No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Chad Alan Lee, Petitioner,

vs.

Ryan Thornell, et al., Respondents.

*** CAPITAL CASE ***
ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

In *Maples v. Thomas*, 565 U.S. 266 (2012), the Court announced that abandonment of a state post-conviction relief ("PCR") petitioner by his counsel, without communicating that counsel had withdrawn so that their client could seek new counsel or proceed *pro se* to preserve appeal rights necessary to exhaust a federal claim, served to excuse the procedural default of a claim of ineffective assistance of capital trial counsel that occurred where the PCR court denied relief but the petitioner, without knowledge of that denial, failed to timely appeal.

I.

Whether attorney abandonment in state PCR proceedings as articulated in *Maples*, with its focus on the severance of the agency relationship, necessarily forgives a petitioner's "fail[ure] to develop the factual basis of a claim in State court proceedings" under 28 U.S.C § 2254(e)(2) and permits the federal courts to admit evidence not previously admitted in state court without running afoul of the proscription on the admission of such evidence under § 2254(e)(2) and *Shinn v. Ramirez*, 596 U.S. 366 (2022).

II.

Whether the Ninth Circuit erred in failing to consider whether to remand with instructions to stay the federal proceeding to allow state court exhaustion of Lee's claim of ineffective assistance of capital trial counsel premised on defaulted facts, which included organic brain damage in the form of Fetal Alcohol Syndrome and Fetal Alcohol Effect from Lee's *in utero* exposure to alcohol, where Lee explicitly invoked the Court's admonition in *Ramirez* that "[w]hen a claim is unexhausted, the prisoner might have an opportunity to return to state court to adjudicate the claim." 596 U.S. at 379.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. The petitioner is not a corporation.

RELATED PROCEEDINGS

Reporter's Transcript of Proceedings, guilt phase verdicts, *State v. Lee*, CR92-04225 (Maricopa Cnty. Super. Ct. Mar. 24, 1994) (Reynolds & Lacey homicides).

Reporter's Transcript of Proceedings, guilt phase verdict, *State v. Lee*, CR92-04225 (Maricopa Cnty. Super. Ct. Aug. 29, 1994) (Drury homicide).

Reporter's Transcript of Proceedings, penalty phase verdict, *State v. Lee*, CR92-04225 (Maricopa Cnty. Super. Ct. June 23, 1994) (Reynolds & Lacey sentences).

Reporter's Transcript of Proceedings, penalty phase verdict, *State v. Lee*, CR92-04225 (Maricopa Cnty. Super. Ct. Nov. 5, 1994) (Drury sentences).

Direct Appeal Opinion (convictions and sentences affirmed – Reynolds & Lacey homicides), *State v. Lee*, 944 P.2d 1204 (Ariz. 1997).

Direct Appeal Opinion (convictions and sentences affirmed – Drury homicide), *State v. Lee*, 944 P.2d 1222 (Ariz. 1997).

Order (denying Petition for a Writ of Certiorari), *Lee v. Arizona*, 523 U.S. 1007 (1998) (two cases).

Minute Entry (denying state post-conviction relief), *State v. Lee*, CR92-04225 (Maricopa Cnty. Super. Ct. Dec. 29, 2000).

Order (denying petition for review on denial of post-conviction relief), *State v. Lee*, CR-01-0110-PC (Ariz. Sup. Ct. Oct. 30, 2001).

Order (finding certain claims brought pursuant to 28 U.S.C. § 2254 procedurally defaulted, including the subject ineffective assistance of trial counsel claim), *Lee v. Schriro*, CV-01-2178-PHX-EHC & CV-01-2179-PHX-EHC (consolidated § 2254 cases) (D. Ariz. Feb. 4, 2005), ECF 94.

Memorandum of Decision and Order (denying relief on exhausted claims brought in petition filed pursuant to 28 U.S.C. § 2254), *Lee v. Schriro*, CV-01-2178-PHX-EHC & CV-01-2179-PHX-EHC (consolidated § 2254 cases) (D. Ariz. Jan. 6, 2009), ECF 126.

Judgment in a Civil Case, *Lee v. Schriro*, CV-01-2178-PHX-EHC & CV-01-2179-PHX-EHC (consolidated § 2254 cases) (D. Ariz. Jan. 6, 2009), ECF 127.

Order (denying motion to alter or amend judgment under Fed. R. Civ. P. 59(e)), *Lee v. Schriro*, CV-01-2178-PHX-EHC & CV-01-2179-PHX-EHC (consolidated § 2254 cases) (D. Ariz. Jan. 27, 2009), ECF 130.

Order (granting motion to remand pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012)), *Lee v. Schriro*, No. 09-99002 (9th Cir. Dec. 1, 2014), ECF 52.

Order (denying claims remanded pursuant to *Martinez*), *Lee v. Ryan*, CV-01-2178-PHX-GMS & CV-01-2179-PHX-GMS (consolidated § 2254 cases) (D. Ariz. June 26, 2019), ECF 170.

Order (denying Motion for Reconsideration), *Lee v. Ryan*, CV-01-2178-PHX-GMS & CV-01-2179-PHX-GMS (consolidated § 2254 cases) (D. Ariz. July 16, 2019), ECF 172.

Opinion, *Lee v. Thornell*, 104 F.4th 120 (9th Cir. June 11, 2024), ECF 156-1.

Order and Amended Opinion, *Lee v. Thornell*, 118 F.4th 969 (9th Cir. Sept. 30, 2024), ECF 163.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chad Alan Lee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in which it affirmed the denial of habeas corpus relief in this capital case.

OPINIONS AND ORDERS BELOW

Direct Appeal Opinion (convictions and sentences affirmed – Reynolds & Lacey homicides), *State v. Lee*, 944 P.2d 1204 (Ariz. 1997).

Direct Appeal Opinion (convictions and sentences affirmed – Drury homicide), *State v. Lee*, 944 P.2d 1222 (Ariz. 1997).

Order (denying Petition for a Writ of Certiorari), *Lee v. Arizona*, 523 U.S. 1007 (1998) (two cases).

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Order (denying petition for review on denial of post-conviction relief), *State v. Lee*, CR-01-0110-PC (Ariz. Sup. Ct. Oct. 30, 2001).

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Order (denying motion to alter or amend judgment under Fed. R. Civ. P. 59(e)), *Lee v. Schriro*, CV-01-2178-PHX-EHC & CV-01-2179-PHX-EHC (consolidated § 2254 cases) (D. Ariz. Jan. 27, 2009), ECF 130.

Order (granting motion to remand pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012)), *Lee v. Schriro*, No. 09-99002 (9th Cir. Dec. 1, 2014), ECF 52.

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Opinion, *Lee v. Thornell*, 104 F.4th 120 (9th Cir. June 11, 2024), ECF 156-1.

Order and Amended Opinion, *Lee v. Thornell*, 118 F.4th 969 (9th Cir. Sept. 30, 2024), ECF 163.

JURISDICTION

On June 11, 2024, the Ninth Circuit affirmed the denial of federal habeas corpus relief. *Lee v. Thornell*, 104 F.4th 120 (9th Cir. 2024). On September 30, 2024, the Ninth Circuit denied a timely petition for rehearing and petition for rehearing en banc, and amended its earlier opinion. *Lee v. Thornell*, 118 F.4th 969 (9th Cir. 2024). On December 27, 2024, in Application 24A625, this Court granted Lee's Application for Extension of Time to File Petition for Writ of Certiorari to and including February 24, 2025.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Const. amend. VI, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. Const. amend. XIV, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

Chad Alan Lee, a brain-damaged 19-year-old, and a 14-year-old accomplice were charged in Maricopa County, Arizona, with three counts of first-degree murder

for unrelated homicides that occurred over the course of three weeks in April 1992. App. A-6–7. Lee was tried first for the murders of Linda Reynolds on April 6, 1992, and David Lacey on April 15, 1992, and, later, for the murder of Harold Drury on April 27, 1992.

I. Statement of facts and procedural background.[1]

Lee was charged with the first-degree murder of Reynolds, two counts of sexual assault, kidnapping, armed robbery, and theft. 1-ER-156. He was charged with the first-degree murders and armed robberies of Lacey and Drury. 1-ER-157.

A. The Reynolds/Lacey trial.

Evidence admitted at trial, which came largely from Lee's confessions and his trial testimony, showed that he and his minor accomplice David Scott Hunt devised a plan to lure Reynolds, a Pizza Hut delivery driver, to a vacant house in Phoenix where they forced her to undress at gunpoint. 1-ER-152. They forced Reynolds to accompany them into the desert, where Lee removed the stereo from her car, and each sexually assaulted her. 1-ER-151–52. Lee then drove her and Hunt to Reynolds' bank, where she withdrew money from an ATM. 1-ER-154. They returned to the desert, where Reynolds escaped briefly before Hunt found her and forced her back to the car. Her face and lips were bloody. Lee and Hunt argued in front of Reynolds whether to release her, which Hunt opposed because she could identify them. 1-ER-152. Lee stated that as he escorted Reynolds away from Hunt, Lee shot her in the head as she tried to take the gun from him. Lee testified he returned to his car to

[1] The Statement includes citations to Lee's Excerpts of Record filed in the United States Court of Appeals for the Ninth Circuit in *Lee v. Thornell*, No. 09-99002.

retrieve a knife, which he used to stab Reynolds twice in the chest to stop her from suffering. 1-ER-152. On April 7, 1992, Lee pawned Reynolds' wedding ring, a gold ring, and the car stereo after filling out a sales slip and using his driver's license as identification. 1-ER-153.

After midnight on April 16, 1992, Lee called for a cab from a convenience store and after Lacey's cab was dispatched, Lacey picked up Lee and took him to a location where Hunt agreed to meet Lee in Lee's car. 1-ER-153. When Lacey stopped the cab to be paid, Lee pulled out his revolver and demanded money. Lee asserted that Lacey turned around and tried to grab the gun. Lee fired nine shots, four of which struck Lacey. Lee took $40 from Lacey and dumped his body on the side of the road.

Lee and Hunt were arrested on May 3, 1992, in connection with a Flagstaff armed robbery. 1-ER-155. At 2:45 a.m. on May 4, 1992, Lee confessed to the Reynolds and Lacey murders and agreed to lead officers to where the Reynolds murder weapons were buried. 1-ER-155–56. On May 5, 1992, Lee confessed to both murders to a Phoenix police officer on the drive to a campsite to retrieve the weapons and again to Coconino County officers on the return to Flagstaff. 1-ER-155–56. On May 6, 1992, Lee again confessed to the Lacey murder to a Maricopa County Sheriff's deputy. 1-ER-156.

Lee testified that he shot and stabbed Reynolds and shot Lacey in the head. 1-ER-156. Lee testified "that all statements he made to police officers were of his own free will, that he was advised of his *Miranda* rights, and that he told officers he understood his rights." 1-ER-156.

On March 24, 1994, a jury convicted Lee of all counts related to Reynolds and Lacey. 1-ER-158.

B. The Drury trial.

On direct appeal, the Arizona Supreme Court indicated that the facts proving the murder of Drury at an AM-PM convenience store on April 27, 1992, derived from Lee's confessions to law enforcement: on May 4, 1992, at 2:45 a.m. at the Coconino County Jail; on May 5, 1992, as Lee showed officers where he disposed of the Reynolds murder weapons; and, on May 6, 1992, at the Maricopa County Sheriff's Office. 1-ER-190. Lee's statements established that Lee entered the AM-PM around 1:00 a.m. 1-ER-189.

According to officers, Lee said the clerk went to grab his gun or Lee's arm and Lee shot him several times, including in the head. 3-ER-779, 787. Evidence showed that Lee shot Drury four more times, and as Drury slumped to the floor, Lee walked around the counter and shot him two more times in the head. 1-ER-189. Lee picked up cigarettes and left the store with the cash drawer from the register.

The jury convicted Lee of first-degree murder and armed robbery. 1-ER-191.

C. Capital sentencing.

1. Sentencing for the Reynolds/Lacey homicides.

The aggravation/mitigation portion of sentencing for the Reynolds/Lacey murders began on June 6, 1994. 5-ER-1067. Defense counsel indicated that a presentence report had been filed. 5-ER-1070. The report included victim impact letters from Reynolds' three siblings and mother, a letter from Lacey's father, a letter

from Lee, and a letter to the probation officer from defense counsel Alan Simpson. 4-ER-891–24.

Although the presentence report purported to set forth the substance of the probation officer's interviews with Dr. Mickey McMahon, the defense psychologist, and Lee's childhood caregiver and neighbor, Mary Sutter, those witnesses were called by Simpson at the mitigation hearing. Simpson also presented the testimony of Ed Aitken, a former state parole officer, who testified to having interviewed Lee's parents and three of his siblings. 5-ER-1109–11. Interviews with Leslie Lee (Murphy), Lee's mother; his father, Garry Lee; and his sister, Sandra Lee, revealed that Lee's mother abused alcohol for several years, including prior to Lee's birth. 5-ER-1113. Garry told Aitken "he would furnish her a case of beer every other day, and then that was augmented." 5-ER-1113. Sandra said their mother drank two 12-packs in between. 5-ER-1114.

Notwithstanding substantial evidence of alcohol consumption, including prior to Lee's birth, Simpson failed to retain an expert steeped in FAE. Aitken testified to Lee's history, which included Lee being cared for by the Sutter family for one to two weeks at a time between the ages of a few months and four years. 5-ER-1116. The visits became less frequent when Lee moved three or four miles from the Sutters. 5-ER-1119. Lee was seven or eight when his family moved from Phoenix to New River. 5-ER-1119. As opposed to the dirty and messy home maintained by his parents and the childhood deprivation he suffered, the Sutters cared well for Lee, providing him with food, formula, diapers, his own toys, and a play area. 5-ER-1117. Dr. McMahon

testified that anxiety may result from a child's feelings of abandonment. 4-ER-1024. Dr. McMahon detailed why Lee suffered both maternal and paternal abandonment. 4-ER-1025–26, 1030–33. Maternal abandonment occurred due to Leslie's severe alcohol abuse and sending Lee away periodically, beginning at the age of three months, to stay with the Sutter family. 4-ER-1028. She abandoned him emotionally due to her alcohol consumption and detachment even when she was physically present. 4-ER-1028.

Although Garry was typically present, he assigned work in the family wood-cutting and junk businesses to his children from their very young ages in an emotionally distant way. 4-ER-1031–32. The work was not a cooperative venture, and Garry was not supportive of Lee. This constituted paternal abandonment. Dr. McMahon testified that paternal abandonment could be overcome at school. However, Lee's poor academic performance, resulting in part from his Attention Deficit Disorder, negatively affected his socialization and friendships and, therefore, diminished his support and self-assurance. 4-ER-1034–35. His passage into adulthood was delayed, and he gravitated toward groups of younger peers with whom he did not need to develop mature friendships, in this case with the 14-year-old Hunt. 4-ER-1036–39.

Sutter testified that the family's relationship with Lee began when one of her daughters was asked to babysit him. 4-ER-978. Lee spent the night and eventually he would spend seven or eight nights with the Sutters before being returned to his parents. Lee's parents never came over to check on him or deliver food or diapers for

him. 4-ER-978–80. Sutter testified that Lee became part of the family, and Lee cried when he was returned to his parents. 4-ER-980, 982. She never saw Lee's parents hug him and worried that Lee would perceive both his parents and the Sutters abandoning him by having him ping pong back and forth. 4-ER-983–84.

When Lee was five, the family moved, and the Sutters only saw him on weekends. 4-ER-985. She visited him at the jail, spoke with him on the phone, and sat through the trial. She testified she found him to be the same person she knew and that it would be devastating for her family if he were executed. 4-ER-993–94. Lee's father, Garry, asked the judge in his letter to let Lee live. 4-ER-849.

In his letter included with the presentence report, Lee stated that he has dreamed *inter alia* of how he would have turned out had he been loved, had he had fun in his childhood, if he had a real family, had the Sutters adopted him, and had he been "able to do good in school." 4-ER-917–19. Lee stated that he had bad dreams about what happened to Reynolds and broke down and cried after her mother's testimony. 4-ER-842–43. The prosecution re-called its psychologist from the suppression hearing, who testified that he did not test or interview Lee but stated that Lee may suffer from a learning disability based on Dr. McMahon's test scores but did not otherwise offer a diagnosis because he did not evaluate Lee. 4-ER-953, 957.

At sentencing, Lee stated that he was sorry for the offenses he committed and that he would trade his life for those of his victims if he could. 4-ER-864–65.

The court found as statutory aggravation: Lee had two prior violent felony

convictions under 13 A.R.S. § 703(F)(2) as to each victim based on the prior violent felony convictions as to Reynolds and Lacey; prior violent felony convictions in Coconino County under F(2) for the offenses that occurred at the Flagstaff Walmart parking lot on May 3, 1992; pecuniary gain under F(5) as to the Reynolds and Lacey murders; especial cruelty under F(6) for the time Reynolds was with the defendants in the desert and feared for her life; especial depravity under F(6) based on the infliction of gratuitous violence by Lee stabbing Reynolds twice after he had shot her; and, especial depravity as to the Lacey murder under F(6) based on the senselessness of murder because the robbery could have been accomplished without the murder. 4-ER-870–76. The court sentenced Lee to death. 4-ER-884.

The Arizona Supreme Court affirmed the convictions and death sentences. *State v. Lee*, 944 P.2d 1204 (Ariz. 1997).

2. Sentencing for the Drury homicide.

The court considered in mitigation the evidence admitted at the Reynolds/Lacey sentencing. 3-ER-749–50. The court found prior violent felony convictions under F(2) for the Reynolds and Lacey murders; prior violent felony convictions for the Walmart parking lot armed robberies; pecuniary gain under F(5) for taking property from Drury; and heinousness and depravity under F(6) because the murder was senseless and involved the infliction of gratuitous violence. 3-ER-752–55. The court imposed a sentence of death. 3-ER-760.

The Arizona Supreme Court affirmed the convictions and death sentence. *State v. Lee*, 944 P.2d 1222 (Ariz. 1997).

D. Inadequacy of Lee's Post-Conviction Proceedings.

The Arizona Supreme Court appointed Jess Lorona to represent Lee in his post-conviction relief (PCR) proceedings. Lorona filed a petition that raised nine claims. App. B. In its Response to Petition for Post-Conviction Relief, the State argued that "Claims 1–7, and 9 have either been adjudicated, or could have been raised and adjudicated, in the direct appeals in this matter, and hence are precluded from Rule 32 review." App. C-8. The State addressed with specificity why Claims 1 through 7 were precluded. App. C-8–10. The State further noted that the 17 constitutional attacks on the Arizona death penalty statute were raised and rejected in Lee's direct appeals or could have been raised on direct appeal but were not brought to the attention of the Arizona Supreme Court. App. C-10–11. The State argued with respect to Claim 8, which alleged ineffective assistance of trial counsel (IATC):

> Petitioner contends that he was denied effective assistance of counsel. However, he has failed to raise any colorable claims regarding this issue. Moreover, even if any of these claims are deemed colorable, Petitioner is not entitled to relief because he has failed to demonstrate prejudice. Nevertheless, to avoid potential delay in federal court proceedings that are expected to follow Petitioner's state court proceedings, Respondents request that an evidentiary hearing be held regarding Claim 8. Moreover, because Respondents have a right to know the bases of allegations made in Claim 8, Respondents respectfully request that Petitioner be ordered to file an amended petition within 30 days, in order to explain how his allegations in Claim 8 are colorable.

App. C-11.

Regarding the subclaim that trial counsel failed to move to sever the Reynolds and Lacey trials, which would have permitted Lee to testify with regard to the Lacey murder, the State submitted that Lorona failed to specify facts that illuminated why

Lee would have testified had severance occurred. App. C-14. The State asserted this was an unsupported "conclusory" or "vague or speculative" allegation. App. C-14.

The State asserted that the subclaim that Simpson should have requested a limiting instruction did not demonstrate deficient performance because Lorona failed to specify the evidence for which Simpson should have sought a limiting jury instruction. App. C-14. Similarly, as to the subclaim that Simpson failed to provide support for his request for a second attorney, the State again posits that the claim is merely conclusory because Lorona failed to allege how Lee was prejudiced by having only one attorney at trial. App. C-14–15.

The State argued that Lorona failed to produce evidence in support of a claim that the jury's exposure to prejudicial pretrial publicity prejudiced Lee or that more effective voir dire would have exposed preconceived notions of guilt by the jury. As such, the State argued the claim was not colorable. App. C-15.

Finally, the State submitted that Lorona failed to demonstrate facts to prove a nexus between Lee's deprived childhood and the offenses, which rendered the claim not colorable. App. C-15. Moreover, the State argued that even if Simpson tried to establish such a nexus, Lorona could not prove that such facts would have resulted in the sentencing court imposing a sentence less than death. App. C-15.

The State asked that the court find Claims 1–7 and 9 precluded or not colorable, and that Lorona be ordered to amend Lee's PCR petition to explain how the allegations in support of the IATC claim found in Claim 8 are colorable. App. C-15–16.

In reply, Lorona moved for an extension of time of an unspecified length to reply to the State's response or to amend Lee's petition. App. D-1. Lorona indicated he was busy litigating a trial in federal district court. App. D-1. The PCR court granted an extension of 16 days. App. E.

Lorona filed nothing. On December 29, 2000, the court dismissed with prejudice Lee's PCR petition. App. F-4–7. The court agreed with the State that Claims 1–7 and 9 were precluded. As to Claim 8, the court ruled that an amendment to allow Lorona to allege a colorable claim and an evidentiary hearing to prove ineffective assistance of counsel under *Stickland v. Washington*, 466 U.S. 668 (1984), was unnecessary: it observed Simpson in pretrial, trial and sentencing in Lee's cases and that Lee received "an excellent defense from a very competent and experienced attorney." App. F-5.

E. The IATC claim in the § 2254 proceeding.

Lee filed a First Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C § 2254 on March 3, 2003. 3-ER-519. Lee alleged in Claim 2 that trial counsel rendered ineffective assistance for failure to investigate and present mitigating evidence at Lee's two capital sentencing hearings. 3-ER-569–74. Specifically, Lee alleged:

> Simpson suspected that Chad might have had neurological damage as a result of prenatal exposure to alcohol. The record confirms this. Yet, he failed entirely to pursue this fertile area of mitigation. Rather, he retained an expert with no expertise whatsoever in fetal alcohol exposure issues, and with no background in neuropsychology. Moreover, he failed to conduct any factual investigation to support his suspicion that Chad was neurologically impaired because of *in utero* exposure to alcohol.

3-ER-573 ¶ 265.

On February 4, 2005, the district court ruled Claim 2 procedurally defaulted due to Lorona's failure to raise the claim in the state PCR proceedings. 1-ER-116–18. The district court summarized Lee's claim thusly: "In particular, Petitioner argues counsel should have discovered that, at the time of the crimes, Petitioner suffered from brain damage caused by fetal exposure to alcohol." 1-ER-116. The court also denied evidentiary development as to that claim. 1-ER-131. The district court denied habeas corpus relief on the remaining exhausted claims in Lee's petition in its Memorandum of Decision and Order of January 6, 2009. 1-ER-39. On January 27, 2009, the district court denied the motion to alter or amend the judgment. 1-ER-33. On February 24, 2009, Lee filed a notice of appeal. 6-ER-1538.

On January 25, 2010, Lee filed his Appellant's Opening Brief in the Ninth Circuit. ECF No. 14-1. Before the appeal could be adjudicated, on June 16, 2011, Lee moved the court to stay the appeal based on the grant of certiorari in *Martinez*, 566 U.S. 1, where the question presented, to wit, whether the petitioner had a constitutional right to the effective assistance of counsel in Arizona post-conviction proceedings, was also presented in Lee's opening brief. ECF No. 39; ECF No. 14-1 at 106. The court referred the stay motion to the merits panel. ECF No. 40. On March 20, 2012, this Court filed its opinion in *Martinez*.

On December 1, 2014, the Ninth Circuit stayed Lee's appeal and remanded for application of the intervening decision in *Martinez*. ECF No. 52. The Court specifically ordered that *Martinez* be applied to the procedural defaults of Claims 2,

5, and 6. ECF No. 52.

In the *Martinez* remand litigation, Lee attached to his Supplemental *Martinez* Brief evidence in support of Claim 2 to establish that trial counsel rendered ineffective assistance under *Strickland*, 466 U.S. 668, and that PCR counsel rendered ineffective assistance under *Martinez*, 566 U.S. 1. The evidence included expert medical, mental health, and neuropsychological opinions that Lee suffered from Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effect (FAE) at the time of the offenses. *See* 2-ER-235–312; 2-ER-386–415; 2-ER-417–62.

The district court found that Lee failed to prove the IATC claim because Lee's counsel, Simpson, was justified in relying on Dr. McMahon's opinion that Lee did not demonstrate the dysmorphic facial features or show other symptoms that would manifest in a person infected with FAS or FAE, and counsel was not obligated to seek a second opinion. 1-ER-19–22. Because the court found that trial counsel's performance was not deficient, the court ruled PCR counsel Lorona neither performed deficiently nor that Lee was prejudiced within the meaning of *Martinez*. 1-ER-26.

The district court found Claim 2 to be procedurally defaulted, 1-ER-26, and granted a certificate of appealability. 1-ER-29. On July 16, 2019, the court denied Lee's motion to reconsider the procedural default ruling with respect to Claim 2 and his requests for discovery and an evidentiary hearing, but the court ordered the record expanded to include the supplemental materials attached to his Supplemental *Martinez* Brief. 1-ER-4.

On August 1, 2019, the Ninth Circuit ordered replacement opening briefs, ECF

No. 71 at 2. On March 5, 2021, the Court set oral argument for June 22, 2021. ECF No. 107. On May 28, 2021, due to this Court's grant of certiorari in *Shinn v. Ramirez*, 596 U.S. 366 (2022), the Court vacated the oral argument. ECF No. 113. The decision in *Ramirez* was filed on May 23, 2022.

The Ninth Circuit ordered an additional round of replacement briefs to consider the implications of *Ramirez*. ECF No. 122. On June 11, 2024, the Ninth Circuit affirmed the denial of habeas corpus relief. *Lee*, 104 F.4th 120. On September 30, 2024, the Ninth Circuit filed an Order and Amended Opinion in which it denied panel and en banc rehearing and affirmed the denial of habeas relief. *See* App. A. In that Amended Opinion, the Ninth Circuit rejected alternative bases posited by Lee in his Replacement Opening Brief and Replacement Reply Brief for the federal courts to admit and consider his new FAS and FAE evidence in support of the claim of ineffective assistance of trial counsel notwithstanding the general bar on the admission of such evidence under 28 U.S.C. § 2254(e)(2) and *Ramirez*, 596 U.S. 366. App. A-19–22. The court also ruled that Lee could not prove ineffective assistance under *Strickland* even if it were to consider the evidence of organic brain damage. App. A-23–35.

As an alternative theory of relief, Lee requested that the Ninth Circuit stay the appeal and remand to the district court with directions to stay the federal habeas proceeding to allow Lee to return to state court to exhaust the supporting FAS/FAE evidence he unearthed and presented for the first time in federal court. *See* ECF No. 125 at 30–31; ECF No. 143 at 20. As Lee noted in his Replacement Opening Brief,

Justice Thomas suggested the potential availability of a return to state court to exhaust facts rendered inadmissible under 28 U.S.C. § 2254(e)(2). *See Ramirez*, 596 U.S. at 379 ("When a claim is unexhausted, the prisoner might have an opportunity to return to state court to adjudicate the claim. *See, e.g.*, *Rose v. Lundy*, 455 U.S. 509, 520 (1982))." The Ninth Circuit panel failed to consider this alternative form of relief.

REASONS FOR GRANTING THE WRIT

I. Extraordinary circumstances compel this Court to extend the rule of *Maples v. Thomas* and find that Lee did not fail to develop his FAS/FAE evidence in support of the IATC claim in the state court proceeding.

Rule 10 of this Court explains that one compelling basis upon which a petitioner may rely in requesting the Court to grant certiorari is where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Lee presents an important question of federal law here, to wit, whether attorney abandonment in PCR proceedings, which was the proximate cause of the procedural default of Lee's IATC claim, necessarily means that Lee did not fail to develop the factual basis of his claim in the state court proceedings under 28 U.S.C. § 2254(e)(2). Accordingly, he may present his powerful evidence of organic brain damage in the federal courts in support of his IATC claim.

In *Ramirez*, 596 U.S. 366, the Court held that a habeas petitioner who has failed "to develop the factual basis of a claim in the State court proceedings" under 28 U.S.C. § 2254(e)(2) is prevented from introducing evidence in the federal courts unless two very narrow circumstances are met that are not at issue here. On appeal, Lee drew *inter alia* on the Court's decision in *Maples v. Thomas*, 565 U.S. 266 (2012), to support his argument that Lorona's abandonment of him in the PCR court was a

breach of the agency relationship and necessarily meant Lee did not fail to develop the factual basis for his IATC claim in state court in violation of 28 U.S.C. § 2254(e)(2).

Maples, an Alabama death row prisoner, was represented by volunteers from a New York law firm, who filed the PCR petition in August 2001 that raised claims of IATC. Local counsel moved their admission *pro hac vice* but otherwise participated in no way in the case. However, out-of-state counsel left the firm during the summer of 2002 while the petition pended. *Id.* at 274–75. The state court denied relief in May 2003. *Id.* at 276. "With no attorney of record in fact acting on Maples' behalf, the time to appeal ran out." *Id.* at 271. The state court had mailed the dismissal order to each attorney at the New York firm but the mail room returned the court orders to the Alabama court with notations "Returned to Sender–Attempted, Unknown," and "Returned to Sender–Left Firm." The court took no further action. *Id.* at 276. Neither counsel apprised Maples or the Alabama court of their departures from the firm, and no other attorney from their former firm entered an appearance on Maples' behalf. *Id.* at 275–76.

The time for filing a notice of appeal expired on July 7, 2003. *Id.* at 277. On August 13, 2003, well past the 42 days from judgment within which an appeal must be filed under Alabama law, the state attorney general wrote Maples to tell him of the adverse judgment, the expiration of the time for appealing, and that Maples only had four weeks left to file his federal habeas petition under the statute of limitations of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* Maples'

mother contacted the New York firm and new counsel moved the state court to reissue its judgment to allow for a timely notice of appeal. The state court denied the request because the former attorneys were still listed as counsel and the new counsel had not entered appearances in state court. *Id.* at 277–78. The state appellate court denied Maples' mandamus, which sought to compel the trial court to reissue its judgment. *Id.* at 278.

Maples then petitioned for federal habeas corpus relief, which the district court and, later, the Eleventh Circuit, denied on the basis that the failure to appeal in state court constituted a procedural default of Maples' claims. *Id.* at 278–79. This Court acknowledged that IAC of PCR counsel could not qualify as cause to excuse the default under *Coleman v. Thompson*, 501 U.S. 722 (1991), but reversed the lower federal courts. The Court distinguished the circumstances that befell Maples from attorney negligence on the part of PCR counsel that does not constitute cause under *Coleman*. *Coleman* so held because the attorney is the client's agent under well-settled principles of agency law, where the principal bears the risk of negligent conduct on the part of his agent. Thus, where a negligent attorney merely misses a filing deadline, that is attributed to the client. *Maples*, 565 U.S. at 280–81.

Where, however, the attorney abandons his client without notice, and thereby occasions the default, a habeas petitioner establishes cause for the default because "[h]aving severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative." *Id.* at 281 (quoting 1 Restatement (Third) of the Law Governing Lawyers § 31 cmt. f (1998)). The lawyer's withdrawal, whether

proper or not, terminates his authority to act for his client. In other words, the lawyer's acts or omissions "cannot fairly be attributed to [the client.]" *Id.* at 281 (quoting *Coleman*, 501 U.S. at 753 (citations omitted)).

The *Maples* Court concluded:

> In the unusual circumstances of this case, principles of agency law and fundamental fairness point to the same conclusion: There was indeed cause to excuse Maples' procedural default. Through no fault of his own, Maples lacked the assistance of any authorized attorney during the 42 days Alabama allows for noticing an appeal from a trial court's denial of postconviction relief. As just observed, he had no reason to suspect that, in reality, he had been reduced to *pro se* status. Maples was disarmed by extraordinary circumstances quite beyond his control. He has shown ample cause, we hold, to excuse the procedural default into which he was trapped when counsel of record abandoned him without a word of warning.

Id. at 289.

Maples relied for support on the Court's then-recent decision in *Holland v. Florida*, 560 U.S. 631 (2010), where the Court held that a habeas petitioner could establish equitable tolling with which to forgive the late filing of his § 2254 petition based on a showing of unprofessional conduct on the part of counsel who, in this case, was appointed to represent Holland in both state and federal collateral proceedings. *Id.* at 635–36. The Court set out the test for tolling, which includes a showing that the petitioner pursued his rights diligently and "that some extraordinary circumstance stood in his way." *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

The Court detailed Holland's many attempts, expressed in letters, to have counsel apprise him of the progress of the PCR case, which counsel largely failed to do—even after relief had been denied in the PCR court and the appeal dismissed in

the Florida Supreme Court. *Id.* at 636. Holland repeatedly wrote counsel to express that federal habeas review, including complying with AEDPA's statute of limitations, was of paramount importance. Yet, Holland only learned while working in the prison library that relief had been denied in the state courts and the Florida Supreme Court's mandate had issued. *Id.* at 639. Realizing that his § 2254 petition was now untimely, Holland filed a *pro se* § 2254 petition that blamed counsel for the late filing. *Id.* at 639–40. The district court dismissed the petition as untimely, and the Eleventh Circuit affirmed. *Id.* at 643–44.

This Court ruled that this appeared to be more than a case of excusable neglect that would not toll the statute of limitations. The Court found that counsel had not timely filed the federal petition despite Holland's many letters expressing the importance of doing so, failed to do his own legal research as to the filing date, failed to apprise Holland that the Florida courts had denied relief despite his many pleas that counsel provide that information, and "failed to communicate with his client over a period of years, despite various pleas that [counsel] respond to his letters." *Id.* at 652. The Court cited experts in legal ethics to conclude that counsel violated canons of professional responsibility by failing to "perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments, in their cases, and never to abandon a client." *Id.* at 652–53.

Here, not only did Lee's counsel fail to comply with a court order to file an amended PCR petition that would include the operative facts of the IATC claim, as

will be discussed below, counsel also failed to perform an investigation that would have demonstrated trial counsel's failure to perform the constitutionally-required duty to develop a thorough social history to ensure that all available mitigating evidence would be presented at capital sentencing. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Counsel also violated his duty to communicate with Lee, to keep Lee informed of key developments, and to not abandon Lee in the PCR proceeding.

In a letter to Lorona dated February 21, 2000, 2-ER-321, three weeks before Lorona filed Lee's PCR petition, 3-ER-697, Lee states:

> Jess,
>
> How are you doing? Good I hope? I'm doing OK myself. Listen, why haven't I heard from you lately? What's going on with my case? Write me and let me know what's going on. SOON!!!

2-ER-321. On March 8, 2000, Lorona responded to Lee and informed him that he had obtained an extension to file the PCR petition on March 14, 2000. 2-ER-322.

In another letter dated April 2, 2000, Lee states:

> Dear Jess,
>
> Could you please tell me what the hell is going on? Two weeks ago you told me you were about to file my PCR and that you'd send me a copy. Mind you, this was only two days before it was to be filed. That was mighty kind of you I must say. *And yet I still haven't heard anything from you. Hell, you've never even visited me or discussed my case with me, and it's time to file my PCR?* What the hell is that all about? Hell of an attorney you turned out to be. Write, visit, or call, whatever you do let me know what you're doing, and what you're planning to do, and what you have done.

2-ER-323 (emphasis added).

Lorona's billing records substantiate his failure to confer with Lee about any aspect of the case. 2-ER-326–32. *See* 1989 American Bar Association Guidelines for

the Appointment and Performance of Counsel in Death Penalty Cases (1989 ABA Guidelines) § 11.9.3(B) ("Postconviction counsel should interview the client, and previous counsel if possible, about the case."). Further, although Lorona indicated in early correspondence with prior counsel that he wanted "to tap [his] brain," 2-ER-325, Lorona's billing records reflect, at most, 24 minutes of calls to Simpson or someone at Simpson's office, mostly about delivery of records but no substantive meeting about Lee's case. 2-ER-327 (Sept. 15, 1999); 2-ER-329 (Nov. 4, 1999). Lorona also failed to perform reasonably necessary legal work. Although Arizona Rule of Criminal Procedure 32.5 (2000) required that "[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it[,]" Lorona failed to attach any such evidence to Lee's PCR petition. 3-ER-697–736.

Lee was abandoned, just as were the petitioners in *Maples* and *Holland*. After Respondents alerted the PCR court that Lorona had not alleged any facts to render Lee's IATC claim colorable, and after the state court granted Lorona's motion for an extension of time to file an amended petition to cure that defect, Lorona filed no further pleading in the PCR court on Lee's behalf. Faced with that dereliction, the court dismissed Lee's PCR petition. App. F-1–7. As was true in *Maples* and *Holland*, where counsel failed to communicate with their respective clients at a time when the petitioner might have acted to request or retain other counsel, or acted on his own behalf to avert a looming procedural default, Lorona failed to communicate with Lee that he had filed 25 precluded claims and failed to plead any facts in support of his

IATC that might give rise to a colorable claim. That failure occurred despite Lorona having successfully moved the trial court for time to remedy the defect in the petition. Ultimately, Lorona failed to file an amendment containing the operative facts of an IATC claim that would have saved Lee's petition from dismissal.

Under the principles of agency law upon which the decision in *Maples* rested, Lorona ceased to function as Lee's agent in the state post-conviction proceedings. Moreover, Lorona failed to apprise Lee of the defects in the PCR petition.

The abandonment of Lee by Lorona was just as egregious here because Respondents alerted the court of Lorona's failure to comply with the pleading requirements of the state post-conviction rules, including by attaching evidence in support of claims and having the petitioner certify that he has been consulted with respect to the petition's claims. App. C. Respondents asked that Lorona be granted time to amend Lee's petition to cure the defects or have all of Lee's claims dismissed on the basis they were non-colorable or precluded. App. C-11, 16. In reply, Lorona moved for time to amend. App. D. The PCR court granted an extension of time of 16 days. App. E. Lorona filed nothing, and more than five months later, the court denied Lee's petition, including the IATC claim. *See* App. F. The Ninth Circuit affirmed the district court's dismissal of the IATC claim on procedural default grounds. App. A-16–22.

In *Maples* and here, PCR counsel failed to notify their clients that they would do nothing to ensure exhaustion of state court remedies. With notice, the petitioners

could have sought substitute counsel or even proceeded *pro se* to attempt to prevent the defaults from occurring.

II. The Ninth Circuit failed to address Lee's alternative form of relief that the appeal should be stayed and remanded with instructions for the district court to hold in abeyance the § 2254 case to allow Lee's return to state court to exhaust his IATC claim based on the Court's suggestion in *Shinn v. Ramirez*.

The Court's decision in *Ramirez*, 596 U.S. 366, bore implications for the relief Lee sought below. Under *Martinez*, 566 U.S. 1, and Ninth Circuit precedent, Lee began to prosecute his appeal based on the expectation that the record on appeal would be expanded to include the medical and mental health evidence he attached in the Supplemental *Martinez* Brief filed in the district court. After *Ramirez*, Lee replaced his opening brief with arguments he forewent in reliance on *Martinez*.

In the Replacement Opening Brief, Lee sought as an alternative form of relief a stay of his appeal and remand with instructions to stay consideration of the § 2254 case so he could return to state court to exhaust his now-defaulted factual basis for the IATC claim. *See* ECF No. 125 at 30–31, 70. In *Ramirez*, Justice Thomas, speaking for the Court's majority, stated:

> Despite the many benefits of exhaustion and procedural default, and the substantial costs when those doctrines are not enforced, we have held that a federal court is not required to automatically deny unexhausted or procedurally defaulted claims. When a claim is unexhausted, the prisoner might have an opportunity to return to state court to adjudicate the claim. *See, e.g.*, *Rose v. Lundy*, 455 U.S. 509, 520 (1982).

596 U.S. at 379.

The Ninth Circuit failed to address Lee's stay and abey argument. And, it is not a foregone conclusion that the Arizona courts would not consider Lee's IATC claim

in a successive PCR petition. The Arizona Supreme Court has held that it does not apply the rules of preclusion found in Rule 32 of the Arizona Rules of Criminal Procedure where appointed counsel have failed to comply with their ethical obligations in representing a PCR petitioner.

In a case with parallels to this one, after a petitioner initiated PCR proceedings by filing a Notice of Post-Conviction that brought an IATC claim, and after appointed counsel obtained several continuances to file a PCR petition, counsel filed no petition, and the Notice was dismissed. *State v. Diaz*, 340 P.3d 1069 (Ariz. 2014). When the petitioner filed a subsequent Notice, another attorney was appointed who also obtained several continuances to file a PCR petition. However, after counsel filed nothing, the Notice was dismissed. Diaz filed a third Notice, for which counsel was appointed, and filed Diaz's first PCR petition. *Id.* The trial court ruled the petition precluded, and that ruling was affirmed by the state appellate court. *Id.*

The Arizona Supreme Court granted Diaz's petition for review and reversed on the basis that Diaz "was blameless regarding his former attorneys' failures to file an initial PCR petition[.]" *Id.* at 1071. The court held that the reason for the rules of preclusion under Rule 32 is to prevent endless reviews of the same case in the same trial court but that its rules are meant to insure fairness in administration and to protect the fundamental rights of the individual. *Id.* The Arizona Supreme Court suggested that the proper course would have been for the PCR court to "sanction Diaz's former attorneys rather than dismiss the PCR proceedings." *Id.* n.1.

Recently, in *State v. Anderson*, 547 P.3d 345 (Ariz. 2024), the Arizona Supreme Court refused to invoke preclusion under Rule 32.2(a)(3) based on Anderson's failure to raise an IATC claim in two earlier PCR petitions. Counsel told Anderson that upon a conviction for conspiracy to commit first-degree murder, he could receive a sentence of life in prison but was parole eligible after 25 years. The plea offered was for Anderson to serve 18 to 22 years in prison. Anderson chose to go to trial. Anderson later learned that he was not parole eligible, as parole had been abolished in Arizona prior to his plea offer. Due to counsel's incorrect advice concerning parole eligibility and the pervasive misunderstanding by bench and bar as to whether parole remained a possibility even after it had been abolished, the Arizona Supreme Court relaxed its preclusion rule to allow Anderson to plea anew his IATC claim.

Another Arizona capital habeas appeal was stayed by the Ninth Circuit so the petitioner could return to state court to exhaust a claim based on this Court's suggestion in *Ramirez*, 596 U.S. at 379. *See* Unopposed Mot. to Stay and Abey Federal Habeas Proceedings Pending State Ct. Exhaustion at 7, *Clabourne v. Thornell*, No. 23-99000 (9th Cir. Nov. 7, 2023), ECF No. 21-1; Order, *Clabourne v. Thornell*, No. 23-99000 (9th Cir. Nov. 15, 2023), ECF No. 22. This Court has noted that, as a matter of comity, state courts merit the first opportunity to consider claims of deprivation of federal constitutional rights. *See Coleman*, 501 U.S. at 731 (quoting *Lundy*, 455 U.S. at 518).

Although Lee pleaded this alternative basis for relief in his Replacement Opening Brief, ECF No. 125 at 30–31, 70, it was not addressed by the Ninth

Circuit panel. Clearly authority existed for this form of relief sought by Lee.

REASONS FOR REVERSAL

I. Chad Lee was denied effective assistance of counsel under the Sixth and Fourteenth Amendments

In his First Amended Petition, Lee alleged in Claim 2 that trial counsel rendered ineffective assistance for failing to investigate and present mitigating evidence at Lee's two capital sentencing hearings. 3-ER-569–74. Specifically, Lee alleged:

> Simpson suspected that Chad might have had neurological damage as a result of prenatal exposure to alcohol. The record confirms this. Yet, he failed entirely to pursue this fertile area of mitigation. Rather, he retained an expert with no expertise whatsoever in fetal alcohol exposure issues, and with no background in neuropsychology. Moreover, he failed to conduct any factual investigation to support his suspicion that Chad was neurologically impaired because of *in utero* exposure to alcohol.

3-ER-573 ¶ 265.

On February 4, 2005, the district court filed an order in which it ruled Claim 2 procedurally defaulted due to Lorona's failure to raise the claim in the state PCR proceedings. 1-ER-116–18. The district court summarized Lee's claim thusly: "In particular, Petitioner argues counsel should have discovered that, at the time of the crimes, Petitioner suffered from brain damage caused by fetal exposure to alcohol." 1-ER-116. The court also denied evidentiary development as to that claim. 1-ER-131.

On December 1, 2014, the Ninth Circuit stayed Lee's appeal and remanded for application of the intervening decision in *Martinez*, 566 U.S. 1. ECF No. 52. Lee attached to his Supplemental *Martinez* Brief evidence to establish that trial counsel

rendered ineffective assistance under *Strickland*, 466 U.S. 668, and that PCR counsel rendered ineffective assistance under *Martinez*. The evidence included expert medical, mental health, and neuropsychological opinions that Lee suffered from FAS and FAE at the time of the offenses. *See* 2-ER-235–312; 2-ER-386–415; 2-ER-417–62.

The district court found that Lee failed to prove the IATC claim because Lee's counsel, Simpson, was justified in relying on Dr. McMahon's opinion that Lee did not demonstrate the dysmorphic facial features or show other symptoms that would manifest in a person infected with FAS or FAE, and counsel was not obligated to seek a second opinion. 1-ER-19–22. Because the court found that trial counsel's performance was not deficient, the court ruled PCR counsel Lorona neither performed deficiently nor that Lee was prejudiced within the meaning of *Martinez*. 1-ER-26.

The district court again found Claim 2 to be procedurally defaulted, 1-ER-26, and granted a certificate of appealability. 1-ER-29. The court also denied Lee's motion to reconsider the procedural default ruling and his requests for discovery and an evidentiary hearing, but ordered that the record be expanded to include the exhibits attached to his Supplemental *Martinez* Brief. 1-ER-4.

The Ninth Circuit ordered replacement briefs after this Court's decision in *Ramirez*, 596 U.S. 366. On June 11, 2024, the Ninth Circuit affirmed the district court's denial of habeas corpus relief. *Lee*, 104 F.4th 120. On September 30, 2024, the Ninth Circuit denied rehearing but also amended its opinion as follows:

> At Slip Op. page 33, line 18 [104 F.4th at 138], remove "*see also Jones*, 2024 WL 2751215, at *9 (noting that the Arizona Supreme Court has

> apparently never 'vacated the judgment of death in a case involving multiple murders—let alone a case involving all of the aggravating circumstances presented here')."

App. A-5. Lee had pointed out on rehearing the Ninth Circuit's mischaracterization of this Court's assertion in *Thornell v. Jones*, 602 U.S. 154, 170 (2024). *See* ECF No. 160 at 134–14, where Lee included a string cite to the many cases decided by the Arizona Supreme Court in which it *had* reduced death sentences in multiple victim cases.

In its Amended Opinion, the Ninth Circuit again affirmed the district court's procedural default ruling, rejected the argument that Lorona's abandonment of Lee in the PCR proceeding meant that Lee did not fail to develop the factual basis of his IATC claim under 28 U.S.C § 2254(e)(2), and then ruled in the alternative that Lee did not prove *Strickland's* two prongs. The panel agreed with the district court that Simpson did not perform deficiently by accepting the opinion of Dr. McMahon that Lee did not suffer from FAS/FAE and that Lee could not establish *Strickland* prejudice. App. A-23–35. The Ninth Circuit erred on both counts.

A. Trial counsel performed deficiently.

Evidence of organic brain damage is far more compelling than mitigation that derives largely from environmental causes such as those identified by the panel. App. A-24–25. The panel paid insufficient regard to this Court's precedent that speak to the significance of brain damage in the *Strickland* calculus. *See Porter v. McCollum*, 558 U.S. 30, 36 (2009) (per curiam).

The performance prong of *Strickland* asks whether trial counsel's representation "fell below an objective standard of reasonableness[,]" that is,

"reasonableness under prevailing professional norms." 466 U.S. at 688. In *Padilla v. Kentucky*, the Court stated, "We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like … are guides to determining what is reasonable . . . .'" 559 U.S. 356, 366 (2010) (quoting *Strickland*, 466 U.S. at 688). The *Padilla* Court, *id.* at 366–67, cited several of the Court's then-recent IATC decisions for the proposition that the ABA Standards or Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases reflect standards of reasonableness: *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam); *Florida v. Nixon*, 543 U.S. 175, 191 & n.6 (2004); *Wiggins*, 539 U.S. at 524; and, (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *see also Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005). The *Padilla* Court concluded: "Although they are 'only guides,' *Strickland*, 466 U.S. at 688, and not 'inexorable commands,' [*Van Hook*], 558 U.S. at 8, these standards may be valuable measures of the prevailing professional norms of effective representation[.]" 559 U.S. at 367.

With respect to the investigation of mitigating evidence, the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 ABA Guidelines) note that a defendant's psychological history and mental status could "explain or lessen the client's culpability for the underlying offense[,]" and therefore should be considered as part of the mitigation investigation. 2003 ABA Guidelines § 10.11(F)(2), cmt., *reprinted in* 31 Hofstra L. Rev. 913, 1056 (2003).

While Lee's sentencing hearing predated the 2003 ABA Guidelines, the Court has described those Guidelines merely as "more explicit" than the 1989 ABA Guidelines that would have informed reasonably competent counsel's performance at the time of Lee's sentencing. The Court later cited the 2003 ABA Guidelines as describing the standard of care owed by defense counsel for a capital sentencing that took place in 1988, *see Commonwealth v. Rompilla*, 653 A.2d 626, 628 (Pa. 1995), five years before Lee's trial. *See Rompilla*, 545 U.S. at 387 n.7. The 2003 ABA Guidelines explain that expert testimony concerning "the permanent neurological damage caused by fetal alcohol syndrome" could "lessen the defendant's moral culpability for the offense or otherwise support[] a sentence less than death." 31 Hofstra L. Rev. at 1060–61.[2] In *Rompilla*, the Court vacated a death sentence on an IATC claim in large measure where counsel failed to investigate and present evidence of brain damage which, like here, derived from fetal alcohol syndrome. 545 U.S. at 392.

Simpson averred in a declaration attached to Lee's Supplemental *Martinez* Brief that he suspected that Lee's mother consumed alcohol during her pregnancy

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[2] As defense expert Natalie Novick Brown, Ph.D., explained: "In 1994, two medical diagnoses were possible for those with serious birth defects caused by prenatal alcohol exposure: Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effect (FAE). In the late 1990s, the description 'fetal alcohol spectrum disorder (FASD)' was adopted as an umbrella term to include all conditions caused by prenatal alcohol exposure. Thus, FASD is a generic term and not a diagnosis." 2-ER-242. She described the diagnostic criteria for FAS to include: "(a) growth deficiency in height and/or weight at any point in life; (b) dysmorphic facial features; and (c) central nervous system abnormality." 2-ER-242. Philip Mattheis, M.D., also a defense expert here, describes FAE as "the diagnosis used for those with prenatal alcohol exposure and central nervous system dysfunction but no facial abnormalities or growth deficit" and FAS as "prenatal alcohol exposure, central nervous system dysfunction, facial abnormalities, and growth deficit." 2-ER-296.

with Lee and that he may have sustained neurological damage as a result. 2-ER-380 ¶ 6. Simpson swore that the trial court's denial of his request for a second attorney was particularly prejudicial to Lee because Simpson was otherwise consumed with the preparation of guilt phase defenses for three unrelated murder prosecutions for which the State was seeking the death penalty, which impeded his efforts to develop mitigation. 2-ER-379–80, 381 ¶¶ 3, 5, 9–10.

Simpson further swore that he failed to retain an expert who could confirm his suspicion about Lee's mother's alcohol consumption during pregnancy and the possibility it caused neurological problems for Lee. Instead, he retained Dr. McMahon, a psychologist who was not qualified to address the issue of Lee's *in utero* exposure to alcohol. 2-ER-380 ¶ 7. He reviewed Dr. McMahon's curriculum vitae, which bore no indicia he was an expert in issues related to *in utero* alcohol exposure, but he still refrained from inquiring of Dr. McMahon whether he was qualified to diagnose neurological deficits related to *in utero* alcohol exposure. 2-ER-380 ¶ 7. He recalled that Dr. McMahon declined to identify any issue resulting from Lee's *in utero* alcohol exposure because Lee did not demonstrate the facial characteristics of a child who suffered from fetal alcohol syndrome. 2-ER-380–81 ¶ 8. Simpson also averred that his investigator, Ed Aitken, a retired probation officer, was not trained in identifying neurological disorders, including FAS and FAE. 2-ER-381 ¶ 9.

Simpson rendered objectively unreasonable representation. Lee establishes deficient performance of his trial counsel under *Strickland*, 466 U.S. at 688.

B. Lee was prejudiced by counsel's deficient performance.

In announcing its special verdict at the capital sentencing hearing in *Lee I*, the trial for the murders of Reynolds and Lacey, the court stated, "What happened with you is just inexplicable. You have got no record really to speak of, no history of substance abuse really. You had a chance at life, and I admit, that was taken away from you by your own parents." 4-ER-889–90.

While the sentencing court was describing the absence of an explanation in the record as to how Lee could have committed those two homicides, Lee demonstrated in the federal habeas corpus petition and, especially, in the *uncontroverted* evidence produced by well-credentialed medical and neuropsychological experts upon the *Martinez* remand, there was a readily available explanation for Lee's participation in the homicides: Lee suffered from brain damage in the form of FAS and FAE as a result of his *in utero* exposure to alcohol. *See* Reports of Thomas Thompson, Ph.D. (2-ER-388 ¶¶ 6, 7, 403 33); Natalie Novick-Brown, Ph.D. (2-ER-249, 271–76) (same); Christopher Cuniff, M.D. (2-ER-418 ¶ 5) (same); *see also* Report of Philip Mattheis, M.D. (2-ER-295, 299–300) (dysmorphic facial features consistent with FAS). Due to inadequate social history investigation, Lee's trial counsel failed to apprise the sentencing court that Lee's mother consumed large quantities of alcohol during her pregnancy with Lee and that he suffered from FAS and FAE, known today, collectively, as Fetal Alcohol Spectrum Disorder (FASD). Those neurobiological deficits negatively affected Lee's cognition, judgment, maturity, and behavior at the time of the offenses and, if presented, would have increased the weight the court gave

to the statutory mitigating factor at sentencing of Lee's young age, 19, at the time of the crimes.

This Court has granted relief or remanded ineffective assistance of counsel claims in capital cases where the crimes involved more than one victim. *See Andrus v. Texas*, 590 U.S. 806, 808 (2020) (per curiam); *Porter*, 558 U.S. at 32, 44. Lee meets the prejudice prong of *Strickland*.

There is a reasonable probability that the state court would not have imposed a sentence of death had it been apprised of Lee's organic brain damage and the explanation for his actions at the time of the offenses. *See Strickland*, 466 U.S. at 694.

CONCLUSION

Lee requests that the Court grant certiorari, reverse the decision of the Ninth Circuit in Appendix A, and remand with instructions for the Ninth Circuit to grant a writ of habeas corpus conditioned on the Arizona state courts convening a new sentencing hearing or resentencing Lee to life in prison. In the alternative, Lee requests that the Court grant the writ of habeas corpus and order the Ninth Circuit to hold Lee's appeal in abeyance and remand with instructions for the district court to hold an evidentiary hearing on Lee's IATC claim.

Also, in the alternative, Lee requests that the Court grant certiorari, order the Ninth Circuit to stay its consideration of Lee's appeal, and order a remand to the district court with instructions to hold the § 2254 case in abeyance while Lee returns to the Arizona state courts to exhaust the subject IATC claim.

Respectfully submitted this 24th day of February, 2025.

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s/ Timothy M. Gabrielsen
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February 24, 2025