

In the Supreme Court of the United States

CHAD ALAN LEE,

Petitioner,

v.

RYAN THORNELL, ET AL.,

Respondents.

*On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit*

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION(S) PRESENTED FOR REVIEW

Petitioner Chad Allen Lee was convicted and sentenced to death for the 1992 killings of Linda Reynolds, David Lacey, and Harold Drury. The Arizona Supreme Court affirmed the convictions and sentences on direct appeal, and the trial court denied and dismissed Lee's first petition for postconviction relief raising claims of ineffective assistance of trial counsel. Lee raised a new ineffective assistance of counsel claim in his subsequent federal habeas petition, eventually arguing that because postconviction counsel allegedly abandoned him in state collateral review he should not be held to the strict requirements of 28 U.S.C. § 2254(e)(2).

The questions presented are:

1. Can abandonment, as described by this Court in *Maples*, excuse a petitioner's failure to develop the factual basis of a claim in state court such that 28 U.S.C. § 2254(e)(2) does not apply?
2. Does *Shinn v. Ramirez* always require stay and abeyance where a petitioner has raised a procedurally defaulted but technically exhausted ineffective assistance of trial counsel claim?

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INTRODUCTION

First, the equitable theory of abandonment recognized in *Maples* cannot override Congress' dictate that habeas petitioners meet the strict requirements of 28 U.S.C. § 2254(e)(2) in order to admit evidence outside the state court record. But even if 2254(e)(2) did not bar consideration of extra-record evidence, Lee cannot establish that postconviction counsel abandoned him.

Second, Lee argues that the Ninth Circuit failed to consider his alternative request that his habeas proceedings be stayed so that he could return to state court to raise his procedurally defaulted ineffective assistance of counsel claim. But Lee's reliance on Arizona authority recognizing exceptions to state rules of procedural default do not establish a per se regime under which the federal courts must always allow for stay and abeyance. And neither does *Shinn v. Ramirez* alter the test set out by this Court in *Rhines v. Weber* or otherwise direct the federal courts to stay and abey federal habeas petitions rather than deem a claim technically exhausted but procedurally defaulted. Lee may lament this Court's subsequent clarification and restriction of the equitable rule announced in *Martinez*, but he cannot deny that he affirmatively chose to pursue de novo review in federal court rather than seek a return to state court to raise his claim.

There is no compelling reason to grant certiorari here, and this Court should deny Lee's petition.

STATEMENT OF THE CASE

On April 6, 1992, Petitioner Chad Lee, then 19, and his codefendant David Hunt, then 14, ordered a pizza from a payphone, giving the address of a vacant home for delivery. Pet. App. A-6. When the driver, Linda Reynolds, arrived, the two men forced her to disrobe at gunpoint. *Id.* Lee then put Linda into his car and drove her to the desert, with Hunt following in Linda's car. *Id.* Once in the desert, the two men destroyed Linda's car to prevent her from escaping. *Id.* They then had Linda remove the few clothes she had left and had her walk barefoot through the desert before Hunt sexually assaulted Linda and Lee made her perform oral sex on him. *Id.*

Not finished with Linda, Lee and Hunt took her from the desert in their car and made her withdraw \$20 from an ATM. Pet. App. A-6. After returning to the desert Linda tried to escape, but Hunt caught her and took her back to the car. *Id.* at A-6. Lee and Hunt then argued over what to do with Linda. *Id.* at A-7. Perhaps out of fear over her fate, Linda grabbed for a gun the men had. *Id.* at A-7. But despite her desperate attempt, Lee shot her in the head. *Id.* Not satisfied that he had delivered a killing blow, Lee retrieved a knife and stabbed Linda in the chest twice. *Id.* Lee and Hunt left Linda in the desert to die, and trial testimony established that Linda survived "for at least a couple minutes" after the stabbing. *Id.* Lee later pawned Linda's stereo and some jewelry for \$170. *Id.*

Ten days later Lee and Hunt planned another subterfuge, this time against taxi driver David Lacey. Pet. App. A-7. Lee called David's taxi company from a payphone and had Hunt meet him with Lee's car. *Id.* When David arrived to pick up Lee, Lee pulled out a gun and demanded David's money. *Id.* David purportedly tried to grab the gun, after which Lee shot him four times. *Id.* Lee then took \$40 from David and dumped his body on the side of the road. *Id.* Lee left David's cab on a dirt road after searching it for valuables and shooting out its windows and tires. *Id.*

And then, after eleven more days passed, Lee entered a convenience store where Harold Drury was working. Pet. App. A-7. When Harold opened the cash drawer to give Lee change for a purchase, Lee shot him in the shoulder. *Id.* Harold fell to the ground, and Lee shot him four times in the head and the neck. *Id.* Lee then walked around the counter, shot Harold in the temple twice, and took the cash drawer and a pack of cigarettes before leaving with Hunt. *Id.*

Over two separate trials Arizona juries found Lee guilty of first-degree murder for the killings of Linda, David, and Harold. Pet. App. A-9, A-10. Because these trials occurred before *Ring v. Arizona*, 536 U. S. 584 (2002), the trial judge decided whether aggravating circumstances existed and whether Lee should be sentenced to death for each murder. As to Linda and David, the court found that Lee had a prior death-eligible conviction, a prior violent felony, and that the offenses were committed with the expectation of pecuniary gain, all capital aggravators in Arizona. Pet. App. A-9. The court further found that Linda's killing was especially cruel, heinous, or depraved. *Id.* Concerning mitigation, the court considered Lee's age, his lack of significant prior criminal history, his deprived childhood, his cooperation with law enforcement and assistance in recovery of weapons, and his remorse. *Id.* at A-10; *State v. Lee (Lee I)*, 944 P.2d 1204, 1221 (Ariz. 1997). The trial court ultimately sentenced Lee to death for Linda and David's murders. Pet. App. A-9.

In the trial for Harold's killing, the trial court found that Lee had prior death-eligible convictions, prior violent felonies, committed the offense with the expectation of pecuniary gain, and committed the offense in an especially cruel, heinous, or depraved manner. Pet. App. A-10. Lee proffered the same mitigation, but the trial court again found Lee's mitigation was not sufficiently substantial to warrant leniency and sentenced him to death. *Id.*

On direct appeal, the Arizona Supreme Court considered the various claims raised by Lee and conducted its own independent review as to each death sentence.

Pet. App. A-10. As to Linda and David’s killing, the Arizona Supreme Court held that “the mitigating circumstances are not sufficiently substantial, taken either separately or cumulatively, to call for leniency.” *Lee I*, 944 P.2d at 1221. As to Harold’s murder, the Arizona Supreme Court held that “the mitigators considered as a whole are not sufficient to call for leniency when compared to the aggravators related to the crime.” *State v. Lee (Lee II)*, 944 P.2d 1222, 1233 (Ariz. 1997). Expounding on this, the court cited and agreed with the trial court, which explained that “even if this court were to consider every one of the factors proposed by defendant as a mitigating circumstance, when balanced against the aggravating factors of the heinousness and depravity of the murder of Harold Drury and the factor that Drury’s murder came shortly after Linda Reynolds’ and David Lacey’s murders, those mitigating circumstances would not be sufficiently substantial to call for leniency.” *Id.*

Lee subsequently sought postconviction relief in state court. Pet. App. A-11; B-1–B-41. In his petition for postconviction relief, Lee raised several ineffective assistance of trial counsel claims. Pet. App. A-12; B-8–B-15. The postconviction court ultimately denied Lee’s petition, and the Arizona Supreme Court denied review. *Id.* at A-12–A-13.

After his unsuccessful attempts at collateral review in state court, Lee eventually filed his amended habeas petition in federal court, which included the procedurally defaulted ineffective of trial counsel claim at issue here. Pet. App. A-13–A-14. In the claim, Lee alleged that trial counsel was constitutionally ineffective for failing to further investigate and present evidence that Lee might have been cognitively impaired due to prenatal exposure to alcohol. *Id.* But the district court twice dismissed Lee’s claim, finally finding that Lee could not excuse the procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012) because Lee could establish neither deficient performance nor prejudice. *Id.* at A-14–A-15.

On review to the Ninth Circuit and after this Court issued *Shinn v. Ramirez*, 596 U.S. 366 (2022), Lee changed tack, now alleging that the abandonment of postconviction counsel excused him from compliance with 2254(e)(2) and established cause sufficient to overcome the procedural default of his claim. Pet. App. A-19. Lee also argued that the Arizona Supreme Court, in appointing postconviction counsel, did not provide an adequate process such that he could establish cause to overcome the procedural default of the claim and avoid the strictures of 2254(e)(2). *Id.* at A-21. The Ninth Circuit denied Lee’s novel theories, first reasoning that even if abandonment of postconviction counsel provided a pathway around 2254(e)(2), Lee’s postconviction counsel did not abandon him because counsel was at worst negligent but otherwise communicated with Lee, conducted an investigation, and filed a petition. *Id.* at A-19–A-21. And as to the appointment of postconviction counsel, the Ninth Circuit held that even if a deficiency in the process could help Lee avoid 2254(e)(2), the Arizona Supreme Court thoughtfully vetted postconviction counsel in the appointment process. *Id.* at A-21–A-22.

Lee fared no better in attempting to establish cause and prejudice. Assuming without deciding that Lee’s theories of abandonment and deficient process could constitute cause, the Ninth Circuit held that Lee could not establish prejudice because he could not demonstrate that the underlying ineffectiveness claim was a substantial one. Pet App. A-22–A-23. Initially, and in recognition of *Ramirez*, the Ninth Circuit held that because Lee could not satisfy 2254(e)(2) then the federal courts could not consider his new evidence in support of prejudice. *Id.* But even with the consideration of his new evidence the court held that Lee could not establish prejudice because his ineffective assistance of counsel claim was meritless. *Id.* at A-23.

First, the court held that Lee could not show that trial counsel rendered deficient performance. Noting trial counsel’s presentation of “wide-ranging

mitigating evidence on Lee's behalf, including about Lee's age, deprived childhood, mental capacity and personality traits, remorse, lack of prior criminal record, and strong support from Lee's family and friends" along with evidence suggesting that Lee was a follower susceptible to influence, the court reasoned that trial counsel's performance fell within the wide range of professionally competent assistance. Pet. App. A-24–A-25. And even though trial counsel did not present evidence of a fetal alcohol spectrum disorder diagnosis, he still introduced evidence that Lee's mother was an alcoholic who abused alcohol before and after giving birth to Lee. *Id.* at A-26. This, the court held, was reasonable in the face of trial counsel's expert's opinion that Lee lacked the facial characteristics for fetal alcohol syndrome and that further exploration of that diagnosis would not be fruitful. *Id.* The court held that trial counsel's reliance on the expert opinion was reasonable considering the expert's qualifications and experience. *Id.* at A-27–A-29.

Next, the court held that Lee could not demonstrate prejudice, even considering his new evidence. First, the court noted that trial counsel had admitted a compelling mitigation case including evidence of "Lee's difficult and deprived childhood, age, lack of prior criminal history, difficulties in school, learning disability, mental limitations, ... passive and suggestible personality," and "evidence that Lee's mother had abused alcohol before Lee was born." Pet. App. A-32. In assessing the impact of this mitigation, the court commented on the fact that in spite of the sentencing judge's positive view of Lee's mitigation case, he still would have imposed death even if Lee had proven every mitigating circumstance he advanced. *Id.* at A-32. Second, and perhaps more significantly, the court held that Lee's new mitigating evidence could not overcome the extreme aggravating circumstances in his cases where "Lee played a lead role in three senseless murders of complete strangers in a matter of three weeks." *Id.* at A-34. The court ultimately concluded that "[b]alancing the mitigating evidence against the horrific nature of Lee's crimes, in which he played

a central role, Lee cannot establish prejudice from his trial counsel's failure to present evidence of alleged organic brain damage from fetal alcohol exposure." *Id.* at A-35.

REASONS FOR DENYING THE PETITION

This Court grants certiorari “only for compelling reasons,” and Lee has presented no such reason. Sup. Ct. R. 10. Lee has failed to demonstrate either that the Ninth Circuit “decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals,” or that it “decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Sup. Ct. R. 10(b), (c).

General error correction does not offer a compelling reason for certiorari review. Sup. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”); *see also* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013) (“[E]rror correction ... is outside the mainstream of the Court's functions and ... not among the ‘compelling reasons’ ... that govern the grant of certiorari”). Even setting that aside, Lee has failed to demonstrate that the Ninth Circuit committed an error, let alone one worthy of this Court’s review.

Lee cannot meet the requirements of 2254(e)(2), the purported abandonment of postconviction counsel cannot except him from 2254(e)(2), Lee was not abandoned by postconviction counsel, and Lee was not entitled to stay and abeyance. Accordingly, this Court should deny Lee’s petition.

I. 2254(e)(2), which Lee cannot satisfy, dictates the circumstances under which a habeas petitioner may submit new evidence in federal court.

A. Abandonment.

Under the principles of agency law, the attorney is the prisoner’s agent and the prisoner “bears the risk of negligent conduct on the part of his agent.” *Maples v.*

Thomas, 565 U.S. 266, 280–81 (2012) (citing *Coleman v. Thompson*, 501 U.S. 722, 753–54 (1991)). “Negligence on the part of a prisoner’s postconviction attorney does not qualify as ‘cause.’” *Maples*, 565 at 280 (citing *Coleman*, 501 U.S. at 753). Accordingly, an attorney’s failure to meet a filing deadline in state court, for example, is not grounds for cause in a federal habeas action. *Id.* at 281 (citing *Coleman*, 501 U.S. at 753–54). On the other hand, an attorney who abandons his client without notice is considered to have severed the principal-agent relationship, and the attorney’s acts or omissions under those circumstances “cannot fairly be attributed to the client.” *Id.* (citing *Coleman*, 501 U.S. at 753).

In *Maples*, while his petition for post-conviction relief was pending, both of Maples’ attorneys left the law firm that represented him. 565 U.S. at 270. The attorneys neither informed Maples of their departure nor sought permission to withdraw from the trial court, and no other attorneys substituted in as counsel of record. *Id.* at 270–71, 284. Nine months after his attorneys left the firm, the trial court denied Maples’ petition. *Id.* at 271, 283. The clerk sent notices to Maples’ attorneys but they were returned unopened, and Maples was not otherwise notified. *Id.* at 271, 283. As a result, the time for appeal ran out. *Id.* Under these circumstances, the Supreme Court determined that Maples’ attorneys had abandoned him and he had no “functioning” attorney of record during the time period in which he could appeal the denial of his post-conviction petition. *Id.* at 283–88.

Additionally, in *Holland v. Florida*, the petitioner’s federal habeas counsel failed to file his habeas petition prior to the deadline. 565 U.S. 631, 638–39 (2010). The Supreme Court noted that the failure to file the habeas petition on time “might suggest simple negligence.” *Id.* at 652. However, the record further showed that Holland had written several letters to his attorney emphasizing the need to file the habeas petition on time, but the attorney had “failed to communicate with his client over a period of years[.]” *Id.* (emphasis added). Based on these additional

circumstances, this Court remanded for a determination of whether counsel's performance constituted an "extraordinary circumstance" to warrant equitable tolling of the limitations period.

B. Equity versus statute.

In *Martinez v. Ryan*, this Court noted that "[t]he rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion." 566 U.S. 1, 13 (2012); *see also id.* ("These rules reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default.") But later, in *Ramirez*, this Court recognized that judge-made rules of equity allowing for a petitioner to overcome the procedural default of a claim cannot supersede or evade 2254(e)(2). 596 U.S. 366, 384–85 (2022).

The *Maples* court recognized that severance of the agency relationship could serve as cause to excuse the petitioner's procedural default. 565 U.S. at 289. In this respect, although not explicit, the Court crafted an equitable exception to the procedural default doctrine in the case of abandonment. *Id.* at 289 ("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.") But the Court never addressed whether a petitioner would still be subject to 2254(e)(2), even where the agency relationship has ended. Considering *Ramirez*, it is doubtful that even abandonment in postconviction proceedings can excuse a petitioner's failure to develop the factual basis of a claim in state court.

In *Ramirez*, this Court recognized that, prior to the passage of AEDPA, “attorney error during state postconviction proceedings was not cause to excuse an undeveloped state-court record.” 596 U.S. at 385 (internal quotations omitted) (citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11, n.5 (1992)). But then, with the passage of 2254(e)(2), Congress “raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings.” *Ramirez*, 596 U.S. at 385 (quoting (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 433 (2000)). It follows that if Congress imposed a higher standard than *Keeney* in promulgating 2254(e)(2), then any failure to develop the factual basis of a claim is attributable to the petitioner, even where the agency relationship has been severed.

Lee is, in effect, advocating for the same end run around the stringent requirements of 2254(e)(2) as the habeas petitioners in *Ramirez*. And when faced with that argument, this Court did not mince words: The equitable rule must give way to the congressional mandate. *Ramirez*, 596 U.S. at 389 (“While we agree that any such *Martinez* hearing would serve no purpose, that is a reason to dispense with *Martinez* hearings altogether, not to set § 2254(e)(2) aside.”) So, while the abandonment of postconviction counsel may still serve as cause to determine whether a procedural default can be excused, *Maples*, 565 U.S. at 289, 2254(e)(2) controls whether new evidence can be considered. Therefore, Lee must still satisfy 2254(e)(2) before presenting new evidence in the federal courts, even if he can demonstrate that postconviction counsel abandoned him.

C. Lee cannot satisfy 2254(e)(2) and the federal courts therefore cannot consider his new evidence.

Lee asserts that his new evidence should be considered by the federal courts, despite *Ramirez*'s proscription. Petition, at 16. This is proper, in Lee's view, because he did not "fail to develop the factual basis of his claim in State court proceedings" due to the purported abandonment of postconviction counsel. *Id.* But as explained above, a habeas petitioner must still meet the requirements of 2254(e)(2) even where the agency relationship with postconviction counsel has been severed.

Section 2254(e)(2) controls whether a prisoner is entitled to factual development of a claim at an evidentiary hearing in federal habeas proceedings. *Michael Williams*, 529 U.S. at 429. It states:

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

(A) the claim relies on—

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

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

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

§ 2254(e)(2).

Based on its opening clause, § 2254(e)(2) only applies to prisoner's who have "failed to develop the factual basis" of their claim in state court. *Michael Williams*, 529 U.S. at 430. The Supreme Court has held that "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or prisoner's counsel." *Id.* at 432. Section 2254(e)(2) bars the consideration of Lee's new evidence because Lee's ineffective assistance of

trial counsel claim does not rely on a new rule of constitutional law, nor does it rely on a “factual predicate that could not have been previously discovered through the exercise of due diligence.” 2254(e)(2)(A)(i) and (ii). Additionally, the facts underlying Lee’s claim, i.e. his evidence of fetal alcohol syndrome, would not have resulted in a not guilty verdict for the three homicides. § 2254(e)(2)(B). Thus, both AEDPA and *Ramirez* preclude the federal courts from considering Lee’s newly-developed evidence.

D. Postconviction counsel did not abandon Lee.

Even if the abandonment of postconviction counsel could circumvent 2254(e)(2), Lee cannot demonstrate that his postconviction counsel, Attorney Lorona, abandoned him. Lorona never engaged in any conduct that could be construed as severing the attorney-client relationship. Lorona obtained an investigator who visited Lee in prison and Lorona interviewed several witnesses. Lorona filed a post-conviction petition raising 30 claims and sub-claims, including six claims of ineffective assistance of counsel. Pet. App. B-1–B-41. Unlike in *Maples*, Lorona never ceased representing Lee, but further pursued relief in the Arizona Supreme Court by filing a petition for review after the trial court denied Lee’s post-conviction petition. And contrary to Lee’s assertion, *see* Petition at 21, Lorona promptly responded to Lee’s written communications while his case was pending. Pet. App A-20; *cf. Holland*, 565 U.S. at 652.

Lee’s argument for abandonment is premised primarily on Lorona’s failure to file a reply brief or an amended petition in his state post-conviction proceedings. Petition, at 20–23. Lorona’s failure to file a reply brief was not so egregious that it effectively severed the attorney-client relationship and left Lee “without any functioning attorney of record.” *Maples*, 565 U.S. at 280–81, 288. Despite not filing a discretionary reply brief, *see* Ariz. R. Crim. P. 32.16(f)(3), Lorona continued to seek

relief on Lee's behalf, ultimately seeking review in the state's highest court. Lorona's conduct, while arguably strategic, was at most negligent and attributable to Lee. *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (attorney negligence is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are met). Lee was accordingly not abandoned in state collateral review.

E. Lee would not be entitled to relief on the underlying ineffective assistance of trial counsel claim.

Issues of 2254(e)(2) and abandonment aside, this Court's review is not warranted because Lee's procedurally defaulted ineffective assistance of trial counsel claim is meritless.

To warrant relief on an ineffective assistance of counsel claim, a petitioner must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). He must satisfy both prongs of *Strickland's* test by demonstrating that: (1) counsel's performance was deficient under prevailing professional standards; and (2) he suffered prejudice as a result. *Id.* at 687–88. A petitioner demonstrates deficient performance by showing "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 699.

A petitioner's allegations and supporting evidence must withstand this Court's "highly deferential" scrutiny of counsel's performance and overcome the "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689–90. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the

time.” *Id.* at 689. This Court has made clear that ineffective assistance claims are evaluated under *Strickland*, not standards propagated by private organizations. To that end, the ABA Guidelines are only guides and confer no mandatory duties on counsel; courts must evaluate ineffectiveness claims based on this Court’s precedents. *See, e.g., Bobby v. Van Hook*, 558 U.S. 4, 17 (2009); *see also Montejo v. Louisiana*, 556 U.S. 778, 790 (2009) (the Constitution does not codify the model ABA rules).

As to prejudice, a reviewing court must ask “whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the *balance of aggravating and mitigating circumstances* did not warrant death.” *Strickland*, 466 U.S. at 695 (emphasis added). “A reasonable probability is a probability sufficient to undermine confidence in the outcome. That requires a substantial, not just conceivable, likelihood of a different result.” *Thornell v. Jones*, 602 U.S. 154, 163 (2024) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (internal quotation marks omitted)). “In evaluating that question, it is necessary to consider *all* the relevant evidence that the [sentencer] would have before it....” *Wong v. Belmontes*, 558 U.S. 15, 20 (2009). This means that “the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice.” *Id.* at 26.

Surmounting *Strickland*’s high bar is never an easy task. *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

1. ***Trial counsel was not deficient.***

Here, trial counsel performed an adequate investigation that uncovered the possibility that Lee suffered from fetal alcohol effect. Trial counsel discussed the possibility that Lee suffered from fetal alcohol effect with his expert witness, who dismissed that possibility after finding that Lee did not exhibit the corresponding characteristics. And contrary to Lee’s assertion, trial counsel was justified in relying

on the expert's opinion because the expert was well qualified to give it. Pet. App. A-27 (noting that the expert witness held a doctorate in clinical psychology and had been certified as a psychologist for nearly two decades). Relying on his expert's evaluation that Lee did not suffer from fetal alcohol syndrome, trial counsel pivoted and presented substantial evidence concerning Lee's family background, criminal history, personality traits, and post-crime behavior. See Pet. App. A-24 ("At sentencing, Simpson put forward wide-ranging mitigating evidence on Lee's behalf, including about Lee's age, deprived childhood, mental capacity and personality traits, remorse, lack of prior criminal record, and strong support from Lee's family and friends.") And even though trial counsel was unable to present a diagnosis for fetal alcohol effect, he was still able to convey to the sentencer that Lee's mother likely consumed alcohol during her pregnancy. *Id.* at A-25. Though unsuccessful, trial counsel's mitigation strategy during sentencing was the result of "reasonable professional judgment." *Strickland*, 466 U.S. at 699. Lee accordingly cannot show that trial counsel rendered deficient performance.

2. *Lee cannot demonstrate prejudice.*

Lee's new evidence, the proposed fetal alcohol effect mitigation, would have carried little weight and was similar to other evidence considered by the sentencing judge. In Arizona, courts "may attribute less weight to the mitigating effect of a disorder if the defendant fails to establish a relationship between the disorder and the criminal conduct." *State v. Hedlund*, 431 P.3d 181, 185–86 (Ariz. 2018) (quoting *State v. Styers*, 254 P.3d 1132, 1135 (Ariz. 2011)). "When assessing the weight and quality of a mitigating factor, we take into account how the mitigating factor relates to the commission of the offense." *Styers*, 254 P.3d at 1135. Like Lee's deprived childhood evidence and Dr. McMahon's testimony about his psychology, there is no explanatory relationship between his alleged fetal alcohol effect and his crimes.

Consequently, the sentencing judge would have given Lee's new evidence little weight.

Additionally, any evidence of fetal alcohol effect would have only been a slight expansion of the psychological and social history evidence already in front of the trial court. The sentencing judge knew about Lee's home life—his mother's alcohol use, his emotionally absent father, his dirty home, his reputation as a “follower not a leader,” and a poor educational record. The judge also heard about Dr. McMahon's diagnosis of ADD and extensive psychological testing showing his submissive and suggestible personality, along with his family history of mental illness. The court considered this evidence and found Lee's “deprived childhood” mitigating. The fetal alcohol effect evidence, similar in type and theme to the already offered mitigating evidence, would not have made a meaningful difference in the state courts' sentencing decisions. *See, e.g., Wong*, 558 U.S. at 23 (finding that additional cumulative mitigation evidence “would have offered an insignificant benefit, if any at all”).

And even if Lee's new evidence were more than cumulative, he cannot demonstrate prejudice in the face of the overwhelming aggravation. Lee murdered three victims in a span of weeks. In each case, the court found the pecuniary gain aggravating circumstance, which is afforded great weight. *State v. Willoughby*, 892 P.2d 1319, 1338 (Ariz. 1995); *see also State v. Poyson*, 475 P.3d 293, 302 ¶ 42 (Ariz. 2020) (“The pecuniary gain aggravator is especially strong and weighs heavily in favor of a death sentence, when pecuniary gain is the catalyst for the entire chain of events leading to the murders.”) (internal citations and punctuation omitted). And in the case of Linda Reynolds and Harold Drury, the sentencing court found the cruel, heinous, or depraved aggravating circumstance. *Poyson*, 475 P.3d at 302 ¶ 42 (“The cruelty aggravator is ‘entitled to great weight.’”) (citing *State v. McKinney*, 426 P.3d 1204, 1207 ¶ 15 (Ariz. 2018)); *see also State v. Smith*, 673 P.2d 17, 24 (Ariz. 1983) (even in the face of “significant” mitigation, leniency not called for “in light of the

extreme cruelty and brutality of the instant crime”). There is no reasonable probability that the sentencer would not have imposed death, even considering Lee’s new evidence. *See e.g. Jones*, 602 U.S. at 172.

II. Stay and abeyance is not proper here.

Lee contends that the Ninth Circuit erred by not granting his alternative request that his habeas petition be stayed for a return to state court. Petition, at 24. As support for this contention, Lee argues that this Court suggested in *Ramirez* that stay and abeyance is appropriate where a petitioner has raised a procedurally defaulted claim. *Id.* (citing *Ramirez*, 596 U.S. at 379). Insofar as Lee argues that *Ramirez* changed the circumstances under which stay and abeyance are called for, he is mistaken.

A. *Rhines v. Weber*.

“[F]ederal district courts may not adjudicate mixed petitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims.” *Rhines v. Weber*, 544 U.S. 269, 273 (2005) (citing *Rose v. Lundy*, 455 U.S. 509, 518–19 (1982)). In “limited circumstances,” however, a district court may stay habeas proceedings when a petitioner files a mixed habeas petition to allow the petitioner to exhaust the claim in state court. *Id.* at 277. This discretion should be exercised cautiously, as “granting a stay effectively excuses a petitioner’s failure to present his claims first to the state courts.” *Id.* Additionally, “routinely granting stays would undermine the AEDPA’s goals of encouraging finality and streamlining federal habeas proceedings.” *Blake v. Baker*, 745 F.3d 977, 981–82 (9th Cir. 2014). And “a federal habeas court may *never* ‘needlessly prolong’ a habeas case.” *Shinn v. Ramirez*, 596 U.S. 366, 390 (2022) (emphasis in original); *Shoop v. Twyford*, 596 U.S. 811, 820 (2022) (same).

Under *Rhines*, the stay and abeyance procedure is appropriate only where the petitioner has shown: (1) “good cause” for the failure to exhaust his claims in state court; (2) the unexhausted claim is “potentially meritorious”; and (3) the petitioner did not engage in “intentionally dilatory litigation tactics.” 544 U.S. at 277. Moreover, “[a] mixed petition should not be stayed indefinitely.” *Id.* at 277. The *Rhines* procedure for staying a petition applies only to mixed petitions containing both exhausted and unexhausted claims. See *King v. Ryan*, 564 F.3d 1133, 1139–40 (9th Cir. 2009) (*Rhines* exception to total-exhaustion rule carved out exception allowing mixed petitions to remain pending in federal court under limited circumstances).

B. Exhaustion, Procedural Default, and Technical Exhaustion

Federal courts may not grant a writ of habeas corpus unless “the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). A claim is exhausted if: (1) it has been fairly presented to the highest state court with jurisdiction to consider it; or (2) no state remedy remains available for the claim. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996). The latter form of exhaustion is described as “technical exhaustion.” See *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (“A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer ‘available’ to him.”).

A claim is procedurally defaulted when the state court would dismiss the claim because the defendant did not present the claim in a procedurally proper manner. *Ramirez*, 596 U.S. at 371. A default in federal habeas proceedings may be excused only if “a constitutional violation has probably resulted in the conviction of one who is actually innocent,” or if the petitioner demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). To

demonstrate cause, the petitioner must establish that “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Id.* at 488. “[T]o establish prejudice, [a petitioner] must show not merely a substantial federal claim, such that ‘the errors at ... trial created a *possibility* of prejudice,’ but rather that the constitutional violation ‘worked to his *actual* and substantial disadvantage.” *Ramirez*, 596 U.S. at 379–80 (emphasis in original) (quoting *Carrier*, 477 U.S. at 494).

C. Arizona state rules of procedural default.

Arizona requires that “when ineffective assistance of counsel claims are raised, or could have been raised, *in a Rule 32 post-conviction relief proceeding*, subsequent claims of ineffective assistance will be deemed waived and precluded.” *State v. Swoopes*, 166 P.3d 945, 952, ¶ 23 (Ariz. App. 2007) (emphasis in original) (internal quotation marks removed). “The ground of ineffective assistance of counsel cannot be raised repeatedly.” *Stewart v. Smith*, 46 P.3d 1067, 1071, ¶ 12 (Ariz. 2002). Accordingly, claims of ineffective assistance of counsel are precluded in successive petitions for post-conviction relief. “The purpose of the preclusion rule is to require a defendant to raise all known claims for relief in a single petition to the trial court, thereby avoiding piecemeal litigation and fostering judicial efficiency.” *State v. Petty*, 238 P.3d 637, 641, ¶ 11 (Ariz. App. 2010) (internal quotation marks omitted).

The Arizona Supreme Court has identified two very limited exceptions to this general rule of preclusion. *See State v. Anderson*, 547 P.3d 345 (Ariz. 2024); *State v. Diaz*, 340 P.3d 1069, 1071–72, ¶¶ 10–12 (Ariz. 2014). In *Anderson*, a jury convicted the defendant of conspiracy to commit first-degree murder, and the trial court imposed a sentence “of life without possibility of release until the service of at least 25 years.” *Id.* at 348, ¶ 4. Anderson subsequently filed petitions for post-conviction

relief in 2000 and 2003 that raised claims of ineffective assistance of counsel, but they were denied and dismissed. *Id.* at ¶ 5.

In 2022, Anderson filed a third petition for post-conviction relief, alleging “that while he was considering whether to accept a plea agreement stipulating to a term of eighteen to twenty-two years in prison, his trial counsel advised him that if he did not accept the plea agreement and was found guilty at trial, parole would be available after he served twenty-five years.” *Id.* at ¶ 6. Anderson further “claimed that he only recently learned he was not parole eligible when he attempted to enroll in an educational program through the Arizona Department of Corrections, Rehabilitation, and Reentry (“ADCRR”).” *Id.*

In considering whether Anderson’s third petition for post-conviction relief was timely and/or raised a precluded ineffective-assistance-of-counsel claim, the Arizona Supreme Court held that Anderson had adequately explained his failure to raise the claim in a prior petition for post-conviction relief and, therefore, the petition was neither untimely, nor did it raise a precluded claim. *Id.* at 349–51, ¶¶ 15–25. The court’s ruling was based on the “unusual” circumstances of the pervasive misunderstanding of the availability of parole coupled with the extraordinary remedies the state supreme court and the state legislature fashioned to address it, which resulted in Anderson only recently learning that he was ineligible for parole. *Id.* at 348, ¶ 6; *see also id.* at 350, ¶ 17–19. The supreme court made clear that “[w]e do not, however, hold Rule 32.1(a)’s exception to the preclusion rule applies broadly to IAC claims based on erroneous advice surrounding plea agreements” and emphasized that “Anderson’s claim represents an *extremely rare set of circumstances* in the context of the pervasive confusion about parole and the extraordinary remedies [the court] and the legislature fashioned to deal with it.” *Id.* at 351–52, ¶ 26 (emphasis added).

Like *Anderson*, *Diaz* is a limited holding based on the unique facts of the case. There, the defendant had an attorney who filed a notice of post-conviction relief but did not file a petition. *Diaz*, 340 P.3d at 1070, ¶ 3. This happened twice with two different attorneys. *Id.* at ¶ 4. Diaz’s third attorney filed his first petition that alleged IAC of trial counsel. *Id.* at ¶ 5. The trial court found the claim precluded based on the prior postconviction proceedings. *Id.* The supreme court held that Diaz did not waive his ineffective assistance of counsel claim because prior counsel repeatedly failed to file a petition. *Id.* at 1070–71, ¶ 10. The court stated that its “holding in this peculiar scenario does not frustrate Rule 32’s preclusion provisions.... Once the petition is adjudicated, and assuming that Diaz does not obtain relief, this and *all other claims* that Diaz might have brought will be precluded and Diaz will not be able to raise them in a successive petition.” *Id.* at 1071, ¶ 12 (emphasis added).

D. Lee is not entitled to a *Rhines* stay.

Initially, nothing in *Ramirez* purported to affect or actually affected the standard under which federal courts consider stay requests pursuant to *Rhines*. Lee relies on a single passage, taken out of context, for this proposition. In *Ramirez*, this Court stated that:

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, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). When a claim is procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse. Likewise, if the state-court record for that defaulted claim is undeveloped, the prisoner must show that factual development in federal court is appropriate.

596 U.S. at 379. Lee conveniently omits the last two sentences. When read in concert, the implication of the Court's recitation is that petitioners may return to state court to raise truly unexhausted claims, and that they may try to establish cause and prejudice to excuse procedurally defaulted claims. Lee's ineffective assistance of trial counsel claim is not unexhausted, it is procedurally defaulted but technically exhausted. The Court's comment in *Ramirez* therefore has no bearing on Lee's claim, at least in terms of his ability to return to state court.

Aside from his reliance on *Ramirez*, Lee has not and cannot demonstrate that he is entitled to a *Rhines* stay. For one, Lee's claim is not unexhausted, and *Rhines* by its terms only applies to mixed petitions. 544 U.S. at 271. And neither, as explained above, does Arizona's recognition of limited exceptions to its state procedural bars render the claim unexhausted. Arizona requires that postconviction petitioners bring all ineffective assistance of trial counsel claims in the same collateral proceeding. Lee raised ineffective assistance of trial counsel claims in his first postconviction petition, and additional ineffectiveness claims brought in subsequent collateral review proceedings will be precluded under Arizona Rule of Criminal Procedure 32.2(a)(3). Lee cannot credibly argue that his run-of-the-mine claim qualifies for either of the narrow exceptions recognized in *Diaz* or *Anderson*. Lee's claim therefore remains procedurally defaulted but technically exhausted based on the implied procedural bar.

But even assuming that Lee's claim was unexhausted and that he could demonstrate good cause for failing to raise the claim based on postconviction counsel's negligence, Lee cannot meet the remaining *Rhines* requirements because the claim is not potentially meritorious and Lee has been intentionally dilatory. As argued above, Lee's ineffective assistance of trial counsel claim is meritless because trial counsel was not deficient for relying on his expert's assessment of Lee and because there is no reasonable probability that the sentencer would have sentenced Lee to life in the

face of overwhelming aggravation. And, as Lee implicitly concedes, *see* Petition at 24, Lee chose to pursue relief in federal court under *Martinez* rather than seek a return to state court to raise the claim. The Ninth Circuit therefore did not fail to consider Lee's request for stay and abeyance because his claim is procedurally defaulted but technically exhausted and because Lee cannot meet the *Rhines* criteria.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted this 29th day of April, 2025.

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