

No. 24-6668

In the Supreme Court of the United States

Chad Lee, Petitioner,

v.

Ryan Thornell, et al., Respondents

*** Capital Case***

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

QUESTION PRESENTED I

Petitioner Chad Lee posits that abandonment by his state post-conviction relief (“PCR”) counsel constitutes the extraordinary circumstance that defeats the opening clause of 28 U.S.C. § 2254(e)(2) and permits the federal courts to conduct evidentiary development of evidence that was not developed in the state courts. Petition for Writ of Certiorari (“Cert. Pet.”) at i, 16. Thus, the first question for which certiorari should be granted is whether abandonment by PCR counsel, which was the proximate cause of Lee’s procedurally defaulted facts, necessarily means that Lee did not contravene § 2254(e)(2)’s opening clause by failing to develop the factual basis of his claim of ineffective assistance of trial counsel (“IATC”) at capital sentencing.

A. Respondents concede that the Court has not addressed attorney abandonment in the context of § 2254(e)(2)’s opening clause.

After acknowledging that the ineffective assistance of PCR counsel excuses the procedural default of a claim under the Court’s decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), and that abandonment by counsel excuses a defendant’s failure to exhaust a PCR claim on appeal under *Maples v. Thomas*, 565 U.S. 266 (2012), Respondents state:

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.

Brief in Opposition (“BIO”) at 15. As such, Lee has presented a question of first impression for which the Court should grant certiorari and decide this important

question.

The Court has granted certiorari in cases where the lower federal courts' interpretation of an important statutory provision is one of first impression. *See generally Am. Fed'n of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 397 (1940).

That is true where the Court granted certiorari to interpret provisions of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2241 *et seq.* ("AEDPA"), as Lee requests the Court do here. *See e.g. Gonzalez v. Crosby*, 545 U.S. 524, 526 (2005) (deciding whether a motion filed pursuant to Fed. R. Civ. P. 60(b) is, in the habeas context, a "second or successive" petition for writ of habeas corpus under 28 U.S.C. § 2244(b)); *Artuz v. Bennett*, 531 U.S. 4, 5 (2000) (deciding "whether an application for state postconviction relief containing claims that are procedurally barred is 'properly filed' within the meaning of [28 U.S.C. § 2244(d)(1)].").

Of particular significance here is that the Court granted certiorari in (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 424 (2000), to determine, in the first instance, whether § 2254(e)(2) was to be strictly construed to bar evidentiary development in federal court even where a petitioner did not lack diligence in state court but was unable to develop the factual basis for his constitutional claim because, for example, his request for an evidentiary hearing, in the state PCR proceeding, was denied by the Virginia Supreme Court. The Court rejected the Commonwealth's "no fault" argument, which advocated that "if there is no factual development in the state court, the federal habeas court may not inquire into the reasons for the default when

determining whether the opening clause of § 2254(e)(2) applies.” *Id.* at 431.

Respondents err in suggesting that Lee is simply attempting the same end run around § 2254(e)(2) that was rejected in *Shinn v. Ramirez*, 596 U.S. 366 (2022), where the Court explained why “judge-made rules of equity allowing for a petitioner to overcome the procedural default of a claim cannot supersede or evade 2254(e)(2).” BIO at 15. The Court should ignore Respondents’ erecting a straw man, its so-called “Equity versus Statute” argument. BIO at 15.

Lee proposes no such end run. Lee posits only that the clear abandonment by PCR counsel Jess Lorona removes the question of his entitlement to an evidentiary hearing in federal court from § 2254(e)(2) because Lorona’s abandonment merely means Lee did not lack diligence in developing the factual basis for his IATC claim in the state PCR proceeding. Lee makes a statutory argument.

Moreover, Lee’s circumstance is distinguishable from those of petitioners Ramirez and Jones in *Ramirez* because they sought to prove the IAC of PCR counsel and the underlying IATC claims based on new evidence developed for the first time in federal habeas corpus without resort to any argument based on *Maples* or *Holland v. Florida*, 560 U.S. 631 (2010), that their PCR counsel abandoned them. *See Ramirez v. Ryan*, 937 F.3d 1230 (9th Cir. 2019); *Jones v. Shinn*, 943 F.3d 1211 (9th Cir. 2019). And, of course, resort to claims of abandonment were unnecessary and, possibly, counterproductive because the new evidence admitted in their *Martinez* Remand Motions was otherwise admissible—in fact, fact investigation and the admission of new facts was contemplated by the Court’s decision in *Martinez* because the

unreasonableness of trial and PCR counsel's performances under *Strickland v. Washington*, 466 U.S. 668 (1984), and the resulting actual prejudice were required to be proven under *Martinez*—until the Court largely upended the practice of considering new evidence on *Martinez* remands in the federal district courts and the courts of appeals with its decision in *Ramirez*.

B. Respondents err in suggesting that PCR counsel did not abandon Lee and that Lee was not prejudiced by counsel's derelictions.

1. Respondents' present defense of PCR counsel is inconsistent with the position taken by Respondents when the matter was adjudicated in the Superior Court of Maricopa County.

Respondents' present defense of PCR counsel is premised on Lorona's having "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." BIO at 18. Respondents seek to reduce Lorona's failure to comply with the pleading requirements of Rule 32 of the Arizona Rules of Criminal Procedure merely to his failure to file a "discretionary reply brief." BIO at 18. The Arizona Attorney General's present characterization that Lorona provided picture perfect representation of Lee, which asserts Lorona's derelictions were "arguably strategic," conflicts with the position taken by other counsel from that office in responding to Lee's PCR petition in its response of May 1, 2000. Respondents do not so much as acknowledge their inconsistent positions with respect to Lorona's performance in the state PCR proceeding.

Lee placed Respondents' Response to Petition for Post-Conviction Relief before

the Court as Appendix C to his Petition for Writ of Certiorari. In it, Respondents note that all of the claims raised by Lorona, except for a few IATC claims, were precluded or defaulted because they were or could have been raised in Lee's direct appeal. Thus, Respondents mislead the Court with their argument that Lorona investigated and presented some 30 claims in the PCR petition. With respect to the handful of IATC claims, Respondents pleaded that the claims were comprised of "conclusory allegations" and not "colorable" for various reasons, including for not specifying the conduct of trial counsel that was deficient or prejudicial, and not attaching any evidentiary support to the post-conviction petition. *See* App. C-11–15.

While Respondents state that the filing of a reply in addition to their response to Lee's post-conviction petition was "discretionary," such a filing was not discretionary here. Respondents argued that in the absence of an addendum to Lee's PCR petition that would cure the defects they identified, the superior court was required, as a matter of state post-conviction law, to dismiss the petition Lorona filed. Respondents argued that the court should grant Lorona 30 days to amend the PCR petition to correct the defective pleading. App. C-11, 16.

Lorona responded to Respondents by filing his own motion for time to amend Lee's PCR petition. App. D. It was so carelessly prepared that it did not specify how much time Lorona needed to file a reply or amendment. The court granted a two-week extension for Lorona to file a pleading to cure the defects in his petition. App. E. Five months later, with Lorona having filed nothing, the court dismissed Lee's PCR petition. App. F.

Lorona abandoned Lee by failing to communicate with Lee concerning potential claims, failing to obtain the certificate of Lee required by the Arizona post-conviction rules to ensure that communication, and, ultimately, failing to plead any colorable claim upon which relief could be granted. The medical and mental health evidence that Lee later submitted in support of his Supplemental *Martinez* Brief clearly demonstrates that evidence of Lee’s organic brain damage was available. Had Lorona investigated Lee’s social history and produced it to a qualified medical or mental health expert—such as a neuropsychologist or an expert in dysmorphic facial features stemming from *in utero* alcohol exposure—this information could have been utilized effectively, for example, to establish the statutory mitigating factor under former Arizona Revised Statute (“A.R.S.”) § 13-703(G)(1) that Lee was unable to conform his conduct to the requirements of law.

2. Lee was prejudiced by Lorona’s abandonment.

Respondents posit that, apart from the issues of § 2254(e)(2) and abandonment, certiorari should be denied because Lee’s procedurally defaulted IATC claim is meritless. BIO at 19–23. Lee has set forth arguments on both the deficient performance and prejudice prongs of *Strickland* in the Petition. *See* Cert. Pet. at 29–32 (deficient performance), 33–34 (prejudice). In summary, trial counsel averred that he failed to retain an expert steeped in Fetal Alcohol Syndrome who could have assisted him in explaining that the *in utero* consumption of large quantities of alcohol by Lee’s mother led to Lee’s being afflicted with organic brain damage that affected his cognition, judgment, maturity, and behavior at the time of the offenses for which

he was convicted and sentenced to death. Trial counsel failed to inquire of his expert whether he was even qualified to opine on whether Lee suffered from FAS, and counsel accepted that unqualified expert's view that Lee did not display the dysmorphic facial features of one suffering from FAS. From the evidence admitted on the Supplemental *Martinez* Brief, Lee in fact did suffer dysmorphic facial features but that is not the sole indicator that one suffers from FAS. Lee attached medical and neuropsychological evidence in the district court that he suffered from neurobiological deficits that impaired his functioning at the time of the offenses. Cert. Pet. at 33–34. In addition, the admission of such evidence would have significantly increased the mitigating weight the sentencing court attributed to Lee's young age, 19 at the time of the offenses, a statutory mitigating factor under former A.R.S. § 13-703(G)(5). There is a reasonable probability that had the sentencing court been accurately apprised of Lee's FAS and its effects on cognition, it would not have imposed a sentence of death.

QUESTION PRESENTED II

Lee posits that he requested alternative relief in the Ninth Circuit, to wit, that, were the court to deny his abandonment argument for overcoming procedural default, he was entitled to a stay so that he could return to the state courts to exhaust the IATC claim. Cert. Pet. at i, 24–27. Lee's request for stay and abeyance has become even more robust in light of the fact that the Superior Court of Maricopa County, which earlier appointed counsel on a claim related to the legislative repeal of Arizona's pecuniary gain statutory aggravating factor, A.R.S. § 13-703(F)(5), has now

extended the appointment of John Mills, Esq., of the Phillips Black law firm, and appointed a second death penalty-qualified attorney, Joseph Welling, also of Phillips Black, to represent Lee in a successive petition for post-conviction relief. *See* Min. Entry, *State v. Lee*, No. CR1992-004225 (Maricopa Cnty. Super. Ct. Apr. 8, 2025).

Respondents respond that the Arizona cases upon which Lee relies in support of his request for remand “do not establish a per se regime under which the federal courts must always allow for stay and abeyance.” BIO at 6. Respondents also respond that Lee has taken *Ramirez*, 596 U.S. 366, out of context in quoting for support of the Petition for Writ of Certiorari the portion that suggests a return to state court should state court remedies remain available to a habeas petitioner after *Ramirez*’s restrictions on the admission of new facts in federal court. *See* Cert. Pet. at 15–16, *quoting 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 Arizona Supreme Court cases cited by Lee in his Petition (at 25–26) and which Respondents seek to distinguish in their Brief in Opposition (at 25–27), *State v. Diaz*, 340 P.3d 1069 (Ariz. 2014), and *State v. Anderson*, 547 P.3d 345 (Ariz. 2024), actually compelled what should have been an order of the Ninth Circuit to stay and hold in abeyance Lee’s appeal in order for the state courts, as a matter of comity, to adjudicate Lee’s IATC claim. The cases hold that the Arizona rule of preclusion in Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure do not apply where appointed PCR counsel has violated an ethical responsibility to his client. In *Diaz*,

340 P.3d 1069, the violation occurred when successive PCR counsel failed to file the required petition. In *Anderson*, 547 P.3d at 351, the ethical breach was PCR counsel's "misadvice" to his client regarding when he would become parole eligible if he went to trial and were convicted.

An ethical breach occurred when PCR counsel Lorona was informed by Respondents' prior counsel on May 1, 2000, that the PCR petition failed to comply with various provisions of Rule 32. See App. C. Despite this, Respondents magnanimously agreed to an extension of time for Lorona to amend the petition. Lorona then successfully applied to the PCR court for additional time to correct his deficient pleading. However, Lorona failed to amend Lee's PCR petition, which was dismissed with prejudice some five months later. As was true of the petitioner in *Diaz*, Lee was blameless in Lorona's derelictions, Lee should have been granted a stay and abeyance to return to state court to exhaust.

The Ninth Circuit has, in yet other federal habeas corpus appeals, ordered the very same stay and abeyance relief sought by Lee. As Lee apprised the Court in his Petition for Writ of Certiorari, the Ninth Circuit stayed another capital habeas appeal so the petitioner could return to state court to exhaust a claim based on the language in *Ramirez* quoted above. See Unopposed Mot. to Stay and Abey Federal Habeas Proceedings Pending State Ct. Exhaustion, *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.

Most recently, in *Doerr v. Shinn*, 127 F.4th 1162 (9th Cir. 2025), another capital Arizona federal habeas corpus appeal, the court granted a stay and abeyance request to permit a return to state court for exhaustion post-*Ramirez* under the authority of *Rhines v. Weber*, 544 U.S. 269 (2005). Respondents had argued that *Rhines* did not apply because Doerr’s claim was “technically exhausted” because no further remedy existed under Rule 32 for him to obtain a merits ruling to exhaust the claim. *Id.* at 1170. The Ninth Circuit cited *Diaz* and *Anderson* for the proposition that it was not clear that the Arizona courts would not consider the merits of Doerr’s claims upon his return to the state court but that, as a matter of comity, the state court should have the first opportunity to apply state law.

Lee should have been afforded the same remedies conferred on the petitioner-appellants in *Clabourne* and *Doerr*. The Court should grant certiorari and order the Ninth Circuit to vacate its decision affirming the denial of habeas corpus relief and to stay and hold in abeyance the appeal pending Lee’s exhaustion of his claim in the state courts.

Respectfully submitted this 13th day of May, 2025.

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May 13, 2025