell casings. About $1300 had been taken from the open cash register, but the robbers were unable to open the safe. The coroner, who examined the bodies at the scene, concluded that the bartender had been shot twice, and that the other three victims were shot through the head at close range as their heads lay on the bar. The bartender's body had a laceration on her mouth consistent with having been kicked in the face, and Arthur Bell's body had a contusion on the right side of his head showing he was struck with a blunt object, possibly a pistol.

In 1998, petitioner Robert Jones was convicted of these ghastly crimes of multiple murder and sentenced to death. His co-defendant, Scott Nordstrom, had been convicted in a separate proceeding six months earlier. *See State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001). Jones's theory of the case at trial and on appeal was that Scott Nordstrom and his brother David Nordstrom committed these murders, while he was not involved. While there was no physical evidence or positive eyewitness identifications conclusively linking Jones to the crimes, both he and his truck matched descriptions given by survivors of the Moon Smoke Shop robbery. The prosecution's case against Jones was based in large part on David Nordstrom's testimony. David Nordstrom gave a detailed account of his role as a getaway driver in the Moon Smoke Shop robbery, and identified Jones as a robber and shooter, as well as the guns he carried. But that was not all of the testimony against Jones. Lana Irwin, an acquaintance of Jones, also testified that she overheard Jones talking about details of these murders that the police had not released to the general public. Jones's friend David Evans gave additional implicating testimony.

Jones v. Ryan, 691 F.3d 1093, 1096–97 (9th Cir. 2012) ("*Jones II*").

II. PROCEDURAL HISTORY.

The Arizona Supreme Court affirmed Jones' convictions and sentences on June 15, 2000. *State v. Jones*, 4 P.3d 345, 369, ¶ 82 (Ariz. 2000) ("*Jones I*"). Jones thereafter filed a post-conviction relief petition in the state trial court; that court denied his petition on September 18, 2002, and the Arizona Supreme Court denied review on September 9, 2003. *Jones II*, 691 F.3d at 1099–1100. The district court subsequently denied Jones' petition for writ of habeas corpus, and a three-judge panel of the Ninth Circuit Court of Appeals unanimously affirmed that denial. *Id.* at 1099–1108. Following the Ninth Circuit's denial of rehearing and this Court's denial of certiorari, *see Jones v. Ryan*, __ U.S. __, 133 .Ct. 2831 (2013) (Mem.), the Arizona Supreme Court granted the State's motion for an execution warrant and fixed October 23, 2013, as Jones' execution date.

While the State's motion for an execution warrant was pending, Jones filed a motion in district court to set aside the judgment denying habeas relief. *See* Fed. R. Civ. P. 60(b)(6). In the motion, Jones argued that his first habeas counsel,[1] who was also state post-conviction counsel, labored under a conflict of interest during the habeas proceeding, which prevented him from raising three ineffective-assistance-of-trial-counsel claims that he had not exhausted in state court and from challenging, under *Martinez v. Ryan*, __ U.S. __, 132 S.Ct. 1309 (2012), his own

[1] Former counsel withdrew, and present counsel was appointed, while Jones' certiorari petition was pending.

effectiveness in the state post-conviction proceeding.[2] The district court denied the motion, finding that it constituted a second or successive habeas proceeding that the Ninth Circuit had not authorized, rather than a true Rule 60(b) motion. *See Jones v. Ryan*, __ F.3d __, 2013 WL 5676467, *3 (9th Cir. Oct. 18, 2013) ("*Jones III*"). (*See also* Petitioner's Appendix F.)

Jones appealed from this ruling, arguing that he did not receive a "fair shot" to raise his ineffective-assistance claims in his habeas petition because then-counsel's conflict of interest precluded counsel from alleging his own ineffectiveness in the state court proceeding, and thus precluded counsel from raising claims on habeas that were procedurally defaulted by his failure to raise them in state court. *Id.* at *6. A three-judge panel of the Ninth Circuit disagreed, recognizing at the outset that "when a Rule 60(b) motion is actually a disguised second or successive § 2254 motion, it must meet the criteria set forth in 28 U.S.C. § 2244(b)(2)." *Id.* at *4 (quotations and alterations omitted). "[A] motion that does not attack 'the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably' raises a claim that takes it outside the bounds of Rule 60(b) and within the scope of AEDPA's limitations on second or successive habeas corpus petitions." *Id.* at *5 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 n.5 (2005)).

The panel rejected Jones' arguments on three grounds. First, the panel observed "that 'an attack based on habeas counsel's omissions … ordinarily does not

[2] Jones also argued that the State suppressed exculpatory evidence during the habeas proceeding relating to an electronic-monitoring system that formed David Nordstrom's alibi for the Union Hall murders. Jones abandoned this claim following the Ninth Circuit's panel opinion affirming the district court's denial of Rule 60(b) relief and does not ask this Court to review it. (Petition, at 6 n.2.)

go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably.'" *Jones III*, 2013 WL 5676467, at *6 (quoting *Gonzalez*, 545 U.S. at 532 n.5). The panel further noted that this Court "in *Gonzalez* was careful to explain how Rule 60(b) could not be used to get a second chance to assert new claims." *Jones III*, 2013 WL 5676467, at *6.

Second, the panel determined that "even if habeas corpus counsel's conflict of interest could, in some circumstances, be a defect in the integrity of the proceedings assailable under Rule 60(b), [counsel's] alleged conflict in Jones's case does not constitute such a defect." *Id.* at *7. The panel reasoned that Jones had filed his habeas petition almost 8 years before this Court decided *Martinez*, and that the district court had denied that petition more than 2 years before *Martinez*. During this entire time period, the pre-*Martinez* "rule that state post-conviction relief counsel's ineffective assistance could not serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim was settled law." *Id.* Accordingly, the panel concluded, "it cannot be argued that the integrity of Jones's first habeas corpus proceeding is in doubt, because a proceeding is not without integrity when in accord with law." *Id.*

Third, the panel concluded that *Gonzalez*'s rule that a proper Rule 60(b) petition attacks only the integrity of the federal habeas proceedings "must be understood in context generally to mean the integrity of the prior proceeding with regard to the claims that were actually asserted in that proceeding." *Id.* Rule 60(b), the panel reasoned, "does not permit a petitioner to assert entirely new claims … that the petitioner contends were required to ensure [the habeas proceeding's]

integrity." *Id.* The panel specifically found that *Martinez* had no effect on the Rule 60(b) analysis under *Gonzalez*:

> *Martinez* … did not change the rule in *Gonzalez* that Rule 60(b) cannot be used as a vehicle to bring new claims. *Martinez* did not purport to overrule *Gonzalez*, nor is its language irreconcilable with that case's central holding. *Gonzalez* firmly stands for the principle that new claims cannot be asserted under the format of a Rule 60(b) motion, and instead Rule 60(b) is properly applied when there is some problem going to the integrity of the court process on the claims that were previously asserted.

Id. Overall, because Jones sought to attack his convictions on the merits instead of to remedy a defect in the integrity of the habeas proceeding, the panel affirmed the district court's denial of his Rule 60(b) motion as an unauthorized successive habeas petition. *Id.*

In the alternative, "[a]ssuming for the sake of argument that Jones's motion is permissible under Rule 60(b)," the panel concluded that Jones had not met the standards for relief from judgment. *Id.* at *10–*12. Applying governing Circuit law, *see Phelps v. Alameida*, 569 F.3d 1120, 1134–35 (9th Cir. 2009), the panel determined that Jones had failed to show that *Martinez* constituted a change in the law that amounted to an extraordinary circumstance justifying reopening the habeas proceeding. *Jones III*, 2013 WL 5676467, at *10–*12 (citing *Gonzalez*, 545 U.S. at 535). In particular, the panel found that the interest in finality, the lack of a relationship between *Martinez* and "the decision resulting in the original judgment," and the interest in comity weighed heavily against granting Jones' motion. *Jones III*, 2013 WL 5676467, at *10–*12.

Jones sought rehearing *en banc* from the panel decision affirming the denial of Rule 60(b) relief. The Ninth Circuit denied this motion on October 21, 2013, with no judges voting to rehear the case.

REASONS FOR DENYING THE WRIT

This Court grants certiorari "only for compelling reasons." U.S. SUP. CT. R. 10. Jones has presented no such reason. Jones has not established that the Ninth Circuit Court of Appeals' decision conflicts with a decision from another United States court of appeals or a state court of last resort, that the Ninth Circuit decided an important question of federal law not yet settled by this Court, or that the Ninth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.*

The Ninth Circuit panel correctly found that, because Jones' Rule 60(b) motion raised new, substantive claims and did not attack a defect in the habeas proceeding's integrity, it constituted an unauthorized second or successive petition. Contrary to Jones' position, there is no tension between *Martinez* and *Gonzalez*, and the panel opinion does not conflict with a decision from the Fourth Circuit. In fact, Jones concedes his inability to show a genuine circuit split on the issue for which he seeks certiorari. (*See* Petition, at 10 ("[W]hile the cases are not on all fours so as to allow Mr. Jones to claim a true circuit split on the issue *sub judice* … the Ninth and Fourth Circuits come close ….").) And in arguing that *Martinez* and *Gonzalez* cannot be reconciled, Jones conflates the analytically distinct concepts of procedurally defaulted *claims* and second or successive *petitions* disguised as Rule 60(b) motions. *Martinez* is relevant only to the former, while *Gonzalez* continues to

control the latter. The distinction Jones has created is illusory and does not warrant certiorari review.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY DISMISSED THE RULE 60(B) MOTION AS A SECOND OR SUCCESIVE HABEAS PETITION BECAUSE JONES SOUGHT TO RAISE NEW CLAIMS IN THAT MOTION RATHER THAN TO CHALLENGE A DEFECT IN THE HABEAS PROCEEDING'S INTEGRITY. MOREOVER, *MARTINEZ* HAS NO EFFECT ON THE RULE 60(B) ANALYSIS UNDER *GONZALEZ*.

Jones contends that his Rule 60(b) motion was not a second or successive habeas petition because it challenged a defect in the habeas proceeding's integrity: first habeas counsel's conflict of interest that purportedly prevented counsel from presenting three ineffective-assistance claims in the habeas petition. (Petition, at 10–17.) Jones contends that *Gonzalez*'s pronouncement that habeas counsel's omissions do not go to the integrity of the habeas proceeding does not survive *Martinez*. (*Id.*) He also asks this Court to grant certiorari to "determine whether *Martinez* has any retroactive effect in Rule 60(b) proceedings." (*Id.* at 12.) These are not compelling arguments, and this Court should deny certiorari.

As a preliminary matter, Jones cites two of this Court's recent decisions relating to attorney abandonment: *Maples v. Thomas*, __ U.S. __, 132 S.Ct. 912 (2012), and *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549 (2010). To the extent Jones claims to have been abandoned by his first habeas counsel, this Court should reject that argument. Notably, counsel's failures in *Maples* and *Holland* went far beyond failing to raise a claim for relief. In *Maples*, the petitioner's attorneys

ceased representing him in state-court proceedings but did not notify him or the court, creating a chain of events that resulted in the habeas court finding certain claims procedurally defaulted. 132 S.Ct. at 916–17. This Court found that an attorney's abandonment could constitute cause to excuse a procedural default. *Id.* However, this Court also cautioned that its holding did not "disturb [the] general rule" that an attorney's negligence binds his client. *Id.* at 922–23 ("[W]hen a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause."). Likewise, in *Holland*, this Court found that an attorney's abandonment of his client could constitute grounds for equitable tolling of AEDPA's limitations period. 560 U.S. at __, 130 S.Ct. at 2554–59. There, the record revealed a "near-total failure [on counsel's] part to communicate with petitioner or to respond to petitioner's many inquiries and requests over a period of several years." *Id.* at __, 130 S.Ct at 2568 (Alito, J., concurring).

The failure to raise a claim on habeas constitutes, at most, attorney negligence, and *Maples* does not disturb the long-standing rule that such negligence binds a client. 132 S.Ct. at 922–23; *see Towery v. Ryan*, 673 F.3d 933, 941 (9th Cir. 2012) (per curiam) (distinguishing *Maples* and *Holland* and finding no abandonment where attorney did not refuse to represent prisoner or renounce attorney-client relationship but instead diligently pursued habeas relief and simply omitted a constitutional claim). This is particularly true where, as here, counsel raises numerous claims for relief, including multiple ineffective-assistance-of-counsel claims. *See id.*

A. *There is no tension between* Martinez *and* Gonzalez.

Martinez is, by its express terms, a narrow holding that provides an avenue for a state prisoner, under certain limited circumstances, to show cause and prejudice to excuse the procedural default of a trial-level ineffectiveness claim. 132 S.Ct. at 1315, 1317, 1320. *Martinez* addresses *only* PCR counsel's performance and, even then, does not recognize a constitutional right to such counsel's effectiveness. Nothing in *Martinez* confers a right to the effective assistance of habeas counsel, or to conflict-free habeas counsel. And *Martinez* does not even address Rule 60(b), let alone establish that habeas counsel's conflict of interest or negligence would permit a prisoner to reopen a habeas proceeding and raise any and all previously-omitted, procedurally-defaulted ineffectiveness claims. In short, as the panel correctly found, *Martinez* "did not change the rule in *Gonzalez* that Rule 60(b) cannot be used as a vehicle to bring new claims." *Jones III*, 2013 WL 5676467, at *7.

Moreover, even if counsel's conflict of interest could amount to a defect in the habeas proceeding's integrity under *Gonzalez*, Jones' first habeas attorney did not labor under any such conflict. As the panel correctly noted, at the time prior habeas counsel represented Jones' in federal court, it was well-settled that ineffective assistance of PCR counsel was not an independent claim for habeas relief, *see* 28 U.S.C. § 2254(i), and could not serve as cause to excuse the procedural default of other habeas claims. *See Martinez*, 132 S. Ct. at 1315 (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)). *Martinez* was issued nearly 8 years after counsel filed Jones' habeas petition, and the district court dismissed the petition more than 2 years before *Martinez*. In other words, prior counsel did not possess a conflict of

interest until the case was well through the district court and pending on appeal—in fact, even if a non-conflicted attorney had represented Jones in district court, that attorney could not have asserted PCR counsel's ineffectiveness as cause. As the panel correctly recognized, "a proceeding is not without integrity when [it is] in accord with law." *Jones III*, 2013 WL 5676467, at *7.

"*Gonzalez* firmly stands for the principle that new claims cannot be asserted under the format of a Rule 60(b) motion" and *Martinez* did not overrule this holding. *Id.* Because Jones sought to present new, substantive claims for relief, rather than to challenge a defect in the habeas proceeding's integrity, his Rule 60(b) motion constituted an unauthorized SOS petition. *See Gonzalez*, 545 U.S. at 531 ("Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts."); *Thompson v. Calderon*, 122 F.3d 28, 30 n.2 (9th Cir. 1997) ("*Thompson I*") ("[W]here a habeas petitioner tries to raise new facts or new claims not included in prior proceedings in a Rule 60(b) motion, such motion should be treated as the equivalent of a second petition for writ of habeas corpus.") (quotations omitted); *Lopez v. Ryan*, 2012 WL 1520172, *7 (D. Ariz. April 30, 2012) (aspect of Rule 60(b) motion asserting new claim for relief constituted a second or successive petition). This Court should deny the petition for *en banc* rehearing.

….

….

B. *The Ninth Circuit Panel did not hold that* Martinez *was not retroactive.*

Jones interprets the panel opinion to hold that *Martinez* does not apply to his case because the district court denied relief 2 years before *Martinez* issued. (Petition, at 12.) Jones observes that the this Court gave *Martinez* retroactive effect, and suggests that the panel's refusal to do so in this case conflicts with several cases, including *Martinez*, in which courts have remanded habeas matters to district court for consideration of *Martinez* claims. (*Id.* at 12–13.) But Jones misapprehends the panel opinion and divorces its comments from their context. As set forth above, the panel did not hold that *Martinez* lacked retroactive effect. Instead, it correctly observed that this Court did not issue *Martinez*, and did not recognize that PCR counsel's ineffectiveness could constitute cause for a procedural default, until 2 years after Jones' habeas proceedings concluded in district court.[3] *Jones III*, 2013 WL 5676467, at *7. As a result, Jones' counsel did not possess a conflict of interest during those proceedings, and the integrity of that proceeding is not in doubt. *See id.*

[3] This holding was not, as Jones contends, irreconcilable with the panel's assessment of the first *Phelps* factor, which asks whether the Rule 60(b) motion is based on a change in the law. (Petition, at 13–14.) The panel weighed this favor slightly in Jones' favor. *Jones III*, 2013 WL 5676467, at *10. The panel's recognition that Jones' first habeas counsel did not possess a conflict of interest in the district court proceedings because *Martinez* had not yet been decided is in no way inconsistent with its finding that *Martinez* was "a remarkable—if limited—development in the Court's equitable jurisprudence." *Id.* (quotations omitted)

C. *There is no relevant split between the Ninth and Fourth Circuits.*

Jones contends that the Ninth Circuit's decision conflicts with the Fourth Circuit's unpublished decision in *Gray v. Pearson*, 2013 WL 2451083 (4th Cir. June 7, 2013). (Petition, at 15–17.) Jones is incorrect, and the conflict he seeks to create is nonexistent and unworthy of certiorari review.

Gray is easily distinguished. There, the federal district court appointed the same attorneys who had represented the petitioner in state collateral proceedings to represent him in his federal habeas proceeding. *Gray*, 2013 WL 2451083, at *1. The district court denied habeas relief, and one of the two claims on which the court issued a certificate of appealability was whether the petitioner was "entitled to the appointment of independent counsel under" *Martinez*, "which was handed down during the pendency of [the petitioner's] federal habeas proceedings." *Id.* The appellate court answered this question in the affirmative, reasoning that under *Martinez*, "a clear conflict of interest exists in requiring [petitioner's] counsel to identify and investigate potential errors that they themselves may have made in failing to uncover ineffectiveness of trial counsel while they represented [petitioner] in his state post-conviction proceedings." *Id.* at *3.

In *Gray*, *Martinez* was decided, and habeas counsel was alerted to his potential conflict, during the district court proceeding. Conversely, in this case, *Martinez* was not decided until 2 years after the district court proceeding had ended. Unlike Jones, *Gray* did not advance the conflict-of-interest claim belatedly in a Rule 60(b) motion after the habeas proceeding had ended; rather, he asked for

new counsel on appeal from the denial of habeas relief.[4] *Gray's* different procedural posture renders that case inapposite.[5] There is no conflict between the Ninth and Fourth Circuits for this Court to resolve.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully asks this Court to deny Jones' petition for writ of certiorari.

Respectfully submitted,

Thomas C. Horne
Attorney General

Jeffrey A. Zick
Section Chief Counsel

Lacey Stover Gard
Assistant Attorney General
(Counsel of Record)
Attorneys for Respondent

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[4] Notably, substitute counsel in this case was appointed while Jones' certiorari petition was pending and before his habeas appeal was final, but did not seek to raise the present claims until after certiorari had been denied.

[5] Jones' reliance on *Bergna v. Benedetti*, 2013 WL 3491276 (Nev. July 9, 2013), is equally unavailing. (Petition, at 17.) In *Bergna*, the State moved to disqualify habeas counsel *during the district court proceedings* because she had represented the prisoner in state court. *Id.*

NO APPENDIX