**No. 12-17165**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**KLEE CHRISTOPHER ORTHEL,**

*Petitioner-Appellant,*

**v.**

**JAMES A. YATES, WARDEN,**

*Respondent-Appellee.*

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On Appeal from the United States District Court
for the Northern District of California
3:10-cv-03612-SI

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# APPELLANT'S REPLACEMENT OPENING BRIEF

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## STATEMENT IN SUPPORT OF ORAL ARGUMENT

Mr. Orthel respectfully requests oral argument, which will aid the Court's decisional process. This case presents detailed factual and procedural considerations as well as important legal questions. Mr. Orthel submits that oral argument in this proceeding—in which his counsel was appointed through the Pro Bono Program—will assist the Court in addressing the issues presented and in reviewing the lengthy proceedings in this case.

## INTRODUCTION

Virtually every medical professional to evaluate Klee Christopher Orthel since he entered the criminal justice system in 1994 has recognized that he is extremely mentally ill. From the beginning, Mr. Orthel defended himself by invoking the insanity defense, with the key factual dispute not being whether he was mentally ill—all agreed he was—but whether Mr. Orthel was legally insane and thus not criminally responsible for his actions. Mr. Orthel has since spent most of his incarceration seeking treatment in various prison-based mental health facilities. All the while he has been heavily medicated, sometimes voluntarily, sometimes by court order, with the most powerful anti-psychotic medicines in existence—medicines this Court has described as "a particularly intrusive category of drug that alters mental processes, affects behavior and demeanor, and interferes with a person's self-autonomy, in addition to subjecting patients to serious side effects." *United States v. Cope*, 527 F.3d 944, 954 (9th Cir. 2008) (internal quotation marks omitted). The only reason Mr. Orthel *ever* managed to seek federal post-conviction review is because his mother finally took the initiative to hire a private attorney, who commenced the proceedings that led to this appeal.

Mr. Orthel is the reason that equitable tolling exists. He is a deeply ill man who was incapable of comprehending federal habeas corpus, much less initiating the

process himself. He is entitled to his chance at federal post-conviction review before he spends the rest of his life in prison. This Court should now provide it.

## STATEMENT OF JURISDICTION

The district court had jurisdiction over this proceeding under 28 U.S.C. § 2254. The district court's decision granted Respondent Yates's motion to dismiss on all claims, and was thus a final order. SER 4-11. This Court has jurisdiction under 28 U.S.C. § 2253. The district court entered judgment on August 17, 2012, and Mr. Orthel filed a notice of appeal on September 4, 2012. SER 3 (Judgment); SER 13-18 (Notice of Appeal). The district court granted Mr. Orthel's application for a certificate of appealability on October 16, 2012. SER 1-2. This appeal is thus timely under Federal Rule of Appellate Procedure 4(a).

## STATEMENT OF THE ISSUES

Mr. Orthel is a prisoner serving a life sentence who has taken powerful anti-psychotic medicines and who has participated in well-documented intensive psychotherapy throughout his time in the California prison system. The issues in his appeal are:

### CERTIFIED ISSUE

1. Whether the district court erred in denying equitable tolling, where Mr. Orthel provided evidence that he suffered from severe mental illnesses that rendered him unable to understand the need to file or prepare a habeas petition and that he was diligent in pursuing his rights to the extent he could understand them.

### UNCERTIFIED ISSUE

2. Whether the district court erred in failing to hold an evidentiary hearing, where Mr. Orthel alleged facts sufficient to demonstrate that he suffered from a severe mental illness throughout the relevant period.[1]

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[1] As detailed below, the district court's order granting a Certificate of Appealability to Mr. Orthel almost certainly included a Certificate of Appealability on that court's failure to conduct an evidentiary hearing—the order specifically noted that "there was no evidentiary hearing or expert testimony to evaluate petitioner's claims." SER 1. Mr. Orthel's prior appellate counsel, however, identified the issue as uncertified in the initial opening brief. In response to that brief's treatment of this issue, on September 25, 2013, the Clerk of Court issued an order allowing Respondent to "file a letter brief responding to Appellant's briefing of the uncertified issue of whether the district court should have, sua sponte, held an evidentiary hearing before dismissing the petition." Order, Sept. 25, 2013, ECF No. 23. Respondent Yates filed

## STATUTORY ADDENDUM

Pertinent statutes and rules are set forth in an addendum to this brief.

(continued…)

a letter brief on September 30, 2013, and oral argument was held on October 10, 2013, where this issue was raised. Letter Br., Sept. 30, 2013, ECF No. .25; Docket Entry Regarding Oral Arg., Oct. 10, 2013, ECF No. 28. For this reason, the issue is listed as uncertified above.

In any event, regardless of whether the district court certified the issue of its failure to conduct an evidentiary hearing, this Court construes uncertified issues as a motion to expand the Certificate of Appealability, as long as the brief complies with Circuit Rule 22-1(e). This brief complies with Circuit Rule 22-1(e). To the extent the Court believes the evidentiary hearing issue is uncertified, expansion of the Certificate of Appealability is warranted to address that important issue. *See, e.g., Nedds v. Calderon*, 678 F.3d 777, 782 n.3 (9th Cir. 2012).

## STATEMENT OF THE CASE

On August 17, 2010, counsel retained by the family of Klee Christopher Orthel filed a habeas petition in the U.S. District Court for the Northern District of California seeking relief on an underlying constitutional issue as well as equitable tolling for the eleven years Mr. Orthel spent suffering from severe mental impairment that rendered him unable to file a habeas petition on his own. During the course of the proceedings below, Mr. Orthel's counsel filed more than two thousand pages of medical records detailing the history and severity of Mr. Orthel's mental illnesses, which include schizoaffective disorder, bipolar disorder, post-traumatic stress disorder, and depression, as well as the debilitating symptoms resulting from these illnesses and the numerous medications Mr. Orthel took. Unmoved by Mr. Orthel's history of mental illness, the district court granted Respondent's motion to dismiss, finding that Mr. Orthel did not qualify for equitable tolling. It did so without conducting an evidentiary hearing. This appeal followed.

### A. Experts Diagnose Mr. Orthel With Schizoaffective Disorder And Bipolar Disorder At Trial.

Mr. Orthel's mental illness has been center-stage from the beginning of his involvement in the criminal justice system. During his original criminal trial in 1994, Mr. Orthel's primary defense was that he was legally insane. Both Mr. Orthel and the government presented evidence related to Mr. Orthel's known mental impairment, including testimony from Mr. Orthel's family members and four expert witnesses.

SER 84-88. Mr. Orthel's family members testified on his behalf, focusing primarily on the history of Mr. Orthel's mental illness prior to trial. Mr. Orthel's grandmother, for example, explained that she noticed Mr. Orthel's "bizarre behavior" in 1993, after he returned home upon discharge from the Navy. *Id.* The evidence further showed that, while serving as a submarine technician in the Navy, Mr. Orthel suffered a massive head trauma and lost consciousness. Medical Excerpts of Record ("MER") 1373.[2] After this injury, he began experiencing emotional symptoms, including a fear that he would sink in the submarine. *Id.*

Mr. Orthel's grandmother also described occasions in which she observed Mr. Orthel "talking to himself and speaking in broken or incomplete sentences," as well as frequent instances in which he "would lapse into delusions that he was on a secret mission for the navy." SER 84. "While under his delusions, [Mr. Orthel] believed he was receiving military messages over the CNN-TV news channel." SER 84-85. "On one occasion, [he] used the riding lawn mower to cut large symbols in the grass." SER 85. "On another occasion, [he] left a symbol on the roof of his house so he could make contact with a satellite." *Id.* Evidence in the record also suggests that Mr. Orthel believed that the victim, "his cousin (Sylvia)[,] was a Serbian official" and

[2] On February 12, 2013, Respondent Yates filed Mr. Orthel's medical records with this Court. Supplemental Excerpts of Record, Feb. 12, 2013, ECF No. 11. These records are denoted as MER throughout the brief.

"that the Bosnia maps shown on CNN were actually maps of Blue Lake," where Sylvia lived. MER 1389.

In addition to family members, four different expert witnesses testified about Mr. Orthel's mental impairment—two on behalf of Mr. Orthel and two on behalf of the state. SER 86-88. All four experts "agreed [Mr. Orthel] was mentally ill but disagreed about whether he was legally insane." SER 86. Mr. Orthel's first expert, Dr. Paul S. D. Berg, "administered several psychological tests and diagnosed [Mr. Orthel] as suffering from schizophrenia of the paranoid type and possibly bipolar disorder." *Id.* Mr. Orthel's second expert, Dr. William Pierce, diagnosed Mr. Orthel "as suffering from a severe bipolar disorder with psychotic features, namely, delusions. He also diagnosed [him] as suffering from post-traumatic stress disorder." *Id.* Dr. Pierce based his opinion in part on the fact that Mr. Orthel "believed he was a secret agent on a mission with a license to kill," and Mr. Orthel's "belief he would soon be released from prison because of his special status." *Id.* Both Dr. Berg and Dr. Pierce concluded that Mr. Orthel was legally insane. *Id.*

The state's first expert, Dr. Otto Vanoni "diagnosed [Mr. Orthel] as suffering from a high level of narcissism, with some borderline psychosis and schizophrenic indications, and as having difficulty controlling anger." SER 87. The state's second expert, Dr. Robert E. Soper, diagnosed Mr. Orthel as "suffering from a schizoaffective disorder, namely, a chronic psychotic disorder with manic depressive

(bipolar) features." *Id.* Although believing that he was legally sane, the state's expert witnesses did not dispute that Mr. Orthel suffered from a severe mental illness.

Post-conviction, Mr. Orthel (still represented by counsel) filed a direct appeal and a habeas petition in the California Court of Appeals. SER 149. The California Court of Appeals affirmed Mr. Orthel's conviction on January 21, 1998, and Mr. Orthel petitioned for review in the California Supreme Court. SER 151. The California Supreme Court denied review on April 29, 1998. SER 12, 153. After the California Supreme Court denied review, Mr. Orthel does not appear to have been represented by counsel any longer.

### B. Mr. Orthel Continues To Suffer From Severe Mental Illness While Incarcerated.

Since his incarceration, Mr. Orthel has amassed more than two thousand pages of medical records, the majority of which relate to his severe mental impairments. MER 1-2266. Review of these complex and detailed medical records reveals that Mr. Orthel suffered from schizoaffective disorder, bipolar disorder, depression, and post-traumatic stress disorder throughout his incarceration, which caused him to suffer from paranoia, delusions, hallucinations, depression, and anxiety, among other things. *See, e.g.*, MER 963-66, 1234, 1335-38, 1343, 1372-73, 1385-86, 1437, 1696, 1712, 1717, 1721-22, 1806-09, 1812, 1858, 1867, 1895.

As a result of his illnesses, Mr. Orthel endured multiple psychotic breaks, during which his hallucinations and delusions worsened and required the medical staff

to refer him to heightened care units—the Mental Health Crisis Bed unit (Crisis Bed Unit)[3] and hospitalization in the Department of Mental Health Unit—designed to address acute decompensation. *See, e.g.*, MER 1772, 1867, 1943, 2085-87, 2187; SER 123-24. In between psychotic breaks, Mr. Orthel remained in the Mental Health Program,[4] where he received constant treatment for his mental illness and the resultant symptoms. In brief, Mr. Orthel "has a long[,] well documented history of psychotic symptoms and recurrent major depressions, as well as past episodes of severe irritability mood." MER 1024; *see also* MER 1916 (noting in 2008 that "since 1994 he experienced A/V H [(auditory and visual hallucinations)] of command voices and paranoia").

During his incarceration, Mr. Orthel took numerous medications for these conditions (often taking several at once) including Risperidone (Risperidal), Bupropion (Wellbutrin), Trihexyphenidyl (Artane), Paroxetine (Paxil), Escitalopram (Lexapro), Ziprasidone (Geodon), Haloperidol (Haldol), Citalopram (Celexa),

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[3] The Crisis Bed Unit is often referred to as the Correctional Treatment Center in the record. According to the Department's Program Guide Overview, the Crisis Bed Unit operates in the Correctional Treatment Center. *See* Cal. Dep't of Corr. & Rehab., Mental Health Servs. Delivery Sys., *Program Guide Overview* at 12-1-9 (rev. 2009), *available at* http://cdcr.ca.gov/DCHCS/docs/Mental%20Health%20Program%20Guide.pdf.

[4] The Mental Health Program oversees the provision of mental health care to inmates in the California prison system. *See* Cal. Dep't of Corr. & Rehab., *Mental Health Program (MHP)*, http://cdcr.ca.gov/DCHCS/Mental_Health_Program.html (last visited Nov. 4, 2014).

Venlafaxine (Effexor), and Chlorpromazine (Thorazine). *See, e.g.*, MER 1-9, 37-88, 219-22, 273-74, 299-300; SER 67, 75. These medications target brain function, altering, to varying degrees, natural substances or activity in the brain. They also often interact. For example, the combination of Risperidone and Bupropion, which Mr. Orthel took simultaneously from 1998-2003 (with other drugs intermixed, including Venlafaxine), MER 39-77, requires careful monitoring for side effects due to potential drug interactions. Side effects directly affecting mental capacity are severe and include hallucinations, confusion, irrational fears, forgetfulness, difficulty concentrating, excessive tiredness, anxiety, and problems with thinking, concentration, or memory.[5]

**1. 1996-1997.**

When Mr. Orthel arrived at San Quentin State Prison in early 1996, a prison physician performed a mental health screening. The physician administered this screening because Mr. Orthel was at that time taking a cocktail of anti-psychotics, including Haldol, MER 1003, a powerful drug used to treat psychotic disorders.[6] Mr. Orthel had also come to San Quentin after having been hospitalized in 1994 following

[5] The United States National Library of Medicine, National Institutes of Health is the source of the factual information about the medications Mr. Orthel was taking. Information about each medication can be found by searching for the drug name at http://www.nlm.nih.gov/medlineplus/medlineplus.html (last visited Nov. 3, 2014).

[6] U.S. Nat'l Library of Med., Nat'l Insts. of Health, *Haloperidol.*

"a serious suicide attempt by hanging . . . that included being found pulseless and required cardiopulmonary resuscitation to revive him." MER 1373, 1384. Yet, in a theme that recurs throughout Mr. Orthel's medical records, *see, e.g.*, MER 1045 (noting that Mr. Orthel "can present well, masking underlying anxiety [and] distress and has difficulty trusting"), Mr. Orthel presented himself as a rational person to the prison physician. Deceived by Mr. Orthel's appearance of sanity, the physician concluded that Mr. Orthel was fit to reside in the prison's general population. MER 1004.

Events quickly disproved this assessment. On July 2, 1997, Mr. Orthel had a psychotic episode in which he barricaded himself inside his cell, spread body lotion across the cell windows, made various demands of prison guards, and engaged in a hunger strike. MER 1194, 1200. He informed prison officials that he was a law clerk for Justice Blackmun, that he was the subject of a study by the Joint Chiefs of Staff, that he is related to John Quincy Adams, Robert E. Lee, George Washington, and Paul Klee,[7] and that these facts justified him murdering his cousin. MER 1199, 1201-02. Mr. Orthel simultaneously denied that he was mentally ill and refused to take medication for his psychosis. *Id.* Prison physicians promptly diagnosed Mr. Orthel with (among other things) schizophrenia and resumed his prescription of the powerful anti-psychotics Haldol. MER 1194. In the subsequent months, Mr. Orthel continued minimizing his symptoms, much as he had done in his initial intake

[7] The Metropolitan Museum of Art, Paul Klee, http://goo.gl/6GrP2W (last visited Nov. 4, 2014).

interview, apparently as part of his campaign to stop taking anti-psychotic medications. *See, e.g.*, MER 1011 (noting on September 5, 1997, that Mr. Orthel "requested medications be discontinued"); MER 1200 (noting that Mr. Orthel "started refusing Haldol . . . in Jan '96").

While Mr. Orthel was denying his mental illness, he continued to have psychotic episodes. For example, on December 2, 1997, Mr. Orthel attempted to cut his "trigger finger" off his hand because that was the finger he had used to shoot his cousin. MER 1124. He reported concerns that his life was in danger, told prison officials that he was thinking about hanging himself, and was recorded as having lost nearly 60 pounds of body weight. *Id.*

**2. 1998-2001.**

By the time Mr. Orthel's conviction became final on April 29, 1998 (commencing the relevant period for his petition), the prison had hospitalized him in the Department of Mental Health and placed him in a crisis bed in the Crisis Bed Unit for acute decompensation, as well as the parasuicidal acts he committed from July 1997 to May 1998. *See, e.g.*, MER 983; MER 1013 (explaining that "he was pretty psychotic at the time of the cell extraction" in November 1997); MER 1031 ("Acute suicide risk."); MER 1043 (he is hearing voices and is depressed, manic, and anxious); MER 1069 (physician notes he is a high risk for self-directed violence and he is making threats to others); MER 1485 ("I'm losing my mind and stuff is coming out of

the walls."); MER 1493 ("I'm doing ok if I ignore the voices."). The Crisis Bed Unit "provides short term (less than 10 day[s]) inpatient treatment to patients with marked impairment and dysfunction requiring 24 hour nursing care, are a danger to others as a result of a serious mental disorder, or are a danger to self for any reason." *See* Cal. Dep't of Corr. & Rehab., *Mental Health Services Program* at 3, *available at* http://goo.gl/3UWJPQ. The only level above the Crisis Bed Unit is hospitalization in the Department of Mental Health, where Mr. Orthel spent three months in 1998. MER 2180.

Once discharged from the Crisis Bed Unit in late spring 1998, Mr. Orthel was placed in the Enhanced Outpatient Program, a unit within the Mental Health Program that treats inmates "with acute onset or significant decompensation because of a serious mental disorder and are unable to function in the prison general population." *See* Cal. Dep't of Corr. & Rehab., *Mental Health Services Program* at 2; MER 1369. The Enhanced Outpatient Program is the second-highest level of care available in the prison. It has "separate housing units" and "is similar to a day treatment program or locked mental health unit in the community." *See* Cal. Dep't of Corr. & Rehab., *CDCR's Mental Health Treatment for Inmates* at 2 (Feb. 2013), *available at* http://www.cdcr.ca.gov/news/docs/3JP-May-2013/Mental-Health-Fact-Sheet.pdf. Mr. Orthel did not stay in the Enhanced Outpatient Program for long, however, as a senior psychologist noted that "there has been a deterioration in [Mr. Orthel's]

adaptive or mental status," MER 1370, and sent him to the suicide prevention unit in the Department of Mental Health inpatient psychiatric unit "because of the severity and length of the patient's current depression," MER 1024; *see also* MER 1412 ("Mr. Orthel has demonstrated severe decompensation in the past two weeks with symptoms of delusions, paranoia, and suicidal ideation."). "During his hospital stay, his depression remained severe and he continued to have suicidal ideation and anxiety." MER 1024.

During this time period, Mr. Orthel stated that he was "hearing voices and 'plots of gangsters with secret codes,'" *see* MER 1484, and complained of being "'under some sort of surveillance or hidden cameras or something.'" MER 1385; *see also* MER 1082-83. The doctor also noted that Mr. Orthel "demonstrated some difficulty cognitively with somewhat impaired complex attention and organizational ability," likely due to "the prior head trauma" that he suffered while in the Navy. MER 1372; *see also* MER 1386 (noting in November 1998 that Mr. Orthel "would benefit from improved problem-solving skills"). The doctor performing the evaluation diagnosed Mr. Orthel with "delusional disorder persecutory type, dysthymic disorder, and cognitive disorder not otherwise specified as well as paranoid personality disorder with narcissistic and borderline features." MER 1372. Another member of his medical team again noted at that time that "[h]e can present well, masking underlying anxiety [and] distress and has difficulty trusting." MER 1045; *see*

*also* MER 1020 ("He minimizes symptoms at this time."); MER 1043 ("Mr. Orthel presents well, but when probed reveals considerable anxiety and possible auditory hallucinations.").

After he completed treatment in both the Crisis Bed Unit and the suicide prevention unit, Mr. Orthel was transferred back to the Enhanced Outpatient Program, where he spent the majority of his time from 1999 to 2001 due to symptoms of "[s]chizoaffective disorder, [d]epressive type" and "[g]rave disability." MER 1437, 1904; *see also* MER 965-66, 968-70, 1445-57, 1565-67, 1585, 1606, 1864 (denoting time spent in the Enhanced Outpatient Program). During this period, Mr. Orthel stated "that he often[] has suicidal thoughts," MER 1606, and medical staff reiterated that Mr. Orthel has a "[h]istory of being extremely paranoid and hypervigilant." MER 1400. For example, Mr. Orthel stated that "he had thoughts of [the] CIA trying to have him hurt Russians or they would hurt him." MER 1550. Mr. Orthel continued to take psychotropic medication for his delusions, paranoia, and hallucinations even when he was not in the Crisis Bed Unit or hospitalized in the Department of Mental Health, and the medical staff noted that he had periods of "disorganized thinking." *See, e.g.*, MER 963-66, 1614.

**3. 2002-2005.**

In 2002 and 2003, Mr. Orthel spent additional time in the Enhanced Outpatient Program. *See, e.g.,* MER 964. Even with Risperidone (which he continued

to take along with other medications such as Bupropion), Mr. Orthel was "still somewhat paranoid" and his depression periodically worsened. MER 46, 50, 1277, 1314. Mr. Orthel's condition remained such that he stayed in the Mental Health Program and continued to take medication for his schizoaffective disorder, paranoia, and depression. *See, e.g.*, MER 1277-1314. In 2004, his medications were changed from Risperidone and Bupropion to Risperidone, Effexor (Venlafaxine), and Lexapro (Escitalopram)—an equally potent cocktail of drugs. *See, e.g.*, MER 219.

In April 2004, Mr. Orthel stopped taking his medication because it "'slowed down' his thinking." MER 1335, 1337-38. Prison officials did not notice that Mr. Orthel had stopped taking his medications, however, until Mr. Orthel's mother called Mr. Orthel's case manager to tell him. MER 1335. At this time, Mr. Orthel had been assigned a new treatment team that was not familiar with his treatment plan and with whom Mr. Orthel felt hesitant discussing his symptoms. *Id.* After Mr. Orthel's mother called, his case manager examined him and described his thinking as "rigid and paranoid," and his "insight and judgment poor." MER 1343. The case manager also noted that Mr. Orthel has "a significant paranoid process which comes to the fore when he is stressed or he begins to ruminate and become preoccupied." *Id.* Also in April, Mr. Orthel's psychiatrist wrote that Mr. Orthel was agitated and depressed and that he had paranoid and suicidal ideations. MER 1341. In November 2004, the hallucinations continued, especially when "resting or going to sleep, [he] sees visions,

smells odors, or hears voices, sounds or whispers in the absence of external stimulation." MER 1327; *see also* MER 1356.

In the summer and fall of 2005, Mr. Orthel continued to experience "paranoid thinking," *see* MER 1808, as well as auditory hallucinations. MER 1809; *see also* MER 374 ("Chronic Psychosis (Schizoaffective Disorder & Depression)"); MER 1806 ("hears 'sounds'"). In July 2005, for example, Mr. Orthel "report[ed] that he continues to hear voices and receives messages from the TV, Radio, Magazines and the Newspapers." MER 1809. He also told physicians that "I feel controlled by my environment. Sometimes they control my mind." MER 1848. Finally, he claimed that he had a large inheritance because he was related to the owners of Curtis Engine and Lloyd's of London. MER 1201-02; *see also* MER 1809.

**4. 2006-2007.**

In early 2006, Mr. Orthel refused medication for at least two weeks. MER 444-59. In May 2006, he had another psychotic episode. He was found with badly swollen ankles and calves, from "tying his ankles with material ripped from clothing, in an attempt to show that he was 'in control of' his body.'" MER 1772. "He subsequently accused the writer of 'trying to take control of [his] mind, just like they do.'" MER 1867. Mr. Orthel had "also . . . been purposely holding his urine to the point where his bladder was so distended that urine would leak out despite his attempts to stop it" in an effort "to learn how to control his body." MER 1772; *see*

*also* MER 801. Finally, he "was not eating anything but his lunch" and "claim[ed] that his mouth is sore from biting into the 'hooks' that are in all of his food, other than his lunch." *Id.* One medical professional noted that there was "[c]learly some deterioration in thought process—off target answers, odd word choice" and reiterated his diagnosis of "schizophrenia [and] borderline [] antisocial traits." MER 514; *see also* MER 777. As one example, during an examination Mr. Orthel answered "I have a big mouth" to most questions asked. MER 505. Another professional warned the staff to "[t]ake appropriate precautions" because Mr. Orthel was "voicing homicidal ideations." MER 531; *see also* MER 515-16.

After this episode, the prison involuntarily medicated Mr. Orthel under a *Keyhea* order from June 15, 2006 until June 15, 2007. The California courts issue *Keyhea* orders when an inmate is found by clear and convincing evidence to be "gravely disabled and incompetent to refuse medication." *See* SER 119-20. At this time, Mr. Orthel "believe[d] he [was] being controlled by mysterious 'others' who attempt to harm him" and he "[a]cknowledge[d] hearing voices," but he refused to take his medication. MER 1867.

While medicated under the *Keyhea* order, Mr. Orthel was kept in the Enhanced Outpatient Program, and he continued to suffer from auditory hallucinations, delusions, and paranoia. MER 1696, 1895; *see also, e.g.*, MER 1711 ("I heard more stuff at night."); MER 1768 (explaining Mr. Orthel's "pervasive paranoid thought

process where he seems to always experience himself at risk exacerbated by evident perceptual distortions regarding his body and environment"). In August 2006, for example, although he was on medication, Mr. Orthel "hear[d] sonar beeps in [his] cell" and believed that there was "some surveillance going on" relating to his security clearance that he received in the Navy. MER 1736. And in October 2006, still on medication, Mr. Orthel "easily accept[ed] conspiracy ideas and remember[ed] his delusions as real events." MER 1717; *see also* MER 1712 (noting that when Mr. Orthel "was getting . . . meds the other day," he "went blind for 15 to 20 seconds"); MER 1721 (noting that although medicated through *Keyhea*, Mr. Orthel "still holds some strange beliefs"); MER 1722 (explaining that Mr. Orthel "said he heard 'voices'"). Mr. Orthel also accused the nurses of playing games on him and thought that they "talk[ed] in code when they were around [him]. [Mr. Orthel] would write a circle of letters and draw a line in between the letters depending upon what they would say." MER 1717; *see also* MER 1755.

These symptoms continued through 2007, as Mr. Orthel presented signs of "depression, mood swings, anxiety, agitation, hopelessness, poor impulse control, [suicidal ideations] and delusions." MER 1812; *see also, e.g.*, MER 1858 (same). He also continued to speak of a "secret code." MER 1230. And by late 2007, after Mr. Orthel had been in the Enhanced Outpatient Program for months, he was no longer reliably receiving his medication. MER 1129, 1649, 1663-65, 1673-93, 1812, 1829,

1842-48 (denoting time in the Enhanced Outpatient Program). Indeed, in November 2007, Mr. Orthel received his medication just 50% of the time, and often not at the right time of day. *See, e.g.*, MER 1234, 1273.

**5. 2008 to the date of Mr. Orthel's petition.**

On January 22, 2008, the prison initiated involuntary medication procedures, and a state court granted a second *Keyhea* order. SER 123, 127. Mr. Orthel was admitted to the Acute Psychiatric Program in February 2008, "[d]escribed as 'actively suicidal, paranoid, anxious, withdrawn, depressed, delusional, disoriented, hallucinating, refusing medications, confused, [and] poor hygiene.'" MER 2187. The Acute Psychiatric Program is a "short-term, intensive-treatment program" for inmates who suffer from "impairment of functioning with signs and symptoms that may be attributed to either an acute major mental disorder or an acute exacerbation of a chronic major mental illness." Cal. Dep't of Corr. & Rehab., Mental Health Servs. Delivery Sys., *Department of Mental Health Impatient Program* at 12-6-2 (rev. 2009), *available at* http://goo.gl/x1ZNZV. Upon discharge from the Acute Psychiatric Program, Mr. Orthel was again placed in the Enhanced Outpatient Program, where he continued to report "auditory hallucinations and depression" through April 2008. MER 2161, 2186.

In August 2008, the prison admitted Mr. Orthel to the Crisis Bed Unit after he smeared feces on his cell wall to spell out "Sic Semper tyrannous," and because he

was suffering from delusions, depression, and auditory hallucinations. SER 124. Mr. Orthel remained in the Crisis Bed Unit through September. MER 2129. During this period, the records reinforce Mr. Orthel's history of poor impulse control, feelings of worthlessness or guilt, and difficulty with problem solving. MER 2123, 2135. He also told a nurse that "there's a lot going on [in] his mind, [he] hears voices, [and experiences] flashbacks." MER 608.

Less than six months later, Mr. Orthel once again refused medication, which led to "acute decompensation" and "required a cell extraction." MER 1943, 2085-87; SER 124. The prison admitted him to the Crisis Bed Unit on January 13, 2009, and on that same day he "was found with a noose around his neck [and] was jumping off [the] toilet, then he wa[s] trying to electrocute himself" by rubbing salt in the electrical socket and licking it. MER 1943, 2187. Mr. Orthel remained in the Crisis Bed Unit for several weeks, where a physician described him as "extremely psychotic as well as suicidal." MER 1999. While in the Crisis Bed Unit, Mr. Orthel continued to attempt suicide in numerous ways, including by "urinat[ing] in his cell and try[ing] to slip on it and fall down" and by standing on the toilet and letting himself fall onto the floor. MER 2180; SER 124; *see also* MER 2022-26. Despite receiving heightened treatment, his condition did not improve through February, and the Crisis Bed Unit recommended that he transfer to the Department of Mental Health hospitalization unit. MER 1930-34, 2189 (describing Mr. Orthel as having "major mental illness").

Mr. Orthel remained under a *Keyhea* order through August 2010 (the end of the relevant time period). Despite continuous medication over several years, however, "Mr. Orthel did not gain much insight into his mental illness and need for treatment." SER 124; *see also* MER 2202 ("He was not overly concrete in his thinking."). "For instance, during an interview on or about January 7, 2010, Mr. Orthel denied he had any mental illness and stated that he did not want to take his medications." SER 124. He also continued to believe that he "was receiving secret messages from the media" and struggled with the symptoms detailed above. MER 2035. In February 2011, Mr. Orthel's psychiatrist indicated that his condition was so tenuous that "[w]ithout regular adherence to psychotropic medication, Mr. Orthel would decompensate and become unable to manage the basic elements of life." SER 125.

### C. Mr. Orthel Files A Habeas Petition.

On August 17, 2010, counsel hired by Mr. Orthel's mother filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 on Mr. Orthel's behalf in the U.S. District Court for the Northern District of California. SER 115-16, 165-71. Mr. Orthel's petition alleged that he "was denied rights to due process, to present a defense, [and] effective assistance of counsel by sua sponte jury instruction issued during sanity phase of case." SER 170. He sought equitable tolling of the Antiterrorism and Effective Death Penalty Act (AEDPA) limitations period based on his mental impairment. *Id.* After counsel filed this complaint, Mr. Orthel sent a letter

to the court stating, among other things, the following: "I should point out that I have schizoaffective disorder, and a disability rating of 50% from the VA. I have great difficulty with the forms you sent, and the people here at my prison that have to sign them (or produce account balances)." SER 162.

Because Mr. Orthel's petition was filed more than one year after his state conviction became final, the district court entered an order instructing Respondent Yates to "either (1) move to dismiss the petition on the ground that it is untimely, or (2) inform the court that respondent is of the opinion that a motion to dismiss is unwarranted in this case." SER 160. Pursuant to that order, Respondent Yates filed a motion to dismiss Mr. Orthel's habeas petition as untimely. SER 144-47. Mr. Orthel opposed the motion on its merits, but also explained that he had not yet received his mental health records from the prison and requested that the court hold the motion to dismiss in abeyance until he had the opportunity to obtain and review these records. SER 137-42. Respondent Yates agreed, SER 134-36, and the court held the motion in abeyance and allowed for supplemental briefing on this issue. SER 132.

Upon receipt and review of these records, which spanned more than two thousand pages, Mr. Orthel filed a supplemental opposition brief in support of his claim that he should receive equitable tolling. SER 109-17. Mr. Orthel attached a declaration from his counsel describing the contents of the medical records and a

March 1, 2011 Verified Petition for Renewal Judicial Determination Re: Involuntary Medication for Mr. Orthel. SER 115-17, 119-27.

The verified petition confirmed that Mr. Orthel suffers from "schizoaffective disorder, bipolar type" and recommended psychotropic medications for treatment. SER 122-23. According to this verified petition, his "symptoms include delusions, depression, and auditory hallucinations. His psychiatric history goes back to the mid-1990s." SER 123. The verified petition concluded that Mr. Orthel is "[g]ravely disabled and incompetent to refuse psychotropic medication." SER 125. Because Mr. Orthel did not file any of the medical records, the district court denied the motion to dismiss without prejudice so that both parties could review the medical records. SER 97-102. The court noted in its order that the record contained evidence that Mr. Orthel was "severely mentally disabled," and, at least for significant periods of time after his conviction, was unable to understand the need to file a petition. SER 101.

On January 13, 2012, Respondent Yates renewed his motion to dismiss, arguing that Mr. Orthel had a period of mental stability for at least eight years (1998 – 2006) and that he had not shown diligence in pursuing his claims. *See* SER 54-80. Respondent acknowledged, however, that Mr. Orthel's psychotic episodes were incapacitating. SER 78. Mr. Orthel filed an opposition to Respondent's motion, contending that Mr. Orthel's mental impairment was "constant and demonstrable"

and that his mental impairment made it impossible for him to understand the need to pursue his claims because he "lacks the insight to even understand that he is truly mentally ill." SER 30-31. Appended to the petition was a declaration of Mr. Orthel's mother, who had hired counsel on behalf of her son, asserting that she would produce any documents or provide any necessary testimony. SER 34-36. Respondent filed a reply brief, reiterating his prior arguments. SER 19-22.

On August 17, 2012, the district court granted Respondent's renewed motion to dismiss Mr. Orthel's habeas petition and entered final judgment. SER 3-11. The district court concluded that Mr. Orthel's "medical records during the relevant times show an eight year period, starting in June 1998 and ending in 2006, when petitioner was largely stable." SER 8. The court relied primarily on the fact that Mr. Orthel "took medications for his conditions throughout this time period, except for a brief period of a few weeks in 2004," as well as invoking a few select excerpts from his two-thousand-plus-pages medical file. *Id.* The district court also concluded that Mr. Orthel "has made no showing with respect to the second prong of *Bills*, that he was diligent in pursuing his claims." SER 10.

Mr. Orthel filed a notice of appeal and requested a certificate of appealability, which the district court granted on October 16, 2012. SER 1-2, 13-18. The district court explained that "jurists of reason would find it debatable that petitioner was not entitled to equitable tolling on the basis of his diagnosed mental illnesses." SER 1-2.

In particular, the district court noted that "petitioner's medical records were vast and complex and there was no evidentiary hearing or expert testimony to evaluate petitioner's claims." SER 1. The district court also recognized that Mr. Orthel raised a "serious constitutional issue" as to the jury instructions issued during the sanity phase of his trial. SER 2.

Beginning in January 2013, the parties filed briefing before this Court. Opening Br., Jan. 16, 2013, ECF No. 7. On September 25, 2013, the Clerk of Court issued an order allowing Respondent to "file a letter brief responding to Appellant's briefing of the uncertified issue of whether the district court should have, sua sponte, held an evidentiary hearing before dismissing the petition." Order, Sept. 25, 2013, ECF No. 23. Respondent Yates filed a letter brief on September 30, 2013, and oral argument was held on October 10, 2013. Letter Br., Sept. 30, 2013, ECF No. 25; Docket Entry Regarding Oral Arg., Oct. 10, 2013, ECF No. 28. In December, Mr. Orthel sent a letter to this Court requesting that his counsel be removed from the appeal and that he be able to represent himself. Letter, Dec. 16, 2013, ECF No. 30. Mr. Orthel attached a new habeas petition to the letter. *Id.* Mr. Orthel's counsel filed a motion to withdraw from the appeal, which this Court granted on December 27, 2013. Order, Dec. 27, 2013, ECF No. 34. On January 10, 2014, this Court issued an order to appoint pro bono counsel and allow supplemental or replacement briefing. Order, Jan. 10, 2014, ECF No. 38. That Order led to this brief.

## SUMMARY OF THE ARGUMENT

Mr. Orthel is entitled to equitable tolling. This Court held in *Bills* that habeas petitioners are entitled to tolling if they possess a mental impairment "so severe" that the petitioner was either "unable rationally or factually to personally understand the need to timely file," or the "petitioner's mental state rendered him unable personally to prepare a habeas petition and effectuate its filing," so long as "the mental impairment made it impossible to meet the filing deadline under the totality of the circumstances, including reasonably available access to assistance." *Bills v. Clark*, 628 F.3d 1092, 1100 (9th Cir. 2010). Mr. Orthel easily satisfies this test.

The voluminous evidence in the record shows that Mr. Orthel is a deeply troubled individual who suffers from serious mental illnesses, including schizophrenia and bipolar disorder. Due to his illnesses, he has spent virtually his entire time in prison undergoing intensive psychotherapy and taking powerful anti-psychotic medications that quell his violent tendencies and mitigate (though they do not eliminate) his issues with hallucinations, fantasies, and hearing voices. While Mr. Orthel has sporadically pursued productive activities, there is no question that he has been mentally ill from the moment he entered the prison system. There thus *should* be no question that Mr. Orthel was both "unable rationally or factually to personally understand the need to timely file," and possessed a "mental state" that

"rendered him unable personally to prepare a habeas petition and effectuate its filing," *id.*—either of which is independently sufficient to warrant tolling.

Nor is there any serious question that Mr. Orthel has been diligent to the best of his ability. There is not a shred of evidence that Mr. Orthel was aware of federal habeas corpus before this proceeding began, nor is there any evidence that Mr. Orthel had ever filed anything in any court prior to this proceeding. To the contrary, the record makes clear that Mr. Orthel has spent his time in prison battling his multiple mental illnesses rather than investigating potential avenues to challenge his conviction. The only reason this proceeding began, in fact, is because Mr. Orthel's mother made an independent decision to retain counsel to file a federal petition on Mr. Orthel's behalf. Absent that decision by a third party, Mr. Orthel would almost certainly have remained unaware and uncomprehending of the possibility of federal post-conviction review. Mr. Orthel's impairment was thus plainly "a but-for cause of any delay" in his filing a federal habeas petition. *Id.*

Should the Court have doubts about whether the current record warrants relief, however, then Ninth Circuit precedent requires that it remand for a full evidentiary hearing in the district court. This Court has consistently held that "[a] habeas petitioner . . . should receive an evidentiary hearing when he makes a good-faith allegation that would, if true, entitle him to equitable tolling." *Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2006) (emphasis and internal quotation marks omitted). Mr. Orthel

has amply satisfied this standard by lodging extensive, well-supported allegations of mental illness that would, "if true, entitle him to equitable tolling." *Id.* (internal quotation marks omitted). The Court should thus, at the very least, remand for an evidentiary hearing.

## STANDARD OF REVIEW

The Ninth Circuit reviews de novo "[t]he dismissal of a petition for writ of habeas corpus as time-barred." *Forbess v. Franke*, 749 F.3d 837, 839 (9th Cir. 2014). "If the facts underlying a claim for equitable tolling are undisputed, the question of whether the statute of limitations should be equitably tolled is also reviewed de novo." *Bills v. Clark*, 628 F.3d 1092, 1096 (9th Cir. 2010) (internal quotation marks omitted). "Otherwise, findings of fact made by the district court are to be reviewed for clear error." *Id.* (internal quotation marks omitted). "If a district court's finding rest[s] on an erroneous view of the law, they may be set aside on that basis." *Stancle v. Clay*, 692 F.3d 948, 953 (9th Cir. 2012) (internal quotation marks and alteration omitted). A "decision by the district court to decline to order an evidentiary hearing is reviewed for abuse of discretion." *Roy v. Lampert*, 465 F.3d 964, 968 (9th Cir. 2006).

# ARGUMENT

## CERTIFIED ISSUE

## I. Mr. Orthel Is Entitled To Equitable Tolling.

For over two decades, Klee Christopher Orthel has suffered from severe mental illnesses that prevent him from functioning at normal or stable levels. These mental illnesses include schizoaffective disorder, bipolar disorder, post-traumatic stress disorder, and depression. These afflictions—all of which are well documented in the lengthy medical records filed in the district court—have caused Mr. Orthel to experience delusions, hallucinations, anxiety, and paranoia throughout his incarceration. Mr. Orthel's mental illness is so severe that the State of California has spent the past decade forcibly medicating him with antipsychotics, "a particularly intrusive category of drug that alters mental processes, affects behavior and demeanor, and interferes with a person's self-autonomy, in addition to subjecting patients to serious side effects." *United States v. Cope*, 527 F.3d 944, 954 (9th Cir. 2008) (internal quotation marks omitted).

Despite the extensive evidence that Mr. Orthel has long been severely mentally ill, the district court denied equitable tolling. That decision was error, as the record evidence satisfies the two-part test for equitable tolling this Court adopted in *Bills*. The two thousand pages of medical records demonstrate both that Mr. Orthel's mental illnesses prevented him from understanding the need to file a petition (much

less *prepare* a petition) from April 29, 1998 to August 17, 2010, and that Mr. Orthel diligently pursued his claims to the extent he was able to comprehend them. The district court's contrary determination was based on unsupported assumptions that failed to account for the totality of the circumstances in accordance with this Court's precedent. For these reasons and those detailed below, this Court should reverse the district court and hold that Mr. Orthel is entitled to equitable tolling.

### A. Mental Impairment Tolls AEDPA's One-Year Limitations Period.

Under AEDPA, a state inmate has "one year from the conclusion of his direct appeal to file a petition for federal habeas corpus." *Forbess v. Franke*, 749 F.3d 837, 839 (9th Cir. 2014). But this one-year statute of limitations is tolled "if extraordinary circumstances prevented an otherwise diligent petitioner from filing on time." *Id.* (internal quotation marks omitted). This Court's decision in *Bills* governs the "long recognized" extraordinary circumstance of "equitable tolling in the context of a petitioner's mental illness." *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010).

Under *Bills*, "a petitioner must show his mental impairment was an extraordinary circumstance beyond his control." *Id.* at 1099 (internal citation omitted). In order to satisfy this standard, the petitioner must first demonstrate "the impairment was so severe that either (a) petitioner was unable rationally or factually to personally understand the need to timely file, or (b) petitioner's mental state rendered him unable personally to prepare a habeas petition and effectuate its filing." *Id.* at

1099-1100. Second, "the petitioner must show diligence in pursuing the claims to the extent he could understand them, but that the mental impairment made it impossible to meet the filing deadline under the totality of the circumstances, including reasonably available access to assistance." *Id.* at 1099. This Court has recognized that "[s]ome of the same considerations used to review the first prong of *Bills* are also relevant to the analysis of the second prong, because the second requires a review of the totality of the circumstances." *Stancle v. Clay*, 692 F.3d 948, 959 (9th Cir. 2012). Moreover, the "diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 653 (2010) (internal quotation marks and citations omitted).

*Bills* emphasized that courts must "evaluate the petitioner's ability *to do by himself* the two functions involved in complying with the AEDPA filing deadlines . . . and [] evaluate the petitioner's diligence in seeking assistance with what he could not do alone." 628 F.3d at 1100 (emphasis added). "This is not a mechanical rule; rather, equitable tolling determinations require a flexible, case-by-case approach." *Forbess*, 749 F.3d at 840 (internal quotation marks and alterations omitted); *see also Holland*, 560 U.S. at 650 ("The flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices.") (internal quotation marks omitted).

### B. Mr. Orthel's Severe Mental Impairment Rendered Him Unable To Understand The Need To File Or Prepare A Habeas Petition.

Mr. Orthel suffered from several deeply debilitating mental illnesses that made it impossible for him to understand the need to file or prepare a habeas petition from the year his conviction became final (1998) to when his mother hired an attorney to file a petition on his behalf (2010). The extensive medical records filed in the district court vividly demonstrate as much. These records show that Mr. Orthel was completely incapacitated for long periods of time following severe psychotic breaks; that Mr. Orthel frequently experienced hallucinations and delusions about a conspiracy against him; and that the prison kept Mr. Orthel closely supervised and heavily medicated at all times. Such evidence of "severe mental illness, . . . well documented in the record," demonstrates an incapacity to prepare a habeas petition and satisfies the first *Bills* prong. *Forbess*, 749 F.3d at 841. The district court concluded otherwise by plucking selected pages from the record as proof that Mr. Orthel experienced "periods of sufficient competency." SER 9. But once the *entire* record is considered—as *Bills* holds it must be—it is clear that Mr. Orthel's mental illnesses precluded him from understanding the need to file or prepare a habeas petition from April 29, 1998 to August 17, 2010.

### 1. Mr. Orthel Suffered From A Severe Mental Impairment From 1998 To 2010.

Mr. Orthel suffered from numerous psychotic breaks and periods of acute decompensation during the relevant period. On April 29, 1998, the very day his conviction became final, Mr. Orthel was in the process of being transferred from the suicide prevention unit in the Department of Mental Health to the infirmary due to "recent decompensation" and the existence of an "acute potential suicide risk" that "needs [the] structure of an inf[irmary] or hospital at this time." MER 1033. The records show that Mr. Orthel was then-suffering from "reality based paranoia," anxiety, and depression that caused him to exhibit poor judgment. MER 1033-37.

Further, as detailed at length above, Mr. Orthel's mental illness was not confined to brief, isolated incidents, as the district court's order suggests. Mr. Orthel has, rather, endured hallucinations and delusions ever since he returned home in 1993 from active duty in the Navy, where he suffered a serious head trauma. Prison medical staff have consistently recognized as much. For instance, prior to his hospitalization in April 1998, Mr. Orthel had recently completed a stay in the Crisis Bed Unit for decompensation and parasuicidal acts. *See, e.g.*, MER 983. When discharged from the Crisis Bed Unit, Mr. Orthel did not rejoin the general prison population. Instead, the prison placed him in the Enhanced Outpatient Program, a unit with separate housing that is specifically designed to treat inmates "with acute onset or significant decompensation because of a serious mental disorder and are

unable to function in the prison general population." *See* Cal. Dep't of Corr. & Rehab., *Mental Health Services Program* at 2, *available at* http://goo.gl/3UWJPQ; MER 1369. While there, Mr. Orthel's mental condition continued to deteriorate, with a senior psychologist recommending that Mr. Orthel stay in the suicide prevention unit since his "depression remained severe and he continued to have suicidal ideation and anxiety." MER 1024, 1370; *see also* MER 1412. Similar observations and disturbing incidents have been a regular and consistent feature of Mr. Orthel's time in prison.

Scattered observations in Mr. Orthel's medical records that he was "articulate and friendly" or "fully alert and oriented" cannot overcome this backdrop of serious mental illness. SER 8 (internal quotation marks omitted). That is particularly true given the context of such observations. The physicians making these observations did so in the context of an intensive mental health program geared toward treating the seriously ill. Those physicians are not saying that Mr. Orthel is "fully alert and oriented" as compared to the *average person*; they are saying that he is "fully alert and oriented" for someone who is extremely mentally ill and taking the most powerful anti-psychotics in existence. If Mr. Orthel had been doing just fine then the prison would have removed him from the Mental Health Program.

For example, the district court quotes one of Mr. Orthel's medical records that notes he was "'using every moment to grow intellectually and emotionally.'" SER 10 (quoting MER 1575). But a physician made this observation in the course of treating

Mr. Orthel in the Enhanced Outpatient Program, designed for inmates "with acute onset or significant decompensation because of a serious mental disorder [who] are unable to function in the prison general population." Cal. Dep't of Corr. & Rehab., *Mental Health Services Program* at 2. Mr. Orthel was in that Program and similar ones throughout the relevant period—shuttling from active hospitalization, to a crisis bed, to the Enhanced Outpatient Program and, finally, to the Correctional Clinical Case Management System, which is reserved for prisoners needing frequent treatment to manage disorders such as schizophrenia, major depressive disorders, and bipolar disorders. *See id.* at 1-2. Inmates with a "normal, stable," mental state, SER 10, do not reside in these specialized programs.

Further demonstrating that Mr. Orthel was incapable of doing "by himself the two functions involved in complying with the AEDPA filing deadlines," *Bills*, 628 F.3d at 1100, is the fact that the State began forcibly medicating Mr. Orthel with antipsychotics in 2006. Obtaining a *Keyhea* involuntary-medication order is a serious step. California law only "permits the long-term involuntary medication of an inmate upon a court finding that . . . the prisoner, as a result of mental disorder, is *gravely disabled and incompetent* to refuse medication." *Davis v. Walker*, 745 F.3d 1303, 1306 n.2 (9th Cir. 2014) (emphasis added). Prisons must provide substantial justification for such requests, *especially* where the administration of psychotropic or anti-psychotic medications are at issue. *See, e.g.*, *id.*; *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 692

(9th Cir. 2010) ("Because an order compelling a person to take antipsychotic medication is an especially grave infringement of liberty, it requires thorough consideration and justification and especially careful scrutiny, and must be based on a medically-informed record.") (internal quotation marks omitted).

Based on the same record lodged in the district court, the California courts issued *Keyhea* orders to involuntarily medicate Mr. Orthel on June 15, 2006, August 31, 2008, and March 3, 2010. *See* SER 120, 123-24. In other words, the California courts determined that Mr. Orthel's condition was so severe that (1) he was unable to make decisions for himself about medical treatment and (2) his impairment warranted involuntary administration of psychotropic medications for over three years. A prisoner who cannot even decide whether to take anti-psychotic medication plainly lacks the mental capacity to "understand the need to file within the limitations period, and submit a minimally adequate habeas petition." *Bills*, 628 F.3d at 1100. Yet when determining whether Mr. Orthel suffered from a mental impairment that interfered with his ability to make strategic legal decisions, the district court failed to mention these *Keyhea* orders. Particularly coming (as they do) after years of well-documented mental illness, this string of orders supplies sufficient evidence to satisfy *Bills*.

### 2. Medicating Mr. Orthel With A Powerful Mixture Of Antipsychotics Did Not Make Him Competent Under *Bills*.

In addition to downplaying the severity of Mr. Orthel's condition from 1998 to 2010, the district court made the incorrect assumption that medicating Mr. Orthel

gave him the capacity "to manage his own affairs." SER 9. But that gets it backwards in the *Bills* context. If anything, the prison's administration of powerful antipsychotics to Mr. Orthel demonstrates his mental *incompetence* rather than supplying a basis for denying equitable tolling. This Court and the Supreme Court have long recognized that antipsychotic medications can *themselves* impair a person's "ability to function in particular contexts" and sometimes "have serious, even fatal, side effects." *Ruiz-Gaxiola*, 623 F.3d at 691 (internal quotation marks omitted) (citing *Riggins v. Nevada*, 504 U.S. 127, 137 (1992)).

Risperidone—one of two drugs that the district court concluded made Mr. Orthel "stable," SER 8—is an antipsychotic medication with side effects that include confusion, anxiety, agitation, difficulty breathing or swallowing, and seizures. The United States National Library of Medicine entry for Bupropion—the other drug the district court noted, whose side effects include seizures, confusion, hallucinating, irrational fears, and anxiety—states that patients also taking Risperidone should be carefully monitored due to possible drug interactions. As the record reveals, Mr. Orthel did not receive the careful monitoring these powerful medicines require. *See, e.g.*, MER 1234 ("Med[ications] only get to him 50% of the time."); MER 1288 (noting that Mr. Orthel "has participated not at all in the group" during September 2002, but nonetheless concluding "he is well motivated"); *see also Brown v. Plata*, 131 S. Ct. 1910, 1924 (2011) ("Prisoners in California with serious mental illnesses do not

receive minimal, adequate care."). The district court never grappled with these issues, instead summarily concluding that taking medication was tantamount to competence. SER 8.

The district court also never explained why it believed that Mr. Orthel possessed sufficient competency to understand the need to file a habeas petition (much less prepare one) whenever he was medicated. The medical records do not support that conclusion. In 2002, for example, Mr. Orthel was taking Risperidone (along with other medications, such as Bupropion and Trihexyphenidl), yet represented that he was "still somewhat paranoid." MER 47-56, 1277; *see also* MER 1313-14. Likewise, while medicated in 2005, Mr. Orthel continued to experience "paranoid thinking," *see* MER 1808, as well as auditory hallucinations. MER 1809; *see also* MER 1806 ("hears 'sounds'"). In July 2005, for example, Mr. Orthel "report[ed] that he continues to hear voices and receives messages from the TV, Radio, Magazines and the Newspapers." MER 1809. And in February 2008, after over a month of involuntary medication, Mr. Orthel was "[d]escribed as 'actively suicidal, paranoid, anxious, withdrawn, depressed, delusional, disoriented, hallucinating, refusing medications, confused, poor hygiene.'" MER 2187; *see also* MER 2161, 2186. The record thus makes clear that giving Mr. Orthel antipsychotic medicines did not make him competent under *Bills*.

Moreover, the district court did not differentiate between general mental capacity and the specific ability to comprehend the need to prepare and file a habeas petition in compliance with AEDPA's exacting time limits. Even if an inmate possesses general mental capacity, that does not mean he is competent to navigate federal post-conviction review. As the First Circuit has explained, it is error for a district court to conclude that a "petitioner's mental illness did not prevent him from complying with the filing deadline in part because his overall cognitive abilities fall in the upper end of the average range." *Riva v. Ficco*, 615 F.3d 35, 43-44 (1st Cir. 2010) (internal quotation marks omitted). Such a determination "is something of a non-sequitur" because the "petitioner is not claiming that he lacked the intelligence to comprehend and act upon his legal rights but, rather, that he lacked the sanity necessary to consistently and effectively pursue his legal rights." *Id.* at 44. It is simply not relevant that Mr. Orthel "made the honor roll every semester," "'participates actively in class,'" or "began a job reading books on tape for the blind." SER 9 (quoting MER 193). That is because "[t]here is no necessary correlation between intelligence and sanity, and the petitioner's claim does not depend on his IQ." *Riva*, 615 F.3d at 44. Even the most brilliant schizophrenics deserve equitable tolling if they are, in fact, schizophrenic.[8]

[8] The grab bag of cases Respondent cited in its initial Answering Brief for the proposition that "a diagnosed mental illness was not sufficient in and of itself to show incompetence," Appellee's Br. at 33, Feb. 12, 2013, ECF No. 11-1, have nothing to

Entries in Mr. Orthel's two thousand pages of medical records that generically describe him as improving, stable, or alert, SER 8-9, do not change the analysis. After all, there is no question that prison physicians consistently diagnosed Mr. Orthel with schizoaffective disorder, bipolar disorder, post traumatic stress disorder, and depression (noting symptoms related to these conditions) throughout the relevant period. *See, e.g.*, MER 963-66, 1234, 1335-38, 1343, 1372-73, 1385-86, 1437, 1696, 1712, 1717, 1721-22, 1806-09, 1812, 1858, 1867, 1895; SER 86-88, 123-24. And there is also evidence that Mr. Orthel's mental illnesses were often masked and difficult to discern, especially for those that did not typically work with him. One physician noted that Mr. Orthel "tends to present well, masking underlying conditions," MER

(continued…)

do with equitable tolling and are irrelevant. Indeed, if anything, they fully support Mr. Orthel's position:

- The Supreme Court decision Respondent cites, *Atkins v. Virginia*, holds that mentally retarded prisoners cannot be executed precisely *because* they "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." 536 U.S. 304, 318 (2002). The Court's opinion thus contradicts Respondent's suggestion that mentally ill inmates are fully competent.
- Respondent's Ninth Circuit decision, *United States v. Timbana*, held merely that it was not plain error for a district court to find a defendant competent to plead guilty following a full competency hearing at which both experts agreed the defendant was competent to stand trial. *See* 222 F.3d 688, 701 (9th Cir. 2000). That is much more thorough consideration than the district court gave to Mr. Orthel's competency here.

1033-37, or that he "can present well, masking underlying anxiety and distress [and] has difficulty trusting." MER 1045; *see also* MER 1020 ("He minimizes symptoms at this time."); MER 1043 ("Mr. Orthel presents well, but when probed reveals considerable anxiety and possible auditory hallucinations."). Fluctuations in the *visibility* of a mental illness—as distinguished from periods of *actual* mental competence—obviously do not preclude equitable tolling. This Court explained as much in *Forbess*, reasoning that "[a]lthough the mental health records show some variance in Forbess's condition, his reluctance to discuss his delusions with his doctors explains the gaps or variations in the mental health records." 749 F.3d at 840. Mr. Orthel, like Mr. Forbess, periodically refused to discuss his delusions and, indeed, often went further by denying mental illness altogether—denials that were untrue and eventually led to his involuntary medication under *Keyhea*.

Finally, the district court's conclusion that Mr. Orthel was "clear-headed" and "largely stable" when taking the Risperidone/Bupropion drug cocktail is inconsistent with the fact that Mr. Orthel was admitted to a crisis bed on April 29, 1998, while taking those drugs. SER 8; MER 1033; *see also* MER 81, 83 (showing that Mr. Orthel was prescribed Risperidone and Bupropion on March 31, 1998 and April 6, 1998, respectively). As this incident illustrates, Mr. Orthel's mental illness did not vanish with medication. To the contrary, he was always deeply disturbed. The fact that anti-

psychotic medicines may have made Mr. Orthel more *docile* hardly demonstrates that he was *competent* under *Bills*. He clearly was not.

### C. Mr. Orthel Has Been Diligent In Pursuing His Claims.

There is no doubt that Mr. Orthel has diligently pursued his claims and thus satisfies the second prong of *Bills*. As discussed, his mental impairment is so severe that he was unaware he needed to file a federal habeas petition. Mr. Orthel was not represented by counsel during the period for which he seeks equitable tolling and he never personally filed a legal document in court at any time during his incarceration. Absent his mother's intervention, Mr. Orthel probably would have remained unaware of the need to seek relief in federal court. *See Hunter v. Ferrell*, 587 F.3d 1304, 1309 (11th Cir. 2009) ("[T]he record contains no indication that Hunter had prior experience with federal courts or filing a § 2254 petition.").

To obtain equitable tolling, Mr. Orthel must "show diligence in pursuing [his] claims *to the extent he could understand them*." *Bills*, 628 F.3d at 1099-1100 (emphasis added). The key question is whether Mr. Orthel's severe mental illness "made it impossible to meet the filing deadline." *Id.* This so-called "impossibility" requirement does not mean that Mr. Orthel must show "a literal impossibility." *Forbess*, 749 F.3d at 841. The question is, rather, whether Mr. Orthel's unique mental illness caused his delay in filing a habeas petition. *Bills*, 628 F.3d at 1100; *Forbess*, 749 F.3d at 841. The relevant inquiry is thus whether the particular facts of this case demonstrate an

extraordinary circumstance that caused the untimely filing. *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003) ("Where a habeas petitioner's mental incompetence in fact caused him to fail to meet the AEDPA filing deadline, his delay was caused by an 'extraordinary circumstance beyond [his] control,' and the deadline should be equitably tolled."). Mr. Orthel easily clears this hurdle.

The district court did not conclude otherwise. Rather it found only that Mr. Orthel "made no showing . . . that he was diligent in pursuing his claims." SER 10. This conclusion is erroneous. In light of the facts discussed above, Mr. Orthel was so mentally ill that he was unable to make *any* attempt to file a habeas petition. In his worst moments, Mr. Orthel was involuntarily medicated. And in his best, he suffered from hallucinations, delusions, and other symptoms associated with his mental illness and the potent drugs used to treat it. It is thus unsurprising that Mr. Orthel never attempted to file a petition, never asked about filing a petition, and never did anything that suggests he even knew federal post-conviction review exists.

The fact that Mr. Orthel did not himself initiate this habeas proceeding confirms the "impossibility" of him meeting the AEDPA filing deadline. After his direct appeal (which proceeded concurrently with his state habeas claims) was over, Mr. Orthel was not represented by counsel except for appointed counsel during his

*Keyhea* proceedings.[9] That changed in 2010 only because his mother hired a lawyer to file a petition on his behalf. SER 34 (Declaration of Linda Stewart-Oaten) ("[I]t was I who retained attorney William L. Schmidt to review my son's case."); SER 115 (Declaration of William L. Schmidt) ("I am retained by the family of Klee Orthel . . . ."). Mr. Orthel has never pursued post-conviction judicial relief on his own. That is because he has been too mentally ill to do so since the day his state conviction became final.[10]

**UNCERTIFIED ISSUE**

As explained above on page 3, footnote 1, the district court's Certificate of Appealability is broad enough to permit an appeal of the district court's specific failure to conduct an evidentiary hearing. In granting the Certificate, the district court noted that the lack of an "evidentiary hearing or expert testimony to evaluate

[9] California's Office of Administrative Hearings "contracts with attorneys to represent the inmates in [Keyhea] hearings." *See* Cal. Office of Admin. Hearings, *Department of Corrections and Rehabilitation, Keyhea Hearings,* http://www.dgs.ca.gov/oah/GeneralJurisdiction/Keyhea.aspx (last visited Nov. 3, 2014).

[10] Mr. Orthel's participation in the *Coleman v. Wilson* class action lawsuit—which Respondent trumpeted throughout its initial Answering Brief—was, just like this Petition, facilitated by Mr. Orthel's mother. SER 34-35 (Declaration of Linda Stewart-Oaten) ("I became so alarmed about the lack of care for Klee's condition that *I contacted the attorney's* [sic] representing the plaintiffs in the *Coleman v. Wilson* case and Klee joined the class action as a plaintiff, even though he continued to deny that he was mentally-ill." (emphasis added)). Much as he has done at other times during his incarceration, Mr. Orthel denied that he was mentally ill at the time he joined this lawsuit.

petitioner's claims" formed part of the basis for why "jurists of reason would find it debatable that petitioner was not entitled to equitable tolling." SER 1; *see also*, *e.g.*, *Nedds v. Calderon*, 678 F.3d 777, 782 n.3 (9th Cir. 2012). Prior counsel (and this Court) have, however, previously treated the evidentiary hearing issue as uncertified, which requires the Certificate of Appealability to be expanded under Circuit Rule 22-1(e) to address the merits. Because Mr. Orthel "raised a serious constitutional issue as to the jury instruction issued during the sanity phase of his trial," SER 2, and "reasonable jurists could debate" whether an evidentiary hearing was required before denying equitable tolling for Mr. Orthel, this Court should grant his motion to expand the Certificate of Appealability and address this issue on the merits.

## II. The District Court Erred By Not Conducting An Evidentiary Hearing Before Denying Mr. Orthel's Request For Equitable Tolling.

Should the Court have doubts about whether Mr. Orthel is entitled to equitable tolling on the current record, at the very least it should remand for an evidentiary hearing. This Court has consistently required district courts to conduct evidentiary hearings where, as here, a petitioner makes a non-frivolous showing that his mental illness warrants equitable tolling: "[O]ur cases require only that there be 'circumstances consistent with petitioner's petition . . . under which he would be entitled to a finding of an "impediment" under § 2244(d)(1)(B) or to equitable tolling' for further factual development to be *required*." *Laws v. Lamarque*, 351 F.3d 919, 924 (9th Cir. 2003) (emphasis added) (quoting *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148

(9th Cir. 2000) (en banc)). The district court's failure to conduct such a hearing was error. *Id.* ("[M]ore factual development is required before we can say that Laws was or was not precluded from filing his petition by reason of mental impairment several years ago.").

There is no dispute that Mr. Orthel has had a severe mental illness from at least 1993 onward. In order to control his symptoms and reduce the risk that he would physically harm himself, Mr. Orthel has been prescribed numerous medications. And for several years, the state forcibly medicated Mr. Orthel under *Keyhea*. Given the undisputed evidence that Mr. Orthel has been in intensive treatment for serious mental illness throughout the relevant period, an evidentiary hearing is necessary before equitable tolling is denied.

### A. This Court Requires An Evidentiary Hearing Where A Petitioner Makes Good-Faith Allegations That Mental Impairment Prevented Him From Timely Filing A Petition.

This Court's precedent requires district courts to conduct an evidentiary hearing if a petitioner has "made a good-faith allegation that would, if true, entitle him to equitable tolling." *Laws*, 351 F.3d at 921; *see also id.* at 924 ("[O]ur cases require only that there be circumstances consistent with petitioner's petition under which he would be entitled to equitable tolling for further factual development to be required.") (internal quotation marks and alterations omitted); *see also Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2006) ("A habeas petitioner . . . should receive an evidentiary hearing

when he makes 'a good-faith allegation that would, if true, entitle him to equitable tolling.'" (citation omitted)). This requirement is so well established that three-judge panels routinely apply it through non-precedential memorandum dispositions. *See, e.g.*, *Chick v. Chavez*, 518 F. App'x 567, 569 (9th Cir. 2013); *Simon v. Uribe*, 528 F. App'x 764, 765 (9th Cir. 2013); *Dent v. Knowles*, 448 F. App'x 705, 706 (9th Cir. 2011); *Lopez v. Kernan*, 192 F. App'x 659, 660 (9th Cir. 2006).

Nor is the Ninth Circuit alone. Other circuits commonly require evidentiary hearings in similar circumstances. For example, the Sixth Circuit has held that "an evidentiary hearing is required when sufficiently specific allegations would entitle the petitioner to equitable tolling on the basis of mental incompetence which caused the failure to timely file." *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011); *see also, e.g.*, *Pabon v. Mahanoy*, 654 F.3d 385, 392 (3d Cir. 2011); *Davis v. Humphreys*, 747 F.3d 497, 500-01 (7th Cir. 2014); *Hunter v. Ferrell*, 587 F.3d 1304, 1310 (11th Cir. 2009); *Bolarinwa v. Williams*, 593 F.3d 226, 232 (2d Cir. 2010).

This Court's decision in *Roberts v. Marshall*, 627 F.3d 768 (9th Cir. 2010), is not to the contrary. In that case, a habeas petitioner filed medical records and other evidence and argued on appeal that he was entitled to an evidentiary hearing on equitable tolling. But there, unlike here, the petitioner's evidence contained "*no* indication in *any* of the medical evidence presented by petitioner that he was unable to function or that his thought process was impaired during the limitation period." *Id.* at

770-71 (emphases added) (internal quotation marks omitted)). *Roberts* thus held only that a district court need not conduct an evidentiary hearing where the available evidence demonstrates a petitioner's mental health was "good" and "within normal limits." 627 F.3d at 772.

Dispensing with an evidentiary hearing was particularly appropriate there, moreover, because the evidence further revealed that the petitioner had actively sought *state* post-conviction remedies during the period in which he was supposedly too incapacitated to seek *federal* post-conviction relief. *Id.* at 773. Here, by contrast, not even Respondent has suggested that Mr. Orthel is faking an incapacitating mental illness to evade AEDPA's time limitations, or that Mr. Orthel was savvily litigating his post-conviction remedies in state court during the relevant period. He plainly is not and was not. *Roberts* is distinguishable on that front too.

### B. Mr. Orthel Made Sufficient Allegations To Trigger The Evidentiary Hearing Requirement.

Before the district court, Mr. Orthel contended that his mental impairment was "constant and demonstrable." SER 111. Indeed, he argued that his impairment was so severe that he lacked "the insight to even understand that he is truly mentally ill." SER 31. As support, Mr. Orthel attached a verified petition, confirming that he suffers from "schizoaffective disorder, bipolar type" with symptoms such as "delusions, depression, and auditory hallucinations." SER 123. Mr. Orthel plainly

"made a good-faith allegation that would, if true, enable him to equitable tolling." *Laws*, 351 F.3d at 921, 924.

This Court routinely remands cases for an evidentiary hearing where petitioners have made supported allegations that their mental illness prevented them from filing a timely habeas petition. *See, e.g.*, *Dent*, 448 F. App'x at 706; *Chick*, 518 F. App'x at 569; *Simon*, 528 F. App'x at 765; *Lopez*, 192 F. App'x at 660; *Matthews v. Chrones*, 266 F. App'x 605, 606 (9th Cir. 2008). In *Laws*, for example, this Court found that an evidentiary hearing should have been conducted where a petitioner "alleged mental incompetency in a verified pleading." 351 F.3d at 924 (internal citation omitted). Here, Mr. Orthel filed a verified petition providing significant detail concerning his mental health history. Much like the experts in *Laws*, every mental health expert to treat or review Mr. Orthel's medical history, including the four experts at his trial, concluded that he suffers from severe mental illness. *Id.* ("In 1993 it took three psychiatrists, two psychologists, and a judge to decide Law's competence at the time of the [trial]. It is plain that more factual development is required . . . ."). Such compelling evidence of Mr. Orthel's mental incapacity at least warrants an evidentiary hearing before closing the door forever.

The Sixth Circuit's decision in *Ata* illustrates the point. There, the defendant suffered from a severe mental illness with a documented medical history. *See* 662 F.3d at 744. To determine whether an evidentiary hearing was necessary, the court first

evaluated whether the defendant's allegations of mental illness were sufficiently specific to establish a "causal link between her mental incompetency and untimely filing." *Id.* The court then addressed whether the record refuted the defendant's request. *Id.* Like Mr. Orthel, the *Ata* defendant suffered from "paranoid schizophrenia"—a diagnosis supported by numerous medical records—which the court noted was "a lifelong condition with an accompanying regimen of medication." *Id.* This diagnosis, along with the medical records, formed the basis for the court's conclusion that an evidentiary hearing was required before denying the defendant equitable tolling. *Id.* at 745. The same result is proper here.

In light of Mr. Orthel's complex medical history, with well-documented mental illnesses existing long before 1998, this Court should order an evidentiary hearing in the district court. Before Mr. Orthel spends his life in prison without any chance at federal post-conviction review, he is, at the very least, entitled to an opportunity to demonstrate what his medical records practically shout—that he is mentally ill and thus entitled to equitable tolling.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed. In the alternative, this action should be remanded to the district court for an evidentiary hearing.

Dated: November 7, 2014

Respectfully submitted,

/s/ James M. Burnham

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## CERTIFICATION OF COMPLIANCE

1. I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,309 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word in a 14-point Garamond, a proportionally spaced font.

Dated: November 7, 2014

/s/ James M. Burnham
James M. Burnham

## STATEMENT OF RELATED CASES

Counsel is not aware of any related cases pending before this Court within the meaning of Ninth Circuit Rule 28-2.6.

Dated: November 7, 2014

/s/ James M. Burnham
James M. Burnham

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 7, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 7, 2014

/s/ James M. Burnham
James M. Burnham

# STATUTORY ADDENDUM

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**28 U.S.C. § 2254—State custody; remedies in Federal courts**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim 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.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes

financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.