CAPITAL CASE
No. 19-239

IN THE SUPREME COURT OF THE UNITED STATES

LARRY BENZON, WARDEN, UTAH STATE PRISON,

Petitioner,

v.

TROY MICHAEL KELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On July 19, 1994, Troy Kell, along with his co-defendants, Eric Daniels, John Cannistraci, and Paul Payne, were charged with the aggravated murder of Lonnie Blackmon in the Central Utah Correctional Facility ("CUCF") in Gunnison, Utah. The State alleged that the crime was racially motivated, however evidence was presented at trial that Mr. Blackmon had repeatedly threatened to kill Mr. Kell, had a history of violence, and that Mr. Kell acted in self-defense. The trial court nonetheless refused to give an imperfect self-defense instruction. All pre-trial and trial proceedings were held in a room inside CUCF prison. Mr. Kell was convicted and subsequently sentenced to death on August 1, 1996.

Mr. Kell's direct appeal to the Utah Supreme Court was denied. *State v. Kell*, 61 P.3d 1019 (Utah 2002). A Preliminary Petition for Post-Conviction Relief was filed in the Sixth Judicial District Court for Sanpete County on May 16, 2003. New counsel were subsequently appointed and filed an Amended Petition on August 1, 2005. The petition was just 21 pages long, most of which repeated claims from the direct appeal brief, contained only one case citation, and appended no declarations or other new evidence. Amen. Pet. for Post-Conviction Relief and/or Writ of Habeas Corpus, *Kell v. State of Utah*, No. 030600171 (Utah 6th Dist. Ct Aug. 1, 2005). Mr. Kell's amended petition was dismissed and the Utah Supreme Court affirmed. *Kell v. State*, 194 P.3d 913 (Utah 2008).

Following denial of his post-conviction appeal by the Utah Supreme Court on September 5, 2008, Mr. Kell filed a motion for relief under Utah Rule 60(b) on

January 13, 2009. In his Rule 60(b) motion, Mr. Kell alleged he received ineffective assistance of counsel in his post-conviction proceedings because counsel failed to investigate the case and failed to raise many meritorious claims.

On May 27, 2009, federal habeas counsel filed an Initial Petition in Mr. Kell's federal habeas case. Pet. for Writ of Habeas Corpus, ECF No. 36.[1] Two weeks later, on June 12, 2009, counsel filed a Motion to Stay Federal Habeas Proceedings and asked that a stay be granted in Mr. Kell's federal case to allow the already-pending litigation in state court to be completed. Petitioner's Mot. to Stay Fed. Habeas Proceedings, ECF No. 40; 41.

In its order on Mr. Kell's motion to stay, the district court noted that there was already pending before the state court a Rule 60(b) motion based on the "grossly negligent and ineffective assistance of counsel from [Mr. Kell's] appointed state post-conviction counsel." Memo. Decision and Order Granting Stay, ECF No. 51. The court further noted that the Utah Supreme Court had previously held that "a death-sentenced prisoner was entitled to vacate the judgment in his post-conviction case under Rule 60(b)(6) of the Utah Rules of Civil Procedure due to the ineffective assistance of post-conviction counsel." *Menzies v. Galetka*, 150 P.3d 480 (Utah 2006); *see also* Memo. re Decision and Order Granting Mot. to Stay, ECF No. 51 at 2 ("*Menzies* demonstrates that a Rule 60(b) motion can be successful in certain cases.").

The Utah Supreme Court ultimately denied Mr. Kell's 60(b) appeal. *Kell v.*

[1] Filings from Mr. Kell's Utah's district court proceedings are referenced as "ECF No." followed by the docket number assigned by the district court.

State, 285 P.3d 1133 (Utah 2012). Mr. Kell filed his Amended Petition in federal district court on January 14, 2013. Amen. Pet., ECF No. 94. In his Amended Petition, Mr. Kell included for the first time two claims that alleged extraneous influence on jurors. *Id.* at 33-40. Mr. Kell noted in his petition that he would be filing a motion to stay pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). *Id.* at 5; Reply Brief re Pet. for Writ., ECF No. 115 at 44, 50, 201.

The district court entered an order for a stipulated case management schedule, which set a timeline for responsive pleadings to the Amended Petition and motions for discovery and an evidentiary hearing. Order Granting Mot. for Case Management Schedule, ECF No. 97. The schedule contemplated that "briefing on any remaining non-hearing issues" would be addressed after evidentiary issues were addressed and the parties would "work together to create a briefing schedule." *Id.* at 2.

Litigation over discovery began in early 2014. The majority of the intervening period was spent litigating the State's objections to Mr. Kell's discovery requests, with filings often exchanged monthly, and never more than three months apart throughout the litigation. On June 23, 2017, the district court denied Mr. Kell's motion for an evidentiary hearing. Mem. Decision and Order, ECF No. 238.

On August 28, 2017, Mr. Kell filed a motion to stay federal habeas proceedings pursuant to *Rhines* to allow him to return to state court to exhaust the two unexhausted claims in his Amended Petition. Petitioner's Mot. to Stay Fed. Habeas Proceedings, ECF No. 245. On November 16, 2017, the district court granted Mr. Kell's *Rhines* motion in part. Pet. App. 69a-83a. The court found "no indication that

Kell has engaged in intentional or abusive dilatory litigation tactics." Pet. App. 82a.

The district court held that Mr. Kell had established good cause under *Rhines* based on state post-conviction counsel's deficient performance. Pet. App. 74a-75a. The court found that post-conviction counsel "filed a perfunctory petition, failed to conduct even a cursory investigation of the case, including failing to interview even a single juror, and admitted that none of these decisions were strategic." Pet. App. 75a. Counsel's decision to limit investigation could not have been strategic, the court found, "because counsel had not conducted any investigation at all." Pet. App. 75a.

The court also found that Mr. Kell's claim alleging that the trial judge gave jurors a supplemental instruction during penalty phase deliberations off the record and outside the presence of counsel, was "potentially significant." Pet. App. 81a. Conversely, the court determined that Mr. Kell's other unexhausted claim, alleging extraneous influence on jurors, was not potentially meritorious. Pet. App. 81a-83a. The court granted a stay only with respect to the one claim regarding the supplemental jury instruction that the court deemed to be "potentially significant". Pet. App. 81a, 83a.

Pursuant to the district court's stay order and authorization for federal habeas counsel to represent him in state court, Mr. Kell filed a petition for post-conviction review in state district court on January 16, 2018. *See* Pet. for Relief Under the Post-Conviction Remedies Act, *Kell v. Benzon*, No. 180600004 (Utah 6th Dist. Ct. Jan. 16, 2018). The state district court issued an order granting the State's Motion for Summary Judgement on August 31, 2018, finding Mr. Kell's petition was barred by

the current version of Utah's Post-Conviction Remedies Act, Ruling and Order, *Kell v. Benzon*, No. 180600004, (Utah 6th Dist. Ct. Aug. 31, 2018), and Mr. Kell appealed that decision to the Utah Supreme Court, Notice of Appeal, *Kell v. Benzon*, No. #20180788 (Utah Sup. Ct. Oct. 1, 2018). Mr. Kell filed his Opening Brief in the Utah Supreme Court on March 21, 2019, Appellant's Brief, *Kell v. Benzon*, No. 20180788 (Utah Sup. Ct. Mar. 21, 2019), and the State responded on June 28, 2019. Mr. Kell filed his reply brief on August 28, 2019. Appellant's Reply Brief, *Kell v. Benzon*, No. 20180788-SC (Utah Sup. Ct. Jun. 28, 2019). The case is now fully briefed and pending before the Utah Supreme Court.

On December 7, 2017, the State sought certification from the district court to appeal the court's order pursuant to 28 U.S.C. § 1292(b). Mot. to Amend *Rhines* Order to Include Cert. Under 28 U.S. C. §1292(b), ECF No. 261. The district court denied certification, Pet. App. 84a-90a. The State then appealed to the Tenth Circuit.

On May 28, 2019, the Tenth Circuit issued its decision, holding that it lacked jurisdiction to address the State's claims because a "*Rhines* stay is not a final decision, and two elements of the collateral-order doctrine are not met." Pet. App. 38a. The majority began their analysis by explaining that since a *Rhines* stay "does not ordinarily constitute a final decision," they lack jurisdiction to consider the issue. Pet. App. 5a; *see also Crystal Clear Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 415 F.3d 1171, 1176 (10th Cir. 2005). The majority then analyzed the applicability of the collateral-order doctrine to its appellate jurisdiction in this case.

In this analysis, the majority explained that the State failed to make a showing

that the issues "bearing on the appropriateness of a *Rhines* stay are 'completely separate' from the merits" as is required in order to prevent "piecemeal appellate review." Pet. App. 7a; *see also Cunningham v. Hamilton Cty., Ohio*, 527 U.S. 198, 205 (1999); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527 (1988). The majority reasoned that because, in "reviewing a *Rhines* stay, we consider the 'potential merit' of the unexhausted claim," the review is inextricably linked to the merits of the case and, thus, "interlocutory review would frequently require us to consider the potential merit of the underlying habeas claims." Pet. App. 11a. The dissent agreed with the majority in this regard, finding that the analysis of the potential merit of the unexhausted claim, "undoubtedly overlaps with the merits," Pet. App. 57a, despite the State's argument that "potential merit" under *Rhines* is "more inclusive than the actual merit of a habeas claim," Pet. App. 11a n.4.

The majority also reinforced that, despite the State's arguments related to Mr. Kell's case in particular, in analyzing the complete separation requirement, the court must consider the "entire class of orders" rather than the arguments particular to this case. Pet. App. 23a-24a; *see also United States v. Bolden*, 353 F.3d 870, 876 (10th Cir. 2003). The majority determined that many of the issues that arise in *Rhines* stays generally are intertwined with the underlying merits of the claims. The majority also pointed out that

> Utah argues that the tests for good cause and procedural default are the same. Given this argument, we might find 'good cause' based on post-conviction counsel's ineffectiveness for failure to assert trial counsel's ineffectiveness. And once the case ends in district court, we could again face the issue of trial counsel's ineffectiveness as part of our review on

the merits.

Pet. App. 18a. The majority continued, explaining

> Here, for example, Utah challenges the finding of good cause, arguing that Mr. Kell could have asserted the claim at trial and in a direct appeal. To address this argument, we would need to ask whether Mr. Kell's attorneys should have asserted the claim at trial or in the direct appeal. This inquiry would presumably overlap with Mr. Kell's habeas claims of ineffective assistance of counsel. Thus, resolution of Utah's arguments on good cause could entangle us in the substance of Mr. Kell's underlying habeas claims.

Pet. App. 19a.

Finally, the majority addressed the State's failure to satisfy the third element of the collateral-order doctrine, that the issue is important and cannot otherwise be effectively reviewed. In doing so, the majority addressed the State's principle complaint, namely, that the delay resulting from the *Rhines* stay cannot be undone, explaining that the court has "not ordinarily regard[ed] the loss of time as sufficiently important to trigger the collateral-order doctrine." Pet. App. 26a-27a. Notably, the Tenth Circuit addressed the inefficiency and delay inherent in a grant of interlocutory appeal by also explaining that "we could inadvertently trigger simultaneous litigation of the same case in three courts: 1. the state district court or the state appellate court, 2. the federal district court, and 3. our court" and questioned "the efficiency of duplicative litigation in three courts." Pet. App. 32a-33a. Thus, the majority opined that "double or triple litigation tracks" would "create not only inefficiency but also more delay," Pet. App. 33a, and suggested that "[r]ather than await a final judgment, the government could have sought a writ of mandamus" Pet. App. 34a n. 17. The majority ultimately concluded that they lacked appellate jurisdiction and dismissed

the appeal.

REASONS FOR DENYING THE PETITION

I. THE STATE'S ACTUAL COMPLAINT IS ABOUT *RHINES*' STAY AND ABEYANCE PROCEDURE WHICH WAS DESIGNED TO ACCOMMODATE STATE INTERESTS

The State's complaints about the stay an abeyance procedure followed below, and authorized by this Court in *Rhines v. Weber*, 544 U.S. 269 (2005), are overwrought. Disagreeing with *Rhines* is not a basis for invoking the collateral order doctrine.

In federal habeas corpus proceedings, interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claim. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). Federal habeas petitions that are mixed, containing both claims that have and have not been first presented to state courts, were, before the AEDPA, dismissed so as to allow state courts first to address unexhausted claims. *Id*. at 518 ("Because 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,' federal courts apply the doctrine of comity[.]") (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)). The rule of *Lundy* is "simple and clear": "before you bring any claims to federal court, be sure that you first have taken each one to state court." 455 U.S. at 520.

Dismissal for lack of exhaustion would not prejudice a petitioner so long as he or she could later return to federal court, post-exhaustion. However, the AEDPA imposed a one-year statute of limitations for filing habeas corpus decisions once state

court criminal judgments become final. *Rhines*, 544 U.S. at 275. In *Rhines*, this Court held that rather than dismiss a mixed federal petition, a district court judge should stay action on the petition and hold the petition in abeyance while the petitioner exhausted claims. *Id.* at 278.[2]

A *Rhines* stay is only ever available to a prisoner if the *state courts* themselves (operating in the framework created by the state legislature) provide an avenue for a petitioner to litigate. If the State's interest is in speeding the post-conviction process, it can easily shed the supposed burden imposed by *Rhines* stays just by providing no remedy. Absent that, there is no independent federal interest in making it harder for prisoners to pursue remedies that the state courts and legislatures have, through the exercise of their own sovereignty, chosen to make available.[3] Furthermore, the State has more control than Utah and its *Amici Curiae* say. If the State thinks a claim is truly meritless, it can waive exhaustion and ask the court to grant summary judgment on the merits. *See* 28 U.S.C. § 2254(d)(2), (3). But the State has not exercised this option and is simply complaining about *Rhines*, which the district court dutifully followed.[4]

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[2] The State contends repeatedly that appealing a *Rhines* stay would allow immediate consideration of "whether the added delay in executing the State's presumptively valid sentence is justified[.]" Pet. 22. That is not even one of *Rhines*' elements, let alone a *dispositive* consideration that any courts use to grant or deny stays.

[3] This is not to say that federal courts should decide the *applicability* of state procedural bars, particularly in cases, such as this one, where the applicability of a state procedural bar and potential exceptions to that bar are issues that have not been determined by the state's highest court.

[4] The Petitioner claims district courts "routinely misapply *Rhines*," and backs this sweeping claim with a seven-case set from Utah, which reveals that, in four cases, stays were granted over the state's objection. Pet. 16. This is not evidence of "routine misapplication." *See also* n.5, *infra*.

II. EXPANSION OF THE COLLATERAL ORDER DOCTRINE TO ENCOMPASS STAY ORDERS IS NOT WARRANTED

A district court order regarding a stay of its proceedings "is not ordinarily a final decision for the purposes of [28 U.S.C.] § 1291." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983). A stay order is final only "when the sole purpose and effect of the stay is precisely to surrender jurisdiction of a federal suit to a state court." *Id*. at 10 n.11.

In order to be appealable under the collateral order doctrine, the district court's order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). This Court has cautioned that the collateral order doctrine "must never be allowed to swallow the general rule" that parties are entitled to a single appeal following the entry of final judgment. *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009).

These principles are no less important in the context of a *Rhines* stay allowing a petitioner to present his federal habeas claims first to the state court. The total-exhaustion rule is to prevent claim-by-claim litigation of habeas petitions in the district courts. *Rhines,* 544 U.S. at 277.

A. Orders Regarding *Rhines* Stays Cannot Satisfy the Test for Jurisdiction Under the Collateral Order Doctrine

In order to satisfy the collateral order doctrine, "the order must satisfy each of

three conditions: it must (1) 'conclusively determine the disputed question,' (2) 'resolve an important issue completely separate from the merits of the action,' and (3) 'be effectively unreviewable on appeal from final judgment.'" *Van Cauwenberghe*, 486 U.S. at 522 (quoting *Coopers & Lybrand*, 437 U.S. at 468). Failure to satisfy any of the three elements prevents courts from applying the collateral order doctrine. The court below assumed without deciding that a *Rhines* order conclusively determines the disputed question. Pet. App. 6a-7a. However, as the Tenth Circuit found, the State fails to satisfy the remaining two requirements.

1. A Court's Decision under *Rhines* Does Not Resolve an Important Issue Completely Separate from the Merits of the Case

Petitioner concedes that "doctrinal limitations disfavor requests to add another kind of order to the list of those subject to collateral-order review[,]" but then argues this case is an exception because it is a capital habeas case. Pet. 21-22. But the premise of Petitioner's and *Amici*'s arguments are fundamentally flawed in several respects.

First, it is inaccurate that the important issue in every appeal of a *Rhines* stay will be the delay inherent in the stay. Indeed, that is not true in this case. In the court below, the State's primary argument was that the district court misapplied the "good cause" requirement under *Rhines*. *See* Pet. App. 13a-14a ("Utah identifies the definition of good cause as an 'important' issue."). As the Tenth Circuit found here, that determination "will often overlap with a court's preliminary assessment of the merits." Pet. App. 18a-19a (citing *Cunningham v. Hamilton Cty., Ohio*, 527 U.S. 198,

205 (1999)); *see also generally* Pet. App. 17a-19a.

Second, in order to determine whether a district court abused its discretion, an appellate court must review the district court's determination of whether all three *Rhines* factors were satisfied. At least two of those factors, "good cause" and "potential merit," will almost always not be completely separate from the merits of the underlying case. As the Tenth Circuit found here, "[b]ecause 'potential merit' is essential for *Rhines* stays, interlocutory review would frequently require us to consider the potential merit of the underlying habeas claims. And 'potential merit' is obviously not 'completely separate' from the actual merits." Pet. App. 11a.

Indeed, the question of the merit of underlying claims is a central focus of why *Amici* contend this Court should grant review. Specifically, *Amici* contend that district courts are granting stays on claims that state courts ultimately reject, suggesting that the claims lack merit and "federal district courts are misapplying *Rhines*."[5] Brief of Indiana *et al.* as *Amici Curiae* 5. But *Amici* fail to explain how their contention that district courts are failing to correctly apply the "potentially meritorious" requirement under *Rhines* can satisfy the requirement under the

[5] *Amici* contend that state courts denied relief in more than two-thirds of cases in which *Rhines* stays were granted from 2005 to 2010. Brief of Indiana *et al.* as *Amici Curiae* 5. *Amici* base this conclusion on a review of 26 published orders. *Id.* at 4 n.2. However, a search of Westlaw reveals that, in the timeframe chosen by the state, there were approximately 225 *Rhines* decisions in cases involving a sentence of death that were *un*reported. Thus, *Amici* have chosen a sample of approximately 10 percent of available orders, selecting for those in which a stay was granted. The fact that only 26 stays were granted nationwide over a five-year period in fact suggests that stays are being granted in only a small portion of all cases pending. Furthermore, on information and belief, the fact that a third of petitioners obtained relief on their claims in state court indicates, contrary to *Amici*'s argument, a higher rate of obtaining relief than in federal habeas cases generally. Brief of Indiana *et al.* as *Amici Curiae* 4-5. *Amici* also do not indicate how many petitioners later obtained relief in *federal* court. Overall, even the selective sample presented by *Amici* indicate that federal district courts are being judicious in the granting of *Rhines* stays and the system is working as this Court envisioned in *Rhines*.

collateral order doctrine that the issue be "completely separate from the merits of the action."[6] *Coopers & Lybrand*, 437 U.S. at 468.

The question of whether a habeas petitioner has established "good cause" for not exhausting a claim previously will also frequently overlap with the merits of the underlying claim. This would be true, for example, in the case of a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). "[W]hen a petitioner asserts a *Brady* claim, the petitioner might rely on the withholding of evidence for both good cause and the merits of the habeas claim." Pet. App. 17a (citations omitted). The same is true where, as here, a petitioner argues good cause based on ineffective assistance of post-conviction counsel. In that circumstance a court of appeal "might find 'good cause' based on post-conviction counsel's ineffectiveness" and subsequently "again face the issue of trial counsel's ineffectiveness as part of our review on the merits." Pet. App. 18a.

Third, Petitioner mischaracterizes the "separateness" requirement of the collateral order doctrine. The collateral order doctrine requires that the class of orders in question resolve "important questions separate from the merits." *Mohawk*, 558 U.S. at 107. This requirement is not met where the decision is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand*, 437 U.S. at 469 (quoting *Mercantile Nat'l. Bank v. Langdeau*, 371 U.S. 555, 558 (1963)); *see also Cunningham*, 527 U.S. at 205; *Van Cauwenberghe,* 486 U.S. at

[6] *Amici* also fail to explain how a denial of relief in state court necessarily means the claim was "plainly meritless," *Rhines*, 544 U.S. at 277, and that district courts are therefore misapplying *Rhines*.

528. It is insufficient to argue that the appellate court will not have to reach the ultimate conclusion of whether a petitioner is entitled to habeas relief. The question is whether the issues that underpin the interlocutory order "will substantially overlap factual and legal issues of the underlying dispute." *Van Cauwenberghe*, 486 U.S. at 527; *see also Johnson v. Jones*, 515 U.S. 304, 311 (1995) ("The requirement that the matter be separate from the merits of the action itself means that review now is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once[.]" (emphasis in original)); Pet. App. 12a (noting that the Court "has repeatedly cautioned that the collateral-order doctrine requires 'complete separation' from the merits" and listing cases).

Petitioner argues that the separateness requirement is nonetheless satisfied because *some* of the inquiries relevant to whether a *Rhines* stay is warranted are separate from the merits. Pet. 22-23. The Tenth Circuit rejected this argument, noting that "[i]t is true that potential merit is just one element for a *Rhines* stay. But a court can enter a *Rhines* stay *only* if the unexhausted claim has potential merit." Pet. App. 11a n.4 (emphasis added); *see also Van Cauwenberghe*, 486 U.S. at 529-30 (noting in the context of forum non conveniens determinations, certain cases may not "require significant inquiry into the facts and legal issues presented by a case" and that in such cases "an immediate appeal might result in substantial savings of time and expense," but finding that "in the main" there would be overlap in the category of cases as a whole). This Court has consistently held that "the collateral-order doctrine cannot apply absent complete separation for the *entire* class of orders." Pet.

App. 22a-23a (emphasis in original; citing *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985); *Cunningham*, 527 U.S. at 206).

2. A Stay Order is Not Effectively Unreviewable by Other Means

Petitioner argues that *Rhines* stays cannot be adequately reviewed on appeal from final judgment because "the harm from an improper *Rhines* stay is the unwarranted delay in the execution of a State's criminal sentence" and "a court can't restore Utah's lost time." Pet. 25. *Amici* similarly complain that "a delayed appeal cannot cure the harms imposed by the stay." Brief of Indiana *et al.* as *Amici Curiae* 10.

The Court has made clear, however, that the fact that a ruling may "burden litigants in ways that are only imperfectly reparable" by reversal on final appeal is insufficient to "justify making all such orders immediately appealable" under the collateral order doctrine. *Mohawk*, 558 U.S. at 112. In making this determination, courts "do not engage in an individualized jurisdictional inquiry," but rather focus "on the entire category to which a claim belongs." *Id*. at 107 (internal citations and quotation marks omitted.) "As long as the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustice averted, does not provide a basis for jurisdiction under § 1291." *Id*. at 110 (internal citations, quotation marks, and alterations omitted); *see also Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498 (1989) ("[T]his Court has declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order. . . . Instead, we have

insisted that the right asserted be one that is essentially destroyed if its vindication must be postponed until trial is completed."); Pet. App. 26a ("[W]e do not ordinarily regard the loss of time as sufficiently important to trigger the collateral-order doctrine." (citations omitted)).

The Court has also found that other "established mechanisms for appellate review" can provide "sufficiently effective review" of district court rulings such that "applying the blunt, categorical instrument of § 1291 collateral order appeal . . . simply cannot justify the likely institutional costs." *Mohawk*, 558 U.S. at 110-12 (internal quotation marks and citations omitted). In particular, a party may seek interlocutory appeal pursuant to 28 U.S.C. § 1292(b), or may file a petition for a writ of mandamus. *Id*. at 110; *see also Grace v. Vannoy*, 826 F.3d 813, 821 n.8 (5th Cir. 2016) (noting availability of mandamus review); *Swanson v. DeSantis*, 606 F.3d 829, 833 (6th Cir. 2010) (noting availability of mandamus and certification under 28 U.S.C. § 1292(b)).

Petitioner complains that because the district court denied certification under § 1292(b) in this case, that avenue is "at best theoretical." Pet. 26 (citing Pet. App. 84a-90a). The district court's order shows nothing of the sort. In order to obtain certification under § 1292(b), a party must demonstrate that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" 28 U.S.C. § 1292(b). The district court applied that standard to the *Rhines* order in this case and found that the State had

failed to meet this burden. Pet. App. 89a (finding that "there is not a substantial disagreement among any binding authorities that a standard other than the one applied by the court in this case should apply" and that "it does not appear that an immediate appeal would necessarily materially advance the termination of the litigation"). That Petitioner failed to satisfy the requirements for certification *in this case* does not render certification under § 1292(b) "at best theoretical" as applied to the entire class of orders. *See Mohawk*, 558 U.S. at 111 (noting that certification under § 1292(b) is "most likely to be satisfied when a . . . ruling involves a new legal question or is of special consequence"); Pet. App. 20a (stating that many of the State's arguments "involve garden-variety application of legal principles settled long ago").

Similarly, Petitioner complains that "requiring a State to seek mandamus relief . . . does not comport with *Rhines*'s holding" because the "'standard for issuing a writ of mandamus is higher than the abuse of discretion standard.'"[7] Pet. 26 (quoting Pet. App. 59a n.6). Although Petitioner is correct that the "clear abuse of discretion" required for a writ of mandamus to issue is a higher threshold than simply the "abuse of discretion" standard applied to many appeals, both standards involve a significant amount of deference to district court judges. In *Mohawk*, this Court implied that such deference was a reason *not* to find collateral order jurisdiction. 558 U.S. at 110 ("Most district court rulings on these matters involve the routine application of settled legal principles. They are unlikely to be reversed on appeal, particularly when they rest on factual determinations for which appellate deference

[7] Petitioner never sought mandamus review in this case.

is the norm." (citations omitted)). Furthermore, the Court noted that although "discretionary review mechanisms do not provide relief in every case, they serve as useful 'safety valves' for promptly correcting serious errors." *Id.* at 111 (quoting *Digital Equipment v. Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994); *see also* Pet. App. 30a n.15 ("Other circuit courts have generally declined to apply the collateral-order doctrine to orders subject to the abuse-of-discretion standard." (citations omitted)). In other words, it is not necessary that an individual litigant actually obtain relief in a given case, as long as "the class of claims, *taken as a whole*, can be adequately vindicated by other means." [8] *Id.* at 107.

B. Collateral Order Jurisdiction Must Be Determined Based on the Entire Class of Orders

Petitioner essentially advocates that the Court adopt a case-by-case approach to determining whether collateral jurisdiction is appropriate in the case of *Rhines* stays. Pet. 18 ("Collateral review lets States test whether *any* stay properly falls within [*Rhines*'] limited circumstances." (emphasis added)), 24 ("If a *Rhines* stay really did depend on the facts underlying a petitioner's unexhausted claim, the circuit courts could decline to exercise collateral-order jurisdiction over a State's appeal from that stay, as they do in immunity cases."). But as the court below noted, "Perhaps in some appeals of *Rhines* stays, the specific argument being advanced might not involve the potential merit of an unexhausted claim. But the Supreme Court has 'consistently

[8] *Amici* also complain that review of a *Rhines* order is unavailable, citing to a Nevada case in which they argue a *Rhines* stay was improperly granted and contending that "Nevada could not appeal because the Ninth Circuit has held that the collateral-order doctrine does not apply to *Rhines* stays." Brief of Indiana *et al.* as *Amici Curiae* 7. Nevada similarly never sought certification under § 1292(b) or a writ of mandamus in that case. *Crump v. Filson*, No. 2:07-cv-0492 (D. Nev.).

eschewed a case-by-case approach to deciding whether an order is sufficient collateral.'" Pet. App. 21a (quoting *Cunningham*, 527 U.S. at 206; other citations omitted).

Petitioner argues that such a system, where the application of collateral order jurisdiction is dependent on the circumstances of the particular case, already exists in the context of qualified-immunity orders. Pet. 23-24. However, in the context of qualified immunity orders, collateral appeals are limited to cases where the issue is "what law was 'clearly established'" at the time of the events. *Johnson*, 515 U.S. at 313. Petitioner has not identified any issue related to a *Rhines* stay that presents a comparable "neat abstract issue[] of law." *Id.* at 317.

Petitioner states that the "the important question in every appeal from a *Rhines* stay in a capital case is whether a federal court improperly frustrated AEDPA and abused its discretion by adding more delay to the execution of the State's presumptively valid sentence." Pet. 21-22. But that question essentially boils down to asking whether the district court abused its discretion in finding that a petitioner had satisfied one or more of the *Rhines* factors. That question cannot be answered "'with reference only to undisputed facts and in isolation from the remaining issues of the case.'" *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 n.10 (1985)).

Petitioner further argues that a circuit court could decline to exercise jurisdiction over a stay that was fact-dependent but nonetheless "review the purely legal questions." Pet. 24. But nowhere in its petition does Utah identify a purely legal question related to "whether a State must endure the continued delay a stay causes."

Id. Even the questions identified as examples by Petitioner —"Did the prisoner adequately show good cause?" and "Do state or federal time or procedural bars preclude the claim?"—will, as discussed above, almost always be enmeshed with the merits of the underlying case. *See Johnson,* 515 U.S. at 315 ("To take what petitioners call a small step beyond *Mitchell*, would more than relax the separability requirement—it would in many cases simply abandon it.").[9]

Following the case-by-case approach suggested by Petitioner would also have implications for collateral order jurisdiction over stay orders more broadly. The Court has found that generally, as is the case here, a stay is entered "with the expectation that the federal litigation will resume in the event that the plaintiff does not obtain relief in state court on state-law grounds." *Moses H. Cone*, 460 U.S. at 10; *see also* Pet. App. 89a-90a (contemplating the prompt continuation of federal proceedings following the conclusion of state court proceedings). A stay order is appealable under the collateral order doctrine only when the "stay order amounts to a dismissal of the suit." *Moses H. Cone*, 460 U.S. at 10; *see also id.* at n.11 (a stay order does not become final "merely because it may have the practical effect of allowing a state court to be the first to rule on a common issue"); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 15A Federal Practice & Procedure § 3914.13 (2d ed.) ("Stays . . . used to regulate the court's own proceedings or to accommodate the needs of parallel

[9] The Court in *Johnson* also relied heavily on the fact that the purpose of qualified immunity was "protecting public officials, not simply from liability, but also from standing trial." *Johnson*, 515 U.S. at 312 (citing *Mitchell*, 472 U.S. at 525-27). Thus, in addition to presenting a "neat abstract issue[] of law," *Johnson*, 515 US at 317, postponing review until after trial would obviate one of the central purposes of qualified immunity, having to stand trial *at all*.

proceedings . . . are no more appealable than other interlocutory procedural orders."). The State has offered no basis on which to conclude that a *Rhines* stay "amounts to a dismissal of the suit," nor have they offered any basis on which to distinguish a *Rhines* stay from any other circumstance in which a stay does not put one party "effectively out of court." *Id*. at 10 & n.11. Allowing collateral appeals of stay orders in habeas proceedings would open the door to similar appeals of stays in other federal suits.

C. This Court's *Rhines* Procedure Supports the Objectives of Comity and Federalism in Habeas Cases

Petitioner argues that review is warranted in this case because *Rhines* stays implicate "fundamental federalism concerns" and frustrates AEDPA's goal of finality. Pet. 14-16. Petitioner ignores, however, that the ADEPA was also passed with the objective of ensuring that state courts have the opportunity to address a petitioner's federal habeas claims in the first instance. *See Rhines,* 544 U.S. at 276 (noting that AEDPA "encourages petitioners to seek relief from state courts in the first instance"); Pet. App. 41a. *Rhines* stays are granted not just so that petitioners can technically exhaust their claims before returning to federal court, but because comity and federalism dictate that the state court should have the first opportunity to review the merits of petitioners' claims, and the interests of judicial economy counsel against expending resources to move federal litigation forward when a petitioner could very well obtain relief on his claim in state court. *See Doe v. Jones*, 762 F.3d 1174, 1181 (10th Cir. 2014) (noting that a *Rhines* stay furthers "[t]he exhaustion doctrine's principal design 'to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings'" (quoting *Lundy*, 455 U.S. at 518);

Rhines, 544 U.S. at 278 (stays of federal habeas petitions that satisfy the requirements outlined are "compatible with AEDPA's purposes"). The State cannot be harmed by the delay inherent in a stay that is justified and appropriate under *Rhines*.

Petitioner argues that the balance struck by the Court in *Rhines* has been undermined in Utah because "*Rhines* stays have become the norm in Utah" and, absent making these orders immediately and automatically appealable under the collateral order doctrine, the state faces an "inability to do anything about it." Pet. 16. As the court below noted, in only "a slight majority"—four out of six cases—have Utah capital habeas petitioners received a stay over the State's objection. Furthermore, in two of those cases, the petitioners had filed protective federal habeas petitions, despite the fact that their initial state post-conviction proceedings had not yet concluded, and one of the two was granted before *Rhines* was even decided.[10] Mem. Dec. and Order Granting Stay, *Kell v. Benzon*, No. 2:07-cv-359 (D. Utah Oct. 8, 2009), ECF No. 51; Order, *Menzies v. Benzon*, No. 2:03-cv-902 (D. Utah Oct. 27, 2004), ECF No. 41. Thus, the State's argument that *Rhines* stays have become the "norm" resulting in a situation where "'AEDPA has no teeth,'" is inaccurate and does not provide a basis to exercise jurisdiction under the collateral order doctrine. Pet. 16.

[10] In *Menzies v. Galetka*, the Utah Supreme Court held that there was a statutory right to the effective assistance of counsel in post-conviction proceedings. 150 P.3d 480, 510 (Utah 2006). Based on this holding, several Utah petitioners, including Mr. Kell, filed motions for relief pursuant to Utah's rule 60(b), which is similar to the federal rule, based on the grossly ineffective assistance of their post-conviction counsel. Because it remained uncertain how the Utah courts would rule on these motions, petitioners filed protective federal habeas petitions and requested stays of federal proceedings in order to ensure that they did not violate the AEDPA's one-year statute of limitations.

Amici similarly argue, "[t]he Tenth Circuit's holding would also lead to too many *Rhines* stays in capital cases." Brief of Indiana *et al.* as *Amici Curiae* 13. "After all," they contend, "if a capital petitioner has every reason to 'deliberately engage in dilatory tactics,' and the State has no defense, why would the petitioner exhaust all of his claims in state court before filing his habeas petition?" *Id.* But *Amici* fail to explain why the Tenth Circuit's holding that orders on *Rhines* stays do not satisfy the collateral order doctrine would have this effect. First, as discussed below, every circuit to analyze the jurisdictional question since *Rhines* was decided has found it lacked jurisdiction under the collateral order doctrine. *Amici* offer no reason to believe that *Rhines* stays have increased in the decade since the first of these cases was decided. Second, the circumstance described by *Amici* involves *intentionally* defaulting claims in state court for purposes of delay. *Rhines* already takes account of this possibility by requiring petitioners to show that they have not engaged in "intentionally dilatory litigation tactics," *Rhines*, 544 U.S. at 278, *and* that they have "good cause" for their failure to exhaust their claims previously. Any habeas petitioner who pursued such a course of action would risk never having his claims addressed on the merits by any court, state or federal. Neither Petitioner nor *Amici* have provided any reason why the application of the *Rhines* factors themselves, together with the availability of several avenues of review, are insufficient to protect states' interests.

III. THERE IS NO MEANINGFUL DISAGREEMENT AMONG THE CIRCUIT COURTS ON THIS ISSUE

Petitioner contends that there is a "lack of clarity in the circuits" regarding whether or not a district court's stay order pursuant to *Rhines* is appealable under the collateral order doctrine. Pet. 17. Petitioner is mistaken. In addition to the Tenth Circuit's ruling in this case, the Fifth, Sixth, Eighth, and Ninth Circuits have all held that a district court's order on a *Rhines* stay is not a final order under 28 U.S.C. § 1291 and they do not have jurisdiction under the collateral order doctrine to review such orders. *Grace*, 826 F.3d at 813; *Swanson*, 606 F.3d 829; *Howard v. Norris*, 616 F.3d 799 (8th Cir. 2010); *Thompson v. Frank*, 599 F.3d 1088 (9th Cir. 2010). The Fourth Circuit also stated in an unpublished per curiam decision that an order denying a stay is not appealable under the collateral order doctrine. *Vang v. Ozmit*, 365 F. App'x 489, No. 09-7088, 2010 WL 547370 at *1 (4th Cir. Feb. 17, 2010) (unpublished).

Only the Third Circuit has held that a stay order is appealable under the collateral order doctrine. However, in its only post-*Rhines* ruling on the issue, the Third Circuit did not conduct any analysis of the jurisdictional question but rather relied exclusively on its previous ruling in *Christy v. Horn*, 115 F.3d 201 (3d Cir. 1997), to find it had jurisdiction. *Williams v. Walsh*, 411 F. App'x 459, 461, No. 10-4080, 2011 WL 477723 (3d Cir. Feb. 11, 2011) (unpublished). However, *Christy* was decided eight years prior to this Court's decision in *Rhines* and was not subject to the AEDPA. *Christy*, 115 F.3d at 203. Many of the grounds on which the court relied in *Christy* no longer hold true. "The question whether a district court may hold an

unexhausted habeas petition in abeyance pending resolution in state court of certain claims remains unsettled." *Christy*, 115 F.3d at 205. However that question was answered by the Court in *Rhines*, 544 U.S. at 278; *see also Howard*, 616 F.3d at 802-03 (Noting that after Rhines, the basis for employing the collateral order doctrine "is no longer applicable").

The factors established by this Court in *Rhines* do enmesh the decision of whether a stay is warranted with the factual and legal issues in the case. Under *Rhines*, a court must specifically determine whether the petitioner's underlying claims are "potentially meritorious." *Rhines*, 544 U.S. at 278. The determination of whether the petitioner has "good cause" for his failure to exhaust is similarly enmeshed in the factual and legal issues in the case. *See* Pet. App. 17a-18a (discussing the overlap between the inquiry on the merits of a habeas claim and whether a petitioner has established good cause under *Rhines*).

Following this Court's decision in *Rhines*, six circuit courts of appeal have directly considered the question of whether there is jurisdiction under the collateral order doctrine to appeal a district court's order on a *Rhines* stay and all six have found that there is not. Although the Third Circuit upheld jurisdiction in an unpublished opinion, it did so without analysis. No court of appeals, after reviewing the jurisdictional question, has held that a *Rhines* stay is an appealable collateral order. Therefore, there is no meaningful dissent among the circuits regarding this issue for this Court to resolve.

IV. THIS CASE IS NOT A GOOD VEHICLE TO ADDRESS THE QUESTION PRESENTED

Expanding the collateral order doctrine to include stay orders would not change the outcome of this case. The district court in this case conducted a thorough analysis of the *Rhines* factors. Even if the appellate court had jurisdiction to review this case, it would find that Mr. Kell had satisfied the *Rhines* requirements and the district court did not abuse its discretion in granting a stay.

Mr. Kell alleged "good cause" under *Rhines* based on the ineffective assistance of post-conviction counsel. In his motion, Mr. Kell noted that post-conviction counsel filed a petition that "was only 21 pages in length, contained only one case citation, and appended no declarations or other new evidence." Mot. to Stay Fed. Habeas Proceedings, ECF No. 245 at 4. Addressing post-conviction counsel's performance, the district court found:

> Post-conviction counsel could not have made a reasonable strategic decision to limit investigation of jurors because counsel had not conducted any investigation at all. Counsel filed a perfunctory petition, failed to conduct even a cursory investigation of the case, including failing to interview even a single juror, and admitted that none of these decisions were strategic.

Pet. App. 75a.

Nor did the district court abuse its discretion in finding that Mr. Kell's claim was "potentially meritorious." *See Rhines*, 544 U.S. at 277 (referring to a potentially meritorious claim as one that is not "plainly meritless"). Mr. Kell alleged that, while jurors deliberated during the penalty phase of his capital murder trial, the trial judge gave jurors a supplemental instruction, off the record and outside the presence of Mr.

Kell or his counsel, that unconstitutionally shifted the burden of proof to Mr. Kell to prove that his life should be spared. Three jurors signed declarations supporting Mr. Kell's claim. Mot. to Stay Fed. Habeas Proceedings, ECF No. 245 at 14-15, Reply in Supp. of Mot. to Stay, ECF No. 254 at 7-8. After reviewing the facts alleged by Mr. Kell, the district court concluded that the claim was "potentially significant." Pet. App. 80a-81a.

Petitioner contends that the district court nonetheless erred in finding Mr. Kell's claim is potentially meritorious because the claim is procedurally barred in state court. Pet. 27. Petitioner ignores that the application of Utah's procedural bars, particularly to a case that was filed in the time-frame that Mr. Kell's case was filed in,[11] is not a settled question. *See Archuleta v. State*, Utah Supreme Court Case No. 20160419-SC; *Patterson v. State*, Utah Supreme Court Case No. 20180108-SC. Where an issue of state law was already pending before the state's highest court, it would have been particularly inappropriate for a federal district court to decide the question in the first instance. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 499-501 (1941).

Similarly, the district court's conclusion that there was "no indication Kell has engaged in intentional or abusive dilatory litigation tactics" was supported by the record. Pet. App. 82a. The district court found that Mr. Kell had noted he would file

[11] Utah's post-conviction statute was amended in 2008, including changes to the state's procedural bars. Mr. Kell's post-conviction case was initiated in 2003, and proceedings in the state district court, during which time Mr. Kell's unexhausted claim should have been investigated and presented, concluded in 2007. During this time, Mr. Kell had a statutory right under state law to the effective assistance of post-conviction counsel. *Menzies*, 150 P.3d at 480.

a *Rhines* motion in his petition,[12] and had adhered to the case management schedule that was agreed to by both parties, which contemplated addressing discovery and an evidentiary hearing prior to addressing other issues. Pet. App. 82a. Because the district court judge did not abuse his discretion, granting collateral-order jurisdiction in this case would not change the outcome of the district court's decision to grant a *Rhines* stay.

Petitioner has not presented a categorical basis on which for this Court to find collateral-order jurisdiction over stay orders pursuant *Rhines*. Petitioner has thus failed to satisfy the requirements of the collateral order doctrine. As the Court has long held, stay orders, including those made pursuant to *Rhines*, entered "with the expectation that the federal litigation will resume in the event that the plaintiff does not obtain relief in state court on state-law grounds" do not warrant the exercise of jurisdiction under the collateral order doctrine.

CONCLUSION

For the foregoing reasons, the petition should be denied.

[12] As the court of appeals noted, Mr. Kell again stated he would seek a stay to exhaust two claims in the Reply to his federal habeas petition. Pet. App. 16 n.8.

Respectfully submitted this 23rd day of October, 2019.

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