

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 5 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

REYNALDO AGAVO,

No. 21-16908

Petitioner-Appellee,

D.C. No.

v.

2:13-cv-01741-JCM-DJA

CALVIN JOHNSON; ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

MEMORANDUM*

Respondents-Appellants.

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted November 17, 2022
San Francisco, California

Before: McKEOWN and PAEZ, Circuit Judges, and SESSIONS,** District Judge.

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

** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

Respondents Calvin Johnson and the Attorney General for the State of Nevada (collectively “the State”) appeal the district court’s order conditionally granting Reynaldo Agavo’s petition for a writ of habeas corpus. We have jurisdiction under 28 U.S.C. § 1291, and affirm the district court’s decision for the reasons set forth below.

1. *Equitable Tolling*. Agavo filed his federal habeas corpus petition less than one month late. The district court applied equitable tolling on the basis of attorney abandonment and allowed the petition to proceed. We review the timeliness question de novo. *Flemming v. Matteson*, 26 F.4th 1136, 1138 (9th Cir. 2022). “Unless the facts are undisputed, we review the district court’s findings of fact underlying a claim for equitable tolling for clear error.” *Rudin v. Myles*, 781 F.3d 1043, 1053 (9th Cir. 2015).

The habeas corpus limitations period is subject to equitable tolling if the petitioner demonstrates “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal citation omitted). The record supports Agavo’s claim that he pursued his rights diligently. Whether alone or through his family, Agavo worked vigilantly to communicate with defense counsel through the course of collateral proceedings. Despite those efforts, counsel failed to notify Agavo promptly when the state court issued a final

decision on post-conviction review. Agavo's counsel's office also made a mailing error, further delaying Agavo's submission, which was only corrected on account of Agavo's family's request. Upon receiving counsel's belated notification, Agavo moved swiftly to submit his federal habeas corpus petition.

Counsel's failures amount to abandonment and thus, constitute an extraordinary circumstance. *See Gibbs v. Legrand*, 767 F.3d 879, 885 (9th Cir. 2014). Although "garden variety claim[s] of excusable neglect" do not constitute extraordinary circumstances, *Holland*, 560 U.S. at 651–52 (internal citation omitted), "a client cannot be charged with the acts or omissions of an attorney who has abandoned him," *Maples v. Thomas*, 565 U.S. 266, 283 (2012). Here, counsel was retained with the prospect of representing Agavo in both state and federal collateral proceedings, yet failed to maintain contact with his client and keep him properly informed. The "[f]ailure to inform a client that his case has been decided, particularly where that decision implicates the client's ability to bring further proceedings *and* the attorney has committed himself to informing his client of such a development, constitutes attorney abandonment." *Gibbs*, 767 F.3d at 886. We therefore agree with the district court's application of equitable tolling.¹

¹ The State also challenges the district court's conclusion that Ground 7 of the petition, alleging overpayment of a witness, was timely filed. Because the district court subsequently dismissed Ground 7 as moot, we decline to address that issue.

2. *Habeas Corpus*. The district court found a violation of Agavo’s rights under the Confrontation Clause and conditionally granted his petition for habeas corpus under 28 U.S.C. § 2254. We review a ruling on a habeas corpus petition de novo, and any underlying factual findings for clear error. *See Martinez v. Cate*, 903 F.3d 982, 991 (9th Cir. 2018). “The district court’s application of [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)] to the last reasoned state court decision is a mixed question of law and fact which we review de novo.” *Mann v. Ryan*, 828 F.3d 1143, 1151 (9th Cir. 2016).

Pursuant to the AEDPA, we may grant habeas relief on a claim adjudicated on the merits in state court only if the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or if the decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. §§ 2254(d)(1)–(2).

In barring any reference to the California allegations, the Nevada courts unreasonably applied clearly established federal law. The United States Supreme Court has long held that the Confrontation Clause prohibits a trial court from completely barring cross-examination that a jury might reasonably find undermines the credibility of a key witness. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *see also Olden v. Kentucky*, 488 U.S. 227, 232 (1988). Because the

California allegations would have reasonably called into question the credibility of both the child and her mother, Agavo had a right under the Confrontation Clause to engage in reasonable cross-examination. *Id.*

The Supreme Court has acknowledged that if a trial court is concerned about matters such as “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant,” the court can “impose reasonable limits.” *Van Arsdall*, 475 U.S. at 679. Here, the Nevada Supreme Court speculated that the trial court may have had such concerns. The Nevada Supreme Court did not address the possibility of reasonable limits on the proposed testimony. Given that the trial court also failed to address such considerations, we conclude that the absolute prohibition of cross-examination was “beyond reason.” *Olden*, 488 U.S. at 232.

We further find that the Confrontation Clause violation was harmful. *See Fry v. Pliler*, 551 U.S. 112, 121–22 (2007) (citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)); *Van Arsdall*, 475 U.S. at 684. The Nevada Supreme Court acknowledged that “this was a very close case.” *Agavo v. State*, 281 P.3d 1148 (Nev. 2009); *see Olden*, 488 U.S. at 233 (finding harm where “the State’s case against petitioner was far from overwhelming”). The prosecution asserted in its closing argument that the case “boil[ed] down to” a credibility battle between the child and Agavo. The State also portrayed the mother as believing her daughter’s

allegations. The proposed cross-examination would undoubtedly have provided the jury a different perspective on both witnesses. *See Van Arsdall*, 475 U.S. at 679. In sum, the outcome of this case depended largely on the credibility of the primary witnesses, and defense counsel's inability to use the California allegations to potentially undermine that credibility had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638.

AFFIRMED.