No. _____

IN THE
Supreme Court of the United States

DANNY LEE JONES,
Petitioner,

vs.

RYAN THORNELL, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, REHABILITATION & REENTRY,
Respondent.

ON APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

APPENDIX TO APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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Jones v. Thornell

APPENDIX TO APPLICATION FOR AN EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Appendix 1	Per Curiam Opinion, *Jones v. Thornell*, 18-99005 (9th Cir. July 10, 2024)
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANNY LEE JONES, *Petitioner-Appellant*, v. CHARLES L. RYAN, *Respondent-Appellee*.	No. 18-99005 D.C. No. 2:01-cv-00384-SRB OPINION

On Remand from United States Supreme Court

Filed July 10, 2024

Before: Michael Daly Hawkins, Sidney R. Thomas, and Morgan Christen, Circuit Judges.

Per Curiam Opinion

SUMMARY*

Habeas Corpus / Death Penalty

On remand from the Supreme Court for proceedings consistent with the Supreme Court's opinion in *Thornell v. Jones*, 602 U.S. __, 144 S. Ct. 1302 (2024), the panel affirmed the judgment of the district court.

COUNSEL

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

PER CURIAM:

The Supreme Court remanded this appeal for proceedings consistent with the Supreme Court's opinion. *Thornell v. Jones*, 602 U.S. __, 144 S.Ct. 1302, 1314 (2024). Pursuant to the Supreme Court's opinion, the judgment of the district court is affirmed.

AFFIRMED.

FILED

DEC 10 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANNY LEE JONES, Petitioner-Appellant, v. RYAN THORNELL, Director, Department of Corrections, Respondent-Appellee.	No. 18-99005 D.C. No. 2:01-cv-00384-SRB District of Arizona, Phoenix ORDER

Before: HAWKINS, S.R. THOMAS, and CHRISTEN, Circuit Judges.

Petitioner-Appellant's petition for panel rehearing is DENIED.

No. 18-99005

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Danny Lee Jones,

Petitioner-Appellant,

vs.

Ryan Thornell, Director, Arizona Department of Corrections, Rehabilitation and Reentry, et al.,

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case No. 01-CV-0384-SRB

PETITIONER-APPELLANT'S PETITION FOR PANEL REHEARING

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RULE 40 STATEMENT

After this panel, for the second time over the course of more than a decade, granted Danny Lee Jones habeas relief because his Sixth Amendment right to the effective assistance of counsel was violated at his 1993 capital sentencing proceeding, the Supreme Court reversed. Unfortunately, but perhaps unsurprisingly given the extensive fact-dependent record in this capital case, the decision to reverse resulted from a court-majority "making many mistakes of its own." *Thornell v. Jones*, 144 S. Ct. 1302, 1315 (2024) (Jackson, J., dissenting) (cleaned up). *Compare, e.g.*, *id.* at 1308 (finding that "Dr. Potts . . . concluded with a 'reasonable degree of medical certainty' that Jones 'suffers from a major mental illness,' likely a 'form of Bipolar Affective Disorder'"), *and id.* at 1311 (finding that "Arizona courts had already received testimony that Jones 'suffers from a major mental illness,' likely a 'form of Bipolar Affective Disorder[]'"), *with* 4-ER-1070 (Dr. Potts' sentencing report listing only "[t]he **likelihood** that [Jones] suffers from a major mental illness – cyclothymia (an attenuated form of Bipolar Affective Disorder, i.e., manic-depressive illness" (emphasis added)); 10-ER-2576 (Dr. Potts testifying at Jones's penalty phase that "I think that cyclothymia, which is a lesser form of [bipolar disorder] **is what we may have** with the defendant" (emphasis added)); 1-ER-231 (the Arizona Supreme Court on independent review of Jones's death sentence finding that Jones "did not, . . . provide any documented instances of his **alleged**

illness. Thus, **defendant has not established mental illness by a preponderance of the evidence**, and we do not give it mitigating weight" (emphasis added)); *compare also, e.g.*, *Jones*, 144 S. Ct. at 1312 (finding that "Arizona courts had already heard extensive evidence about Jones's head trauma and cognitive impairment"), *with* 1-ER-229–30 (the Arizona Supreme Court on independent review never mentioning either "cognitive impairment" or "brain damage," instead agreeing with the trial court which only gave "some mitigating weight to defendant's head injuries **in that it found the head injuries may have aggravated defendant's substance abuse problem**." (emphasis added)); 9-ER-2461–70 (trial court's special verdicts also never mentioning either "cognitive impairment" or "brain damage"); 9-ER-2407 (the trial court finding that Dr. Potts "was assuming . . . that [Jones] had mild trauma which increased the potential for aggravating the substance abuse," and that "the evidence is very slim, **nonexistent, in fact**, that the defendant has anything that requires any kind of neurological examination" (emphasis added)); *and compare, e.g.*, *Jones*, 144 S. Ct. at 1314 (claiming that "Jones and his *amici* identify *no* cases in which the Arizona Supreme Court has vacated the judgment of death in a case involving multiple murders . . . The absence of such a case strongly suggests that Jones has no reasonable probability of escaping the death penalty."), *with* Br. for Respondent at 36 n.15, *Thornell v. Jones*, No. 22-982 (U.S. Mar. 13, 2024) (Jones citing *State v. Stuard*, 863 P.2d 881 (Ariz. 1993), where the Arizona Supreme

Court reduced three death sentences resulting from the brutal murders of three elderly women to life without parole based on evidence of brain damage, and recognized that "[W]e are sometimes called upon to reduce a death sentence to life imprisonment *even in cases where the facts are aggravated and the tragedy immense*." (emphasis added)); Br. of Arizona Capital Representation Project as Amicus Curiae at 6–7, *Thornell v. Jones*, No. 22-982 (U.S. Mar. 20, 2024) (Jones's amicus curiae discussing *Stuard* as a case where "the defendant was convicted of three counts of first-degree murder relating to a series of attacks on elderly women," "[t]he aggravation in the case was substantial," and yet "the Arizona Supreme Court found leniency was 'required'" because "[l]ike Mr. Jones, the defendant in *Stuard* suffered organic brain damage, which 'may have contributed significantly to [Defendant's] acting-out of violent impulses.'" (emphasis omitted)).

The Supreme Court's regrettable mistakes in a death penalty case aside, *see Jones*, 144 S. Ct. at 1314–15 (Sotomayor, J., & Kagan, J., dissenting), its decision in *Jones* merely reversed the panel's grant of relief on appellate Claims 1 and 2—which were the only issues decided by the panel and before the Supreme Court in *Jones*—leaving certified Claims 3–6 and uncertified Claim 7 for this panel to resolve on remand. *See Jones v. Ryan*, 52 F.4th 1104, 1137 (9th Cir. 2022) ("Because we have determined that Jones is entitled to relief and resentencing on the basis of

Claims 1 and 2, . . . we need not and do not reach the merits of any of Jones's other claims"), *rev'd sub nom. Thornell v. Jones*, 144 S. Ct. 1302, 1308 (2024).

On July 10, 2024, the panel issued a per curiam opinion affirming the district court judgment "[p]ursuant to the Supreme Court's opinion" in *Jones*.[1] (18-99005 ECF 90-1 at 3.) However, the Supreme Court opinion in *Jones* only resolved appellate Claims 1 and 2. Thus, the Supreme Court's decision is not dispositive of Jones's remaining appellate claims—including certified Claim 3 (which alleges that Jones received penalty-phase ineffective assistance of counsel ("IAC") due to his attorney's failure to investigate and present available mitigating evidence through records and lay witnesses) and uncertified Claim 7 (which alleges that Jones received penalty-phase ineffective assistance of counsel as a result of trial counsel's failure to object to the trial court's failure to consider and give effect to all proffered mitigating evidence).[2]

Neither did the Supreme Court's opinion in *Jones* adjudicate adversely the cumulative prejudice under *Strickland* resulting from the combined instances of trial counsel's deficient performance, inclusive of Claims 1, 2, 3 and 7. (*See* 18-99005

[1] A copy of the panel decision is included hereto as an Attachment. *See* 9th Cir. R. 40-1(c). On July 29, 2024, the panel granted Jones's unopposed request for a 45-day extension of time up to and including September 9, 2024 to petition for rehearing from that decision. (18-99005 ECF 92.)

[2] The panel previously ordered supplemental briefing on uncertified Claim 7, rendering that matter fully briefed. (18-99005 ECF Nos. 37, 42, 44.)

ECF No. 32 at 2 (Jones arguing that "[a]lthough Claims 1–3 address discrete instances of trial counsel's deficiencies in investigating and preparing Jones's case for sentencing, *Strickland* requires this Court to consider the prejudice resulting from those deficiencies collectively[]")).

The Sixth Amendment requires that, even where discrete instances of trial counsel's deficiencies may be inadequate by themselves to establish prejudice under *Strickland*, the cumulative impact of all the deficiencies in trial counsel's performance must nevertheless be assessed for whether their "plethora and gravity . . . rendered the proceeding fundamentally unfair." *Harris By and Through Ramseyer v. Wood*, 64 F.3d 1432, 1438–39 (9th Cir. 1995) (citing *Strickland v. Washington*, 466 U.S. 668, 696 (1984) (noting that the "ultimate focus" of the prejudice inquiry "must be on the fundamental fairness of the proceeding whose result is being challenged")).

Given the necessity for reliability of the outcome in this capital case, panel rehearing is respectfully requested so the panel can address the remaining appellate claims that were not before the Supreme Court in *Jones* or disposed of by that decision. This includes penalty-phase IAC Claims 3 and 7, where the assessment of prejudice under *Strickland* requires assessing the combined effect of *all* trial counsel's deficiencies—including those that were the subject of Claims 1 and 2—

on the fundamental fairness of Jones's sentencing proceeding and resulting death sentence. *See* Fed. R. App. P. 40(a)(2).

Respectfully, if panel rehearing is granted, Jones will promptly seek leave to file a supplemental brief that addresses why, notwithstanding the Supreme Court's finding of no prejudice with respect to the discrete instances of trial counsel's deficiencies that were the subject of Claims 1 and 2, the Sixth Amendment's cumulative prejudice requirement nevertheless requires a finding of *Strickland* prejudice when all of trial counsel's deficiencies—including those that are the subject of certified Claim 3 and uncertified Claim 7—are considered.

ARGUMENT

I. The Supreme Court's decision in *Jones* resolved Claims 1 and 2 but did not address or dispositively resolve Jones's remaining appellate claims; nor did *Jones* address the Sixth Amendment's requirement that the cumulative prejudice stemming from all trial counsel's discrete deficiencies, including those which were the subject of Claims 1 and 2 and that are the subject of Claims 3 and 7, be assessed for prejudice under *Strickland*.

Appellate Claims 1 and 2 asserted that Jones's trial counsel was constitutionally ineffective by failing to secure a defense mental health expert, and by failing to seek neurological and neuropsychological testing prior to sentencing. *See Jones v. Ryan*, 52 F.4th 1104, 1116–37 (9th Cir. 2022), *rev'd sub nom. Thornell v. Jones*, 144 S. Ct. 1302, 1308 (2024).

In reversing the panel's grant of relief on appellate Claims 1 and 2, the Supreme Court found that the panel "all but ignored the strong aggravating circumstances in this case" which should have led to "affirm[ing] the decision of the District Court denying habeas relief." *Jones*, 144 S. Ct. at 1307, 1314. Importantly, the Supreme Court did *not* hold that the panel should have also affirmed the district court's denial of habeas relief on Jones's remaining penalty-phase IAC Claims 3 and 7; nor could it have done so since those issues were never reached by the panel and therefore were not before the Supreme Court. *See, e.g.*, *Cantero v. Bank of America, N.A.*, 144 S. Ct. 1290, 1301 n.4 (2024) (not deciding issues that were not first reached by the court of appeals and inviting the court of appeals to reach those issues on remand).

Nor, without Claims 3 and 7 before it, could the Supreme Court's decision in *Jones* have addressed the cumulative prejudice question required under *Strickland*—that is, even if the discrete instances of trial counsel's deficiencies that were the subject of Claims 1 and 2 are, standing alone, inadequate to demonstrate *Strickland* prejudice, does *Strickland* prejudice nevertheless exist when those deficiencies are considered in combination with trial counsel's deficiencies at issue in Claims 3 and 7?

Certified appellate Claim 3 alleges that Jones received ineffective assistance of counsel as his capital sentencing proceeding as a result of his attorney's failure to

investigate and present available mitigating evidence through records and lay witnesses that would have established statutory and non-statutory mitigating circumstances that the trial court and Arizona Supreme Court on independent review of Jones's death sentence found unproved by a preponderance; and that would have also undermined the existence and/or weight of multiple aggravating circumstances alleged. Uncertified appellate Claim 7, meanwhile, alleges that Jones received ineffective assistance of counsel at his capital sentencing proceeding when trial counsel failed to object to the trial court's refusal to consider and give effect to all of his proffered mitigating evidence.

Because neither IAC claim was decided by the panel or before the Supreme Court in *Jones*, rehearing is respectfully needed to address these issues and to assess the cumulative prejudice under *Strickland* stemming from the totality of trial counsel's deficiencies in Jones's case that render his capital sentencing proceeding and resulting death sentence fundamentally unfair. *See Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) ("We do not need to decide whether [trial counsel's] deficiencies alone meet the prejudice standard because other significant errors occurred that, considered cumulatively, compel affirmance of the district court's grant of habeas corpus as to the sentence of death." (citing *United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983) ("[A] court may find unfairness—and thus prejudice—from the totality of counsel's errors and omissions."), and *Ewing v.*

Williams, 596 F.2d 391, 395 (9th Cir. 1979) ("[P]rejudice may result from the cumulative impact of multiple deficiencies.")))); *see also Harris*, 64 F.3d 1438–39 (9th Cir. 1995) (recognizing that *Strickland* "prejudice may result from the cumulative impact of multiple deficiencies"); *Hooks v. Workman*, 689 F.3d 1148, 1187–88 (10th Cir. 2012) (discussing "analysis of cumulative prejudice" as "necessary" under *Strickland* and citing *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003) ("[A] decision to grant relief on ineffective assistance grounds is a function of the prejudice flowing from *all* of counsel's deficient performance[.]")); *id.* at 1188 ("[W]e must assess the aggregate impact of [trial counsel's] numerous errors and decide whether they collectively so infected the trial with unfairness as to make the resulting conviction a denial of due process." (cleaned up)); *Myers v. Neal*, 975 F.3d 611, 623 (7th Cir. 2020) ("[T]he Sixth Amendment requires that we approach the prejudice inquiry by focusing on the cumulative effect of trial counsel's shortcomings. This direction comes from *Strickland* itself . . . We have read *Strickland* just this way—as mandating a cumulative assessment of prejudice—on at least five prior occasions."); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) (noting that a "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions").

CONCLUSION

Jones respectfully asks that the panel grant his petition for rehearing so that it may address the appellate claims that were not before the Supreme Court in *Jones* or disposed of by that decision, including penalty-phase IAC Claims 3 and 7 where the *Strickland* prejudice analysis requires assessing the cumulative effect of *all* trial counsel's deficiencies on the fundamental fairness of Jones's capital sentencing proceeding and resulting death sentence.

Respectfully submitted:

September 9, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that this petition for panel rehearing complies with the length limits set forth in Circuit Rule 40-1. The petition is 2,216 words excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(4)–(6).

s/Amanda Bass Castro Alves
Attorneys for Petitioner-Appellant
Danny Lee Jones

ATTACHMENT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANNY LEE JONES, *Petitioner-Appellant*, v. CHARLES L. RYAN, *Respondent-Appellee*.	No. 18-99005 D.C. No. 2:01-cv-00384-SRB OPINION

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COUNSEL

Amanda Bass (argued), Assistant Federal Public Defender, Federal Public Defenders Office, Phoenix, Arizona; Leticia Marquez, Assistant Federal Public Defender; Jon M. Sands, Federal Public Defender, District of Arizona; Federal Public Defender's Office, Tucson, Arizona; Jean-Claude Andre, Bryan Cave Leighton Paisner LLP, Santa Monica, California; Barbara A. Smith and J. Bennett Clark, Bryan Cave Leighton Paisner LLP, St. Louis, Missouri; Kristin H. Corradini, Bryan Cave Leighton Paisner LLP, Chicago, Illinois; for Petitioner-Appellant.

Jeffrey L. Sparks (argued), Deputy Solicitor General, Chief of Capital Litigation Section; Lacey S. Gard, Chief Counsel; Mark Brnovich, Arizona Attorney General; Office of the Arizona Attorney General, Phoenix, Arizona; for Respondent-Appellee.

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AFFIRMED.