

NO. 04-2759

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ADELL JONES,

Petitioner-Appellant,

v.

ALAN M. UCHTMAN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
No. 04 C 596

The Honorable Judge Ronald A. Guzmán

**REPLY BRIEF
OF PETITIONER-APPELLANT ADELL JONES**

Oral Argument Requested

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Summary dismissal of Adell Jones' habeas petition was improper, and the decision below should be reversed.

Jones filed his petition in a timely manner. Moreover, even if the petition were otherwise untimely, any delay would likely be excused under the doctrine of equitable tolling.

Jones' petition, which was in full compliance with the applicable rules as to form, clearly presented his ineffective assistance of counsel claim to the district court. Because Jones alleged facts that, if true, would entitle him to relief, summary dismissal of the ineffective assistance claim was erroneous.

As the State concedes, the district court wrongly held *Apprendi v. New Jersey*, 530 U.S. 466 (2000), inapplicable to Jones' case. Given its conceded applicability, summary dismissal of Jones' *Apprendi* claim was improper, both because his enhanced sentence was imposed under a facially unconstitutional statute and because Jones has sufficiently alleged that he did not knowingly and voluntarily waive his right to a jury determination of the facts upon which his enhanced sentence was based.

ARGUMENT

I. Jones' Habeas Petition Was Timely Filed.

A. Jones' petition was filed within the one-year limitations period.

Jones' habeas petition was filed within the one-year limitations period established by 28 U.S.C. § 2244(d)(1). The State's argument to the contrary rests on wrongly decided Seventh Circuit precedent that has, in the time since its initial articulation, been

eroded by subsequent Supreme Court decisions. According to the State, and this Court's prior decisions, the one-year limitation period runs during the 90-day period in which an applicant for state post-conviction relief may seek a writ of certiorari in the Supreme Court after his application for state post-conviction relief has been denied in state court. If that were correct, then Jones' federal habeas petition would, but for the operation of equitable tolling, indeed be untimely. However, recent Supreme Court precedent and a statutory provision enacted at the same time as § 2244(d)(1) – neither of which were previously considered by this Court – demonstrate that the one-year limitations period *is* tolled during the 90-day certiorari period following the denial of a state post-conviction application in state court. Thus, construing § 2244(d)(1) properly, Jones' habeas petition was timely filed.

Under § 2244(d)(1)(A), a state prisoner has one year from the latest of “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review” in which to file his federal habeas petition. The Supreme Court of Illinois denied Jones leave to appeal his conviction on June 6, 2001. SA52. Pursuant to 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of the Supreme Court of the United States, Jones then had 90 days – or until September 4, 2001 – in which to file a petition for a writ of certiorari seeking review of that decision. No such petition having been filed, the limitations period established by § 2244(d)(1) began to run the next day, September 5, 2001. *See* Fed. R. Civ. P. 6(a); *Anderson v. Litscher*, 281 F.3d 672, 675 (7th Cir. 2002); Resp. Br. 12.

Jones filed a petition for post-conviction relief in the Circuit Court of Cook County (Illinois) on October 11, 2001, or 37 days after the federal limitations period began to run.¹ Under § 2244(d)(2), “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” Thus, there is no dispute that the federal limitations clock stopped running on October 11, 2001 – the date Jones filed his state post-conviction petition. *See* Resp. Br. 12.

There is, however, considerable dispute as to when the federal limitations clock restarted. It is clear that the limitations period was tolled so long as Jones’ properly filed state post-conviction petition was still “pending.” The dispute is over what it means for a state post-conviction petition to be “pending.”

On February 5, 2003, the Supreme Court of Illinois denied Jones leave to appeal the denial of his state post-conviction petition. SA39. Jones then had 90 days – or until May 6, 2003 – in which to file a petition for a writ of certiorari seeking review of that decision.² *See* 28 U.S.C. § 2101(c); Sup. Ct. Rule 13.1.

The timeliness of Jones’ federal habeas petition depends on whether the 90-day period in which Jones could have sought certiorari after the state supreme court denied him leave to appeal the denial of his state post-conviction application is counted toward

¹ The State calculates that only 35 days had run as of the date Jones filed his state post-conviction petition. *See* Resp. Br. 12. The discrepancy is immaterial to the timeliness of Jones’ petition.

² The record is silent as to whether Jones filed a cert petition.

the one-year limitations period under § 2244(d)(1).³ If the certiorari period is counted, then Jones' federal habeas petition was untimely; if it is not, then Jones's habeas petition was timely.⁴

Relying on this Court's decision in *Gutierrez v. Schomig*, 233 F.3d 490 (7th Cir. 2000), a decision that was reaffirmed in *Gildon v. Bowen*, 384 F.3d 883 (7th Cir. 2004), the State argues that the certiorari period does count toward the limitations period and that the federal limitations clock therefore resumed running on February 6, 2003—the day after the Supreme Court of Illinois denied Jones' application for leave to appeal the denial of his state post-conviction petition. *See* Resp. Br. 12–13; *Gutierrez*, 233 F.3d at 490 (holding that “the one-year limitations period is not tolled during the time a state post-conviction petitioner could have filed, but did not file, a petition for certiorari review in the United States Supreme Court”).

Gutierrez and *Gildon* were, however, wrongly decided and should now be overturned.⁵ Properly construed, § 2244(d)(2) tolls the one-year limitations period for the 90 days during which a state prisoner could have petitioned for certiorari following denial of an application for state post-conviction relief. The contrary holding enunciated in

³ The question of whether the one-year limitations period is tolled during the time a state post-conviction petitioner could have filed, but did not file, a petition for a writ of certiorari is currently pending before the Supreme Court in *Day v. Crosby*, No. 04-1324 (to be argued March 27, 2006).

⁴ Jones filed his federal habeas petition on January 21, 2004—350 days after the Supreme Court of Illinois denied leave to appeal the denial of his state post-conviction petition, but only 260 days after the ensuing certiorari period ended. Thus, when these days are added to the 37 days that elapsed between his conviction becoming final and the filing of his state post-conviction petition, *see* page 3, *supra*, Jones' federal habeas petition was filed either 387 days or 297 days after his conviction became final.

⁵ Under Circuit Rule 40(e), a panel may overrule a prior decision of this Court.

Gutierrez and reaffirmed in *Gildon* does not withstand scrutiny and has been undermined by subsequent precedent.

In reaching the conclusion that it did, the *Gutierrez* court relied on the Sixth Circuit's decision in *Isham v. Randle*, 226 F.3d 691 (6th Cir. 2000). See *Gutierrez*, 233 F.3d at 491-92. The Sixth Circuit has, however, since repudiated *Isham* in light of subsequent Supreme Court precedent. Citing *Carey v. Saffold*, 536 U.S. 214 (2002), and *Clay v. United States*, 537 U.S. 522 (2003), the Sixth Circuit sitting en banc overturned *Isham* in *Abela v. Martin*, 348 F.3d 164 (2003) (en banc), stating:

Because *Clay* explicitly holds that federal petitioners are to receive the benefit of the ninety-day certiorari period even when they seek no such relief, because *Carey* advances a broad definition of when a petition for state relief is "pending" under section 2244(d)(2), and because the contrary view leads to an unstable limitations scheme prone to subsequent revision, we hold that under section 2244(d)(2), the statute of limitations is tolled from the filing of an application for state post-conviction or other collateral relief until the conclusion of the time for seeking Supreme Court review of the state's final judgment on that application independent of whether the petitioner actually petitions the Supreme Court to review the case.

348 F.3d at 172-73.

In deciding *Gildon*, this Court considered neither the Sixth Circuit's decision in *Abela* nor, more importantly, the Supreme Court's decision in *Carey*. *Carey* addressed the question whether "pending" as used in § 2244(d)(2) "cover[s] the time between a lower state court's decision and the filing of a notice of appeal to a higher state court." 536 U.S. at 217. The Supreme Court answered the question in the affirmative, holding that a contrary construction of "pending" "is not consistent with that word's ordinary

meaning.” *Id.* at 219. Thus, *Carey* stands for the proposition that a matter that has been adversely decided but may yet be reviewed by a higher court is still “pending” for purposes of § 2244(d)(2) during the time in which review may be sought, even if an application for such review has not been filed.⁶ *Gutierrez* and *Gildon* are therefore in conflict with Supreme Court precedent insofar as they hold, contrary to *Carey*, that the period for filing an unfiled cert petition does not toll the limitations period under § 2244(d)(2). See *Abela*, 348 F.3d at 172 (“‘pending’ also refers to the time allowed an inmate to file a certiorari petition regardless of whether such filing actually occurs”).

Gutierrez and *Gildon* misconstrue § 2244(d)(2), which tolls the limitations period so long as “a properly filed application for State post-conviction . . . review . . . is pending.” According to this Court, § 2244(d)(2) does not toll the one-year limitation period during the time in which a state post-conviction petitioner could have filed, but did not file, a petition for certiorari because the “potential certiorari petition was never ‘properly filed.’” *Gildon*, 384 F.3d at 886; *Gutierrez*, 233 F.3d at 492. That reasoning, however, is contrary to the express terms of § 2244(d)(2). The adjectival phrase “properly filed” plainly refers to the petitioner’s underlying application for state post-conviction relief, not to the petition for a writ of certiorari that may follow denial of that application by the state’s highest court. Like a petition for leave to appeal to a state’s highest court, *cf.* Supreme Court of Illinois Rules 315 & 612, a petition for a writ of certiorari is not a distinct action separate from the underlying application for state post-conviction relief.

⁶ See also *Serrano v. Williams*, 383 F.3d 1181 (10th Cir. 2004) (holding that § 2244(d)(2) tolls time during which state post-conviction petitioner could have but did not seek rehearing following adverse ruling by state’s highest court).

Rather, the cert stage is simply the final step in the multi-step process that follows the filing of an application for state post-conviction relief. *See White v. Klitzkie*, 281 F.3d 920, 926–27 (9th Cir. 2002) (Berzon, J., dissenting) (“an application for state habeas review . . . is ‘an application for State post-conviction review or other collateral review,’ regardless of whether that application is being considered on appeal by a state supreme court or by the United States Supreme Court on certiorari”), *quoted in Abela*, 348 F.3d at 170. All that § 2244(d)(2) requires as a condition of tolling is the proper filing of an application for state post-conviction review; it does not require the filing of a petition for a writ of certiorari.

So long as the underlying application for state collateral relief was properly filed, it remains “pending” for purposes of § 2244(d)(2) throughout the 90-day period during which certiorari can be sought. In *Clay*, the Supreme Court reiterated its “unvarying understanding” that “[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.” 537 U.S. at 527 (emphasis added). Because a state court decision on a state post-conviction application, like a state court decision on a direct appeal, remains subject to Supreme Court review until the time to seek certiorari expires, that decision is similarly not “final” until the certiorari period expires. Accordingly, because it is not yet final, the state post-conviction application remains “pending” during that period—and the limitations period continues to be tolled under § 2244(d)(2)—regardless of whether certiorari is sought.

This Court attempted to distinguish *Clay* in *Gildon*, noting that “the term construed in *Clay* was ‘final’, where here the term is ‘pending.’” 384 F.3d at 885. *Gildon* emphasized the Supreme Court’s observation that “[f]inality is variously defined” and that “its precise meaning depends on context.” 384 F.3d at 886 (quoting *Clay*, 537 U.S. at 527). But, while “finality” may be “variously defined” depending on context, *Clay* addressed its meaning specifically in the context of post-conviction relief. See *Clay*, 537 U.S. at 527 (“Here, the relevant context is post-conviction relief . . .”). In that context, which is the context presented here, “finality has a long-recognized, clear meaning” and does not attach until “the time for filing a certiorari petition expires.” *Id.* Pendency and finality are mutually exclusive concepts—where there is the one, there cannot be the other. See *Abela*, 348 F.3d at 172 (“a case becomes ‘final’ once it is no longer ‘pending’; they are but two sides of the same coin”). Thus, because a properly filed application for state post-conviction relief does not become final until the time for certiorari has expired, it remains pending until that point.

This conclusion is reinforced by 28 U.S.C. § 2263, which neither *Gutierrez* nor *Gildon* considered. Enacted at the same time as § 2244,⁷ § 2263 demonstrates that Congress knew how to draft legislation that, unlike § 2244(d)(2), would count the post-conviction certiorari period against the limitations period if Congress so desired. Under § 2263(b)(1), which governs tolling after the completion of state direct review, the limitations period established by § 2263(a) for capital prisoners in so-called “opt-in” states is tolled “from the date that a petition for certiorari is filed in the Supreme Court until the

⁷ See Pub. L. 104-132, Title I, §§ 101, 106, 107(a).

date of final disposition of the petition.” 28 U.S.C. § 2263(b)(1) (emphasis added). By its plain terms, § 2263(b)(1), unlike § 2244(d)(2), requires that the prisoner actually file a cert petition in order to get the benefit of any tolling after the last state court decision. Under § 2263(b)(2), which governs tolling after the completion of state collateral review, the limitations period is tolled “from the date on which the first petition for post-conviction review . . . is filed until the final *State court* disposition of such petition.” 28 U.S.C. § 2263(b)(2) (emphasis added). By expressly limiting the tolling period to the time in which the application for state post-conviction relief is pending in the state court system, § 2263(b)(2), unlike § 2244(d)(2), necessarily excludes the ensuing certiorari period. Thus, § 2263(b) demonstrates that Congress, if it wanted to, knew how to condition tolling on the actual filing of a cert petition or how to exclude the cert period from tolling altogether. Viewed against this statutory background, it is evident, by contrast, that tolling under § 2244(d)(2) neither excludes the period in which to seek certiorari nor requires the actual filing of a cert petition.

Accordingly, *Gutierrez* and *Gildon* were wrongly decided and Jones’ federal habeas petition was timely filed.

B. Even if Jones’ petition had not been filed within the one-year limitations period, Jones would likely be entitled to equitable tolling.

This Court, like every other circuit to have addressed the issue, recognizes that the one-year limitations period established by § 2244(d)(1) is subject to equitable tolling. *See Araujo v. Chandler*, — F.3d —, 2005 WL 3454099, at *2 (7th Cir. Dec. 16, 2005) (“we have recognized that in some situations the statute might be subject to equitable toll-

ing"); *Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004) (collecting cases and noting that "[e]very other circuit to address this question has reached the same conclusion"). Thus, even if Jones' habeas petition was not otherwise filed within the one-year limitations period, it may nonetheless be timely under the doctrine of equitable tolling.

"Equitable tolling is proper when extraordinary circumstances outside of the petitioner's control prevent timely filing of the habeas petition." *Balsewicz v. Kingston*, 425 F.3d 1029, 1033 (7th Cir. 2005). Here there appear to be several extraordinary circumstances outside Jones' control that may have prevented him from timely filing his federal habeas petition.⁸

First, Jones was, as the result of a false accusation, placed in segregation by the prison authorities for 60 days during the limitations period.⁹ While in segregation, Jones had no access to the law library. This situation, clearly beyond Jones' control, may well have hampered his ability to file his petition within the one-year limitations period, especially insofar as the time in segregation came toward the end of the limitations period in late 2003 and early 2004.

Second, the State limits prisoners' access to the law library. Each time that an inmate wishes to visit the law library, the inmate must submit a written request. It often takes a month, and sometimes even longer, to gain access. And, once access has been

⁸ Because Jones's petition was summarily dismissed without an answer being required from the State, Jones had neither occasion nor opportunity to build a record in the district court regarding the applicability of equitable tolling. The facts alleged in this section are derived from information provided by Jones to undersigned counsel.

⁹ Upon completion of the officials' investigation, Jones was released from segregation without any charges being filed.

obtained, the visit is limited to two hours. This policy, which is also clearly beyond Jones' control, may well have precluded the timely submission of his habeas petition.

Third, the State evidently interferes with prisoners' receipt of mail. For example, Jones reports that he is now receiving mail that was sent more than six weeks ago. If similar circumstances prevailed during the limitations period, that too may have contributed to an out-of-time filing given Jones' (misplaced) reliance, as described immediately below, on an outside provider of legal services.

Finally, Jones was the victim of a fraud that targeted Illinois prisoners. Jones, through his mother, retained University Legal Services ("ULS"), which promised to prepare and file his habeas petition in a timely fashion. Unbeknownst to Jones, and contrary to the representations made to him, neither ULS nor its proprietor, John Wilson, was licensed to provide legal services. *See generally* Complaint, *Illinois v. John Wilson d/b/a University Legal Services, LLC*, No. 04 CH 33 (Logan County Cir. Ct. April 29, 2004). Ultimately, ULS reneged on its promises to prepare and timely file Jones' habeas petition.¹⁰ While attorney negligence may not be grounds for equitable tolling, *see Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999), fraud by someone falsely claiming to be an attorney is certainly an extraordinary circumstance beyond petitioner's control and may well be grounds for equitable tolling.

In any event, if this Court finds that Jones' petition would be timely only if he is entitled to equitable tolling, the case should be remanded to the district court for dis-

¹⁰ Jones' recognition of that failure may have been compounded by delays in receiving his mail.

covery and an evidentiary hearing on that issue. Because the timeliness of Jones' petition was not raised below, *see* Resp. Br. 11, Jones has not had an opportunity to develop a complete record on the issue. It would, therefore, be unfair and improper for this Court to affirm dismissal of his habeas petition on timeliness grounds without first remanding to the district court.¹¹

II. Jones' Ineffective Assistance Claim Was Improperly Dismissed.

The district court committed reversible error when it summarily dismissed Jones' habeas petition without considering his ineffective assistance claim. Jones adequately presented the ineffective assistance claim, and alleged facts which, if true, would entitle him to relief.

A. Jones' amended petition fully complied with the applicable rules.

The State concedes that "petitioner filed an amended § 2254 petition on the form required under Local Rule 81.3." Resp. Br. 4. That should end the inquiry as to the formal adequacy of Jones' petition.

Contrary to the district court's Order dismissing the amended petition, A2, and contrary to the State's repeated assertions in this Court, *see, e.g.*, Resp. Br. 22-23, N.D. III.

Local Rule 81.3 does *not* prohibit incorporation by reference. Rule 81.3 provides in full:

Petitions for writs of habeas corpus filed pursuant to 28
U.S.C. § 2241 and § 2254 and motions filed pursuant to 28

¹¹ The State cites *Gildon* in support of the assertion that this Court can affirm dismissal on timeliness grounds. *See* Resp. Br. 12. *Gildon*, however, is inapposite for two reasons. First, in that case the district court had dismissed the petition on timeliness grounds, and the petitioner's appeal was in large part directed at that very issue. Here, by contrast, the issue was not raised until the State's Response. Second, this Court affirmed dismissal in *Gildon* on the grounds that even if the facts were as the petitioner alleged, equitable tolling was still unavailable to him. Here, by contrast, equitable would be available to Jones on the facts alleged.

U.S.C. § 2255 shall, when filed by persons in custody, be submitted on forms approved by the Executive Committee. The clerk will supply copies of the approved forms to any person requesting them.

Clearly, there is nothing in the rule that expressly precludes a petitioner from incorporating by reference.

It is true that the separate instruction sheet provided with the local form does state that “[y]ou may not answer a question by referring to another document, such as ‘see attached’ or ‘see brief.’” Addendum 6. However, the instruction sheet is not binding. The instruction sheet does not purport to be part of a local rule, and the State nowhere demonstrates that it is. The instruction sheet, which was not subject to public notice and comment, lacks force under 28 U.S.C. § 2071(b).

Moreover, even if Local Rule 81.3 were construed to encompass the instruction sheet’s prohibition on incorporation by reference, the rule itself would then be invalid under 28 U.S.C. § 2071(a), which requires that any local rule “be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of [Title 28].” The State does not dispute that the Rules Governing § 2254 Cases and the instructions for completing the prescribed national form—both of which were issued by the Supreme Court pursuant to its rule-making authority under 28 U.S.C. § 2072—specifically anticipate reliance on documents outside the four corners of the petition itself. *See* Pet. Br. 16–17; *cf.* Resp. Br. 19–25. Accordingly, if Local Rule 81.3 did prohibit incorporation by reference, it would founder on § 2071(a).

A habeas petition need only be “substantially” in the form prescribed by rule.¹² When first crafting what was Rule 2(c), and is now Rule 2(d), of the Rules Governing § 2254 Cases, the Supreme Court had omitted the word “substantially.” According to a leading treatise:

This was too much for Congress. It believed that “the rules as promulgated by the Supreme Court put too much emphasis upon a strict compliance with the forms, perhaps leading to a rejection of otherwise meritorious claims on the ground of failure to adhere strictly to the form.”

17A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4268.3 (2d ed. 1988) (quoting H.R. Rep. No. 94-1471, at 4 (1976)). Exercising its powers under 28 U.S.C. § 2074, Congress rejected the Supreme Court’s proposed rule “and inserted the word ‘substantially’ in the first sentence of Rule 2(c).” *Id.* Given the rule’s ultimate wording, and the legislative history behind that wording, it is clear that only substantial, not strict, compliance with the prescribed form is required.¹³

¹² Former Rule 2(c) of the Rules Governing § 2254 Cases, which was in effect when Jones filed his amended petition, provided in relevant part that “[t]he petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule.” Current Rule 2(d) of the Rules Governing § 2254 Cases, which was adopted in 2004, provides that a habeas petition “must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule.” In its note to the 2004 amendment, the advisory committee observed that, except for eliminating an implied preference for the national form, the changes made “are intended to be stylistic and no substantive change is intended.” Rules Governing § 2254 Cases, Rule 2 advisory committee note, 28 U.S.C.A. foll. § 2254.

¹³ It would be erroneous to conclude that Rule 2(c), which required only “substantial” compliance with the national form, allowed individual district courts to require strict compliance with locally prescribed forms.

Read alone, the first sentence of Rule 2(c) might be understood to say that the petition shall be in “substantially” the form annexed, but that a district court by local rule may require compliance with that form or some other. Read in the light

Here, Jones' amended petition was substantially in the form prescribed by N.D. Ill. Local Rule 81.3. *See* Pet. Br. 14–16. That is sufficient, particularly in light of this Court's oft-repeated "mantra that 'it is important to construe *pro se* filings liberally.'" *Winsett v. Washington*, 130 F.3d 269, 280 (7th Cir. 1997) (quoting *Coulter v. Gramley*, 93 F.3d 394, 397 (7th Cir. 1996)).¹⁴

B. Jones has alleged facts which, if true, would entitle him to relief on his ineffective assistance claim.

Because Jones' "petition for habeas corpus was dismissed without requiring the respondent to answer and without a hearing," this Court "must assume that the petitioners' allegations are true." *Lunce v. Overlade*, 244 F.2d 108, 109 (7th Cir. 1957); *see also* *House v. Mayo*, 324 U.S. 42, 45 (1945) (same), *overruled on other grounds by Hohn v. United*

of the legislative history such an understanding is clearly wrong. Having concluded that the Supreme Court was in error in promulgating a rule that put too much emphasis on strict compliance with the forms, it could not have been the intention of Congress to allow that undue emphasis to be restored in particular districts under the haphazard procedures by which local rules are made. As approved by the Supreme Court, the use of a prescribed form would have been mandatory in all cases but local rules could substitute some other form for that appended to the rules. Congress removed the language making a prescribed form mandatory and it provided expressly that substantial compliance is enough. The only reasonable construction of the rule as it emerged is that a district may choose a form other than the model form in the rules, but in either event the use of a particular form cannot be made mandatory; substantial compliance with the form will suffice.

17A Wright et al., FEDERAL PRACTICE AND PROCEDURE § 4268.3 (2d ed. 1988).

¹⁴ Contrary to the State's suggestion, the district court was not "required to construct [Jones'] legal arguments for him." Resp. Br. 23. In his original petition, which he incorporated by reference in his amended petition, Jones clearly presented his ineffective assistance claim, with allegations of fact and citations to authority offered in support. The original habeas petition was in the district court's possession and thus readily accessible. Given that the district court was, without evident difficulty, able to identify Jones' similarly incorporated *Apprendi* claim, there is no principled basis for the district court's refusal to consider Jones' ineffective assistance claim. *See* Pet. Br. 20–22.

States, 524 U.S. 236 (1998); 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 15.2c (4th ed. 2001) (“Unless patently false, the facts alleged in the petition must be presumed to be true for summary dismissal purposes.”).

Summary dismissal of a habeas petition “is appropriate only where the petition indicates ‘that petitioner can prove no set of facts to support a claim entitling him to relief.’” *Cuadra v. Sullivan*, 837 F.2d 56, 58 (2d Cir. 1988) (quoting *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir. 1983)). See also *O’Blasney v. Solem*, 774 F.2d 925, 926 (8th Cir. 1985) (“a petition ought not be summarily dismissed unless it appears without a doubt that the petitioner can prove no set of facts which would entitle him to relief”); *United States ex rel. Jones v. Franzen*, 676 F.2d 261, 265 (7th Cir. 1982) (reversing summary dismissal of habeas petition where “assertions might well if true support a grant of the petition”).

Here, if given an opportunity to substantiate his allegations, Jones might well prove facts entitling him to relief on his ineffective assistance claim.¹⁵ For example, Jones alleges that trial counsel “filed no substantive pretrial motions,” SA25, an allegation that surely encompasses trial counsel’s failure to contest the admissibility of Jones’ incriminating statement to the police. Jones might be able to adduce evidence that would call the voluntariness of his statement into question, and evidence that would show that counsel’s failure to challenge the statement’s admission at trial resulted not

¹⁵ Because he sought, but was denied, an evidentiary hearing during state post-conviction proceedings, and sought, but was denied, counsel during those same proceedings, SA42, Jones is entitled to an evidentiary hearing in the district court under 28 U.S.C. § 2254(e)(2), particularly given trial counsel’s apparent failure to develop the record. See *Davis v. Lambert*, 388 F.3d 1052, 1060–61 (7th Cir. 2004).

from strategy, but from a failure to investigate. It is well established that an attorney's failure to investigate may constitute deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). *See id.* at 691; *Rompilla v. Beard*, 125 S. Ct. 2456, 2466 (2005); *United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2005). Therefore, given the obvious prejudice that flowed from the statement's admission, SA58, Jones could well prove that he received ineffective assistance of counsel, even if *Strickland*, rather than *United States v. Cronin*, 466 U.S. 648 (1984), supplies the applicable standard in this case.¹⁶

Accordingly, because Jones might be able to prove facts that would entitle him to relief, summary dismissal of his ineffective assistance claim was erroneous.

III. Jones' *Apprendi* Claim Was Improperly Dismissed.

The State concedes, as it must, that "*Apprendi* applies to this case, and the district court erred in holding otherwise." Resp. Br. 14. According to the State, however, dismissal of Jones' *Apprendi* claim should nonetheless be affirmed because the claim is, purportedly, "without merit." *Id.* at 19. The State is mistaken. Jones has, in connection with his *Apprendi* claim, "state[d] facts that point to a 'real possibility of constitutional

¹⁶ There is no basis for the State's assertion that "[i]n his brief before this Court, petitioner does not challenge the state appellate court's determination that his ineffective assistance of trial counsel claims were without merit." Resp. Br. 26. Jones challenged that determination in his opening brief, Pet. Br. 23 ("Jones could well prove a 'set of facts which would entitle him to relief'"), and continues to challenge that determination here. In suggesting that there is no merit to Jones' ineffective assistance claim, the State relies on the findings of the Illinois Appellate Court. *See* Resp. Br. 25-27. That reliance is misplaced, however. Those findings were made in the context of Jones' direct appeal. As this Court has recognized, however, the facts relevant to an ineffective assistance claim "are virtually never in the direct appeal record." *Davis*, 388 F.3d at 1060. They are, instead, generally to be found in the record developed in the state post-conviction proceeding. *See id.* In this case, because the state post-conviction court denied Jones an evidentiary hearing, *see* n.15, *supra*, there is no record upon which to evaluate Jones' ineffective assistance claim.

error.” Rules Governing § 2254 Cases, Rule 4 advisory committee note, 28 U.S.C.A. foll. § 2254 (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970)). The district court order summarily dismissing Jones’s *Apprendi* claim should therefore be reversed.

Under Illinois law, persons convicted of first degree murder are generally subject to a sentence of 20 to 60 years imprisonment. *See* 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(a). Jones, however, received an enhanced sentence of natural life. Pet. Br. 5–6; SA56. Jones was sentenced under 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(b) (West 1999), *reproduced at* Addendum 13. But that statute, since amended, was facially unconstitutional in light of *Apprendi*.¹⁷

The provision under which Jones received his enhanced sentence allowed imposition of natural life “if *the court* finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or . . . that any of the aggravating factors listed in [720 Ill. Comp. Stat. 5/9-1] are present.” *Id.* (emphasis added). Because the statute required that the judge, rather than a jury, make the findings of fact upon which Jones’ enhanced sentence was based, and because the statute did not require that those findings be made beyond a reasonable doubt, the statute was plainly unconstitutional under *Apprendi*. *See* 530 U.S. at 490 (“any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”). Indeed, subsequent to Jones’ sentencing, the Illi-

¹⁷ The State’s argument that a different statute, 720 Ill. Comp. Stat. 5/9-1, is constitutional, see Resp. Br. 18, is beside the point. Jones was not sentenced under *that* statute, the Illinois death penalty statute, but under 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(b), after the trial court found that were sufficient mitigating circumstances to preclude imposition of the death penalty. SA56.

nois legislature amended 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(b) precisely because the statute violated *Apprendi*. See Pet. Br. 28 n.22.

The State argues that there was no *Apprendi* violation in Jones' case because Jones waived his right to a jury trial and was then found guilty beyond a reasonable doubt of aggravated vehicular hijacking, which is one of the aggravating factors upon which a sentence of natural life can be based. See Resp. Br. 15–18. But, the State's argument misses the mark.

It is undisputed that Jones had a right to a jury at all phases of his trial. But, even as recounted in the state appellate decision on direct appeal, whatever waiver Jones may have made with respect to that right was strictly limited to the death penalty phase of his trial. See SA61 (“[t]he defendant waived his right to a jury *during the death penalty case*”) (emphasis added). The Illinois Appellate Court recounted Jones' waiver as follows:

On June 7, 1999, the trial court in the case at bar asked defendant whether he wanted to waive his right to a jury trial and have the judge hear his case. He answered that he did wish to waive his right to a jury trial. The judge then admonished him that a death penalty case has three phases: (1) the phase where the jury would hear the evidence and unanimously determine whether the State proved defendant guilty beyond a reasonable doubt; (2) the phase where the State has the burden to prove beyond a reasonable doubt that he was eligible for the death sentence and that if one juror decided he was not eligible then he would not be sentenced to death; and (3) then the death phase, where the jury would have to unanimously find that there were no mitigating factors to preclude the imposition of death. Defendant stated that he understood that he was giving up his right to a jury trial in each phase but also understood that he still could invoke that right on the stages left before him.

SA60. As is evident even from this description, the court's admonishment dealt only with the "three phases" of "a death penalty case." Insofar as the admonishment ended with the "death phase," it clearly did not encompass what would come next—namely, the possible imposition of an enhanced sentence under 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(b)—if the jury did not unanimously find that there were no mitigating factors to preclude the imposition of death.

Thus, even if one were to rely solely on the account found in the Illinois Appellate Court decision on Jones' direct appeal, it is apparent that Jones' waiver did not extend to sentencing under 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(b). On the contrary: the court's admonishment, and thus Jones' waiver, specifically *excluded* sentencing under 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(b). Rather than inform Jones of his right to have a jury determine whether an aggravating factor existed for purposes of sentencing under Section 5-8-1, "the trial court specifically admonished [Jones] that if the jury returned a non-death verdict, that he, the judge, would impose the sentence." SA29-SA30.

Though an accurate reflection of the unconstitutional sentencing scheme established by 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(b), that admonishment misinformed Jones of his rights under the Sixth Amendment and thus prevented Jones from making a knowing, voluntary, and intelligent waiver of his right to a jury determination of the facts upon which an enhanced sentence under 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(b) would be based. Consequently, even if Jones had waived his right to a jury with respect to sentencing under 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(b), such a waiver would have been ineffective. *See, e.g., Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitu-

tional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”), *quoted in United States v. Osigbade*, 195 F.3d 900, 903 (7th Cir. 1999)); Pet. Br. 27–28 (collecting cases). Absent an effective waiver of his right to a jury trial with respect to sentencing determinations under 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(b), Jones’ rights under *Apprendi* were violated. *See Fitzgerald v. Withrow*, 292 F.3d 500, 503 (6th Cir. 2002) (“The defendant retains any portion of the jury trial right that he has not validly waived.”).

Accordingly, because Jones has alleged that he was sentenced to an enhanced sentence of natural life under a facially unconstitutional statute and because Jones has alleged that he did not waive his right to a jury trial with respect to the statute under which he received the enhanced sentence, the district court committed reversible error in dismissing Jones’ *Apprendi* claim.

CONCLUSION

The order of the district court dismissing the petition should therefore be vacated and the matter remanded for further proceedings.

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January 17, 2006

**CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(a)(7)(B)**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,433 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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**CERTIFICATE OF COMPLIANCE
WITH CIRCUIT RULE 31(e)(1)**

I hereby certify that pursuant to Circuit Rule 31(e)(1) I have filed an electronic version of this brief in a non-scanned PDF format.

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