

No.

In the Supreme Court of the United States

Darrel Eston 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

PETITION FOR WRIT OF CERTIORARI

Jon M. Sands
Federal Public Defender
District of Arizona
Timothy M. Gabrielsen
(Illinois ARDC No. 6187040)
Assistant Federal Public Defender
(*Counsel of Record*)
407 West Congress Street, Suite 501
Tucson, Arizona 85701
Tel. (520) 405-9176
Email: tim_gabrielsen@fd.org

Counsel for Petition Darrel Lee

*** CAPITAL CASE ***

Questions Presented

In *Williams v. Taylor*, 529 U.S. 420, 432 (2000), the Court ruled that the provisions that limit the admissibility of evidence in federal habeas under 28 U.S.C. § 2254(e)(2) do not apply where a habeas petitioner’s failure to develop evidence in support of a claim is due “to the conduct of another or by happenstance.” In other words, the petitioner has not “failed to develop the factual basis of a claim in State court proceedings” under § 2254(e)(2) where he has not lacked diligence in developing the factual support for his claim, including where the fault for that dereliction lies with another or through happenstance.

I.

Did the lower federal courts violate the rule of *Williams v. Taylor*, 529 U.S. 420 (2000), by attributing fault for not developing factual support of a claim in state court to Lee where a thorough social history investigation was critical to the ability of Lee’s post-conviction relief (PCR) counsel to establish his claim of ineffective assistance of capital sentencing counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), but the state court rejected counsel’s request for the appointment of mitigation specialist Roseann Schaye, who had already contributed pro bono investigative services to Lee and was prepared to continue, in favor of Mary Durand who, due to illness, repeated hospitalizations, and overwork failed to timely perform any mitigation investigation whatsoever prior to the state PCR court’s evidentiary hearing.

II.

Whether newly unearthed mitigation, which included the compelling expert opinion that Lee, a felony-murderer, did not “act with reckless indifference to the grave risk of death” under *Tison v. Arizona*, 481 U.S. 137 (1987), and therefore was ineligible for a sentence of death, established prejudice under *Strickland* to prove the ineffective assistance of trial counsel claim.

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, guilty plea & sentencing, *State v. Karen Thompson*, No. CR-92-01-13 (La Paz Cty., Ariz., Super. Ct. May 26, 1992).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Darrel Eston Lee respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in which it affirmed the Arizona United States District Court's denial of habeas corpus relief in a capital case.

OPINIONS AND ORDERS BELOW

Reporter's Transcript of Proceedings, guilty verdict, *State v. Lee*, No. CR-92-01-13 (La Paz Cty., Ariz., Super. Ct. Nov. 30, 1992).

Reporter's Transcript of Proceedings, death penalty special verdict, *State v. Lee*, No. CR-01-13 (La Paz Cty., Ariz., Super. Ct. May 8, 1993).

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Order (finding certain claims brought pursuant to 28 U.S.C. § 2254 procedurally defaulted, including the subject IATC claim), *Lee v. Ryan*, No. CV-04-0039-PHX-MHM (D. Ariz. Sept. 9, 2006), ECF No. 87.

Memorandum of Decision and Order (denying relief on exhausted claims brought pursuant to 28 U.S.C. § 2254), *Lee v. Ryan*, No. CV-04-0039-PHX-MHM (D. Ariz. Sept. 30, 2010), ECF No. 93.

Order (staying appeal pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012)), *Lee v. Ryan*, No. 10-99022 (9th Cir. Dec. 1, 2014), ECF No. 43.

Order (denying cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012)), *Lee v. Ryan*, No. CV-04-0039-PHX-JTT (D. Ariz. Apr. 9, 2019), ECF No. 138.

Order (denying reconsideration), *Lee v. Ryan*, No. CV-04-0039-PHX-JTT (D. Ariz. May 1, 2019), ECF No. 140.

Opinion, *Lee v. Thornell*, No. 10-99022 (9th Cir. Jul. 24, 2024), ECF No. 120-1.

Order (denying rehearing and rehearing en banc), *Lee v. Thornell*, No. 10-99022 (9th Cir. Nov. 20, 2024), ECF No. 127.

JURISDICTION

On July 24, 2024, the Ninth Circuit affirmed the district court's denial of habeas corpus brought under 28 U.S.C. § 2254. *Lee v. Thornell*, No. 10-99022 (9th Cir. Jul. 24, 2024) (attached as Appendix. A). On November 20, 2024, the Ninth Circuit denied Lee's petition for rehearing and petition for rehearing en banc, *Lee v. Thornell*, No. 10-99022 (9th Cir. Nov. 20, 2024), ECF No. 127. On February 11, 2025, in Application 24A774, the Court granted Lee's Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, to and including April 14, 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:

“[i]n 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[.]”

28 U.S.C. § 2254(e)(2) states:

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, 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.

STATEMENT OF THE CASE

On December 5, 1991, Darrel Lee and Karen Thompson approached John Anderson as he left a Phoenix medical clinic to ask him for a ride. 1-ER-138.¹ Hours later, after they had obtained Anderson's pin number to withdraw money at various ATMs to purchase crack cocaine, and after traversing Interstate 10 between Phoenix and California and between Phoenix and Tucson, they exited I-10 in La Paz County in western Arizona. After Anderson attempted to flee, Thompson struck Anderson in the head with a rock, killing him.

Darrel Lee did not kill, and, although he assented to a plea offer that would have seen him serve life in prison with the possibility of parole after 25 years for felony murder in exchange for his testimony against Thompson, he ultimately rejected the plea. Instead, the prosecutor offered the same life-saving plea to Thompson, which she accepted and testified against Lee at his jury trial.

¹ ER references are to the excerpts of record filed with Lee's Replacement Opening Brief in the Ninth Circuit in *Lee v. Shinn*, No. 10-99022. Ryan Thornell later replaced David Shinn as the director of the Arizona Department of Corrections, Rehabilitation & Reentry, and as the Respondent in the federal proceedings.

A. Guilt phase facts.

The prosecution's case, including the most aggravating aspects as to Lee, derived nearly entirely from Thompson's guilt phase testimony. She acknowledged that she had four prior felony convictions, pleaded guilty to Anderson's murder in exchange for a life sentence, and agreed to testify against Lee. 6-ER-1420-23. She met Lee at a trailer park in Phoenix in November 1991, where they purchased and ingested cocaine. 6-ER-1422-24. On December 4, 1991, they rented a motel room, where they stayed until 11 a.m. on December 5, 1991. 6-ER-1426-28.

As they walked down a Phoenix street, Thompson suggested a ruse whereby they would knock on a door to attempt to gain access in order to rob a resident of an automobile. On a first attempt, a woman denied them access. They proceeded to the medical clinic where they successfully requested a ride from Mr. Anderson. 6-ER-1429-33. According to Thompson, when Anderson balked at taking them toward Tucson, Lee said he had a gun and told Mr. Anderson to do as he was told. 6-ER-1434. Lee had no gun. 6-ER-1435. Anderson first drove them to Chandler, in suburban Phoenix. After Thompson found only \$10 to \$15 in Mr. Anderson's wallet, Thompson successfully requested his pin number so a cash withdrawal could be made at a bank. 6-ER-1436. Thompson testified they "needed more money for drugs." 6-ER-1437. Thompson obtained \$200 at 12:45 p.m. on her first use of Mr. Anderson's debit card. Mr. Anderson continued to drive. 6-ER1438.

On their way south to Tucson, they pulled over on a dirt road and Lee tied Mr. Anderson's hands and Thompson tied his feet with electrical cord. 6-ER-1440-41.

Thompson testified that she and Lee walked back toward the car but she said to Lee that she “didn’t think it was a good idea to leave him there.” 6-ER-1441-42. They placed Mr. Anderson in the trunk and, with Lee driving, they headed back to the trailer court in Phoenix to buy more drugs. After dark, they headed toward California, and they were under the influence of drugs. 6-ER-1443-45.

Thompson testified they turned back, returned to the drug trailer in Phoenix, and they stopped at “all” of the rest areas on I-10 to use more drugs – “intravenously.” 6-ER-1446. Thompson testified they were shooting powder cocaine, which was mixed with water, and they drank beer that they bought a case at a time. 6-ER-1446-48. When Mr. Anderson was pounding and making noise, they told him to be quiet and, according to Thompson, “threatened him with his life.” Thompson testified they became paranoid, “which cocaine makes you feel.” 6-ER-1448-49.

Thompson testified they could not let Mr. Anderson go, and Lee proposed they kill him by asphyxiating him. 6-ER-1449. Thompson testified they stopped somewhere in the country, that Lee disappeared around a house from where the car was parked, that Lee “supposedly asked this guy for part of a hose; that we had run out of – somebody ran out of gas down the road and he needed to siphon off gas from the car, and they gave him a piece of hose.” 6-ER-1449. According to Thompson, Lee said he would run the hose from the tailpipe to the trunk to asphyxiate Mr. Anderson. At 10:30 p.m., they pulled off of I-10 at Gold Nugget Road where Lee attempted to asphyxiate Mr. Anderson but it was unsuccessful because Mr. Anderson kept pushing the trunk lid up. 6-ER-1454-55. They closed the trunk lid, returned to the car and

“shot some more drugs.” They exited the car “because usually when you do a big hit of cocaine, you don’t like to be closed in.” 6-ER-1455-56. According to Thompson, Lee noticed the trunk lid open and that Mr. Anderson had fled. Thompson saw Lee struggle with Mr. Anderson and called her for help. Thompson testified she found a belt in the car, which she testified she helped Lee place around Mr. Anderson’s neck. 6-ER-1456. She testified that the belt broke as Lee pulled on it. Thompson testified she found a rock and struck Mr. Anderson in the head with it, killing him. 6-ER-1460. They placed Mr. Anderson’s body in the trunk. Before leaving, Lee stated that he lost his glasses, but they were too scared to search for them. 6-ER-1461-62.

According to Thompson, Lee drove west across the California state line and stopped for gas using Mr. Anderson’s credit card before heading back toward Phoenix. They again used Mr. Anderson’s debit card to withdraw \$200 and bought more dope. They headed toward Tucson, bought a shovel, shot more cocaine, dug a shallow grave and buried Mr. Anderson. 6-ER-1464-66. They returned to Phoenix before heading west again on I-10, stopping to use Mr. Anderson’s credit cards in Blythe and Indio, California. 6-ER-1466-67. Thompson testified she fled from Lee at a motel in San Diego. She testified she used drugs with another man in California, disposed of Mr. Anderson’s credit cards and was arrested a few days later. 6-ER-1471-73.

A La Paz County sheriff’s investigator testified to having processed the crime scene and found a pair of prescription glasses that the lab manager for Eyemasters in Phoenix identified as having been purchased by Lee on November 19, 1991. 6-ER-1343, 1352, 1400-01. The investigator further testified to having found pieces of a

belt at the Gold Nugget Road crime scene, which Thompson identified as the one she and Lee used. 6-ER-1345, 1458. The investigator testified to having retrieved a bloody rock from the crime scene, 6-ER-1356, which Thompson identified as her murder weapon. 6-ER-1460-61.

Lee testified to an alibi that he later admitted to a psychologist retained by his counsel was false. Lee further testified to having met up with Thompson on the evening of December 6, 1991, that he accompanied Thompson on her trip to California, and that their travel was as Thompson described. Lee testified that, after Thompson left him in San Diego, he drove a Buick back to Phoenix that he believed was owned by Thompson's sister. 6-ER-1520-22.

The jury returned a verdict of guilty to all of the charges. 1-ER-141.

B. Sentencing phase facts.

The prosecution indicated in its Discovery Notification that it would seek to prove three statutory aggravating factors: 1) Lee had a prior conviction in Maricopa County, Arizona, for a crime of violence under former A.R.S. § 13-703(F)(2) for pretending to be armed when he robbed Robert Eadie of his Chevy Suburban in 1987; the murder was committed with the expectation of pecuniary gain under (F)(5), a factor that was repealed by the Arizona Legislature on August 27, 2019, *See* A.R.S. § 13-751 (West 2019); and, the victim suffered from especial cruelty under § 13-703(F)(6). 5-ER-1338. At the aggravation/mitigation hearing, 6-ER-1584-85, the prosecution introduced prison and court records to establish the F(2) factor. 7-ER-1635-58.

In mitigation, appointed defense counsel Stephen Politi produced a transcript showing Lee's poor high school performance; a letter from Lee's mother in which she stated that she and the family loved and supported Lee; and, the report of Dr. Leonardo García-Buñuel, M.D., a jail psychiatrist with the Maricopa County Sheriff's Office, who evaluated Lee for one hour, 50 minutes in the La Paz County Jail on January 22, 1993, after reviewing only police reports and none of Lee's social history. 6-ER-1623-25; 6-ER-1626-33.

The sentencing court, the Honorable Michael Irwin, found the existence of all three aggravating factors. 7-ER-1682-84 (transcript of sentencing). 5-ER-1290-91 (special verdict), and imposed a sentence of death. 7-ER-1690 (transcript); 5-ER-1297 (special verdict). The Arizona Supreme Court affirmed the convictions and death sentence on direct appeal. *State v. Lee*, 917 P.2d 692 (Ariz. 1996). It imposed a sentence of death in its "independent reweighing of aggravating and mitigating circumstances." *Id.* at 702.

C. State PCR proceedings relevant to Lee's IATC claim.

In PCR proceedings, appointed counsel Matt Newman raised, *inter alia*, claims that: Lee was denied his right to effective assistance of trial counsel ("IATC") where Politi failed to investigate mitigating circumstances in the penalty phase and failed to call a single live witness, and failed to obtain a meaningful psychiatric evaluation of Lee. 5-ER-1247-49, 1251-52. Newman attached affidavits of Lee's parents in support of the former claim, 5-ER-1267, 1268, which spoke to Lee's disadvantaged childhood, the 1999 report of a professor of psychology, Anne Herring, Ph.D., and the

report of a professor of neurology and psychology, Geoffrey Ahern, M.D., Ph.D., both of whom taught at the University of Arizona. 5-ER-1280-83, 1284-86. Both doctors diagnosed neurological impairments, with Dr. Herring also diagnosing cognitive weaknesses that caused Lee difficulty in modulating responses or showing mental flexibility when situations change and modification of response is indicated. She found that those infirmities may have caused Lee to suffer from poor impulse control, insecurity, distrust of others likely to contribute to Lee's ineffectiveness in interpersonal relationships and render him susceptible to poor judgment and violence. 5-ER-1283. Judge Irwin ordered an evidentiary hearing. 5-ER-1217.

D. Newman's diligence in attempting to secure a thorough social history prior to the evidentiary hearing.

1. The readiness and willingness of Roseann Schaye to perform the required mitigation investigation.

In anticipation of the hearing, PCR counsel sought to retain a mitigation specialist in order to demonstrate trial counsel's derelictions in failing to develop and present available mitigation on Lee's behalf at capital sentencing.

Mitigation specialists possess clinical and evidence gathering skills and training that most lawyers do not have. They have the time and ability to elicit sensitive, embarrassing and often humiliating evidence (*e.g.*, family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental, or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf.

The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior;

finds mitigating themes in the client's life history; identifies the need for expert assistance; assist in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.

Commentary to Guideline 4.1, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. 2003), *reprinted at* 31 Hofstra L. Rev. 913, 959 (2003). And, unless they are mere platitudes, the Court's statements about courts deferring to counsel's strategic decisions in a given case and not setting specific standards for the effective assistance of counsel should have been respected here,² where PCR counsel initially obtained pro bono services of mitigation specialist Roseann Schaye whom he then moved to have the PCR court appoint but was forced instead to settle for the court's preferred mitigation specialist, Mary Durand, who ultimately performed no mitigation investigation in the case whatsoever prior to a so-called state court evidentiary hearing.

Newman's selection of Ms. Schaye should have been respected by the PCR court. After all, Schaye had already performed pro bono mitigation investigation in the PCR case with the expectation that the court would formally appoint her.

² See *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984) ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."); *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (citing *Strickland*, 466 U.S. at 688-89); *Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("... the standard for judging counsel's representation is a most deferential one."). The Court made clear in *Martinez v. Ryan*, 566 U.S. 1 (2012), that *Strickland* applies when evaluating whether state post-conviction counsel has rendered ineffective assistance that would excuse the procedural default of a federal constitutional claim, as well as whether trial counsel rendered ineffective assistance.

Newman moved for her appointment in the Superior Court of La Paz County on March 21, 2000, to perform a thorough investigation of Lee's social history to determine whether Politi's pretrial mitigation investigation was deficient and whether Politi failed to uncover and present to his court-appointed mental health experts mitigation that might support Lee's IATC claims in the PCR petition. 5-ER-1218. Newman sought 700 hours for Schaye at \$70 per hour to perform the necessary investigation. Newman attached in support a declaration of Ms. Schaye, who averred:

I have extensive experience assisting counsel in capital trials and post-conviction proceedings, in determining the scope of investigation necessary for presentation of mitigation and other mental health claims, in developing evidence for penalty phase proceedings, and in providing mental health experts the kind of materials they routinely rely upon in their professions in order to offer reliable expert opinions.

5-ER-1220. Even prior to the court's consideration of the appointment motion, Ms. Schaye stated that she had already reviewed:

a limited amount of information concerning the offense with which [Lee] is charged, legal proceedings, and minimal information about his life history in order to determine what investigation should be undertaken to identify and develop evidence to support mental health related claims such as mental status at the time of the offense, competency, and mitigation. Investigation of matters related to these claims at this stage of the proceedings necessarily involves factual development.

5-ER-1220.

Ms. Schaye's review showed that no social and medical history had ever been done on Lee, and that such histories are necessary because "a competent mental health evaluation by psychiatrists, neurologists, psychologists, or social workers requires reliable and independently documented data about Lee." 5-ER-1221. Ms.

Schaye stated that “the investigation into Mr. Lee’s social history will necessarily include information about his family dynamics, culture, and patterns of behavior that were transmitted inter-generationally.” 5-ER-1221. She further averred that it was critical to determine the “the psychiatric and medical history of Mr. Lee’s biological family,” across several generations, to look for genetic vulnerabilities for any mental disorders. 5-ER-1221. To develop mitigation, she stated that “it will be necessary to conduct extensive interviews with Mr. Lee, to identify and interview family members and other who observed him over time and during critical periods, including physicians, mental health professionals, law enforcement officials, social service providers, teachers, neighbors, peers and clergy.” 5-ER-1222. Ms. Schaye set forth a comprehensive list of documentary evidence and records that must be collected with respect to Lee and his family to insure a reliable social history, including records of academic testing; employment; the family’s contact with social service agencies; medical and mental health providers; juvenile and adult criminal justice entities; and, reports of probation and parole personnel, including presentence reports. 5-ER-1222-24. Ms. Schaye averred that psychological and psychiatric records needed to be gathered, including records from community mental health clinics, doctors and hospitals, substance abuse facilities, “to include intake evaluations, treatment interventions, medication logs, physician and nurse progress notes and discharge reports.” 5-ER-1223-24.

As will be seen below, the Federal Public Defender’s mitigation investigation yielded compelling mitigation in all of the areas identified by Ms. Schaye, including

evidence that would render Lee ineligible for a sentence of death for his felony murder conviction based on his lacking a reckless disregard for human life under the Court's holding in *Tison v. Arizona*, 481 U.S. 137 (1987).

Ms. Schaye proposed a schedule in which the first three months of her contract would be devoted to developing Lee's social history through approximately 160 hours of interviews of Lee and his family. 5-ER-1224-25. Ms. Schaye proposed to use 320 hours to accumulate and analyze relevant records on Lee and his family, and a final 200 hours to read and analyze the data and to organize and summarize the life history documents for appropriate mental health experts. 5-ER-1224-25. Once she completed that phase, she would propose the number of hours required to complete her investigation of any new areas of investigation that might arise.

On April 17, 2000, Judge Irwin acknowledged, "My own experience with these mitigation experts and mitigation investigators is limited." 5-ER-1213. The court continued Newman's motion for funds for an investigator until it consulted with other judges, and it vacated the May 3, 2000, date it initially set for the evidentiary hearing. 5-ER-1089, 5-ER-1216.

At a hearing on July 20, 2000, the court indicated that it asked Newman to submit the names of other mitigation investigators because Lee was from Phoenix and not Tucson – where Ms. Schaye resided. The court rejected Ms. Schaye for the following reasons:

Your proposed specialist lived in Tucson and going to be charging us a substantial amount for travel and probably would be a lot of travel if she has to go to Phoenix all the time to do this research and work.

And I was hoping that you would give me some names of Maricopa County mitigation specialists to help us keep the cost down a bit.

Unfortunately the names you then submitted were people from all over the country, which would greatly increase the cost, which would have just the opposite effect of what I was trying to achieve here.

5-ER-1205. The court indicated that it contacted Jonathan Bass, a capital case attorney at the Superior Court of Maricopa County, who gave the court the names of Mary Durand and Lisa Christianson, and asked Newman to contact them "to keep the costs down." 5-ER-1205-06.

2. The court's selection of Mary Durand proved to be an abject disaster.

At a telephonic hearing on September 28, 2000, the court engaged Mary Durand as to her ability to serve as Lee's mitigation investigator. 5-ER-1198. The court prefaced its questions by reporting that Durand had informed the court's assistant that she was busy and might not have sufficient time to devote to Lee's case. Durand said she was employed by the Superior Court of Maricopa County as coordinator of mitigation services, that she was working on 15 death penalty cases, she was extremely busy, and "it's difficult to give you an absolute in terms of what details and what hours and that I can get the information that is, of course, most necessary for you to make your decision." 5-ER-1198. Durand stated that she could begin work in the following two weeks but, until she assessed the case, it was "undeterminable" how much time she would need. 5-ER-1199. She outlined the work consistently with what Ms. Schaye had proposed:

The very first thing that would be required is gather every document that we can about Darrel Lee and Darrel Lee's family and life history so

we can begin to develop a pattern and have some information about any kind of mitigation information that might come out of school records, military, health, employment, housing, those kinds of things; and once I get those kinds of records, and have had an opportunity to spend time with Mr. Lee and develop what is actually existent, then it really is a whole lot easier to tell you who we would need in terms of experts and what it would take to complete.

5-ER-1199.

She told the court that until she knew the range of issues, she could not tell the court how much time she needed, but she has had cases that she completed in “less than a year . . . and some that have taken a few years.” 5-ER-1199. The court appointed Durand. 5-ER-1202-03.

At a status hearing three months later, on December 18, 2000, the court again inquired as to the status of the mitigation investigation. 5-ER-1192. Newman said he delivered “four or five big bankers boxes” to Durand’s home. Newman told the court that Durand was organizing the files and making witness lists, and that Durand was planning on a first interview with Lee at the state prison. 5-ER-1193.

At a subsequent status hearing on February 26, 2001, Newman told the court Durand has completed much of the document gathering, with some exceptions, and was preparing a “plan of attack” with respect to scheduling witness interviews. 5-ER-1187. Newman believed Durand to have 15 witnesses to interview and thought that might take three to six months. 5-ER-1188. In response to the State’s question about when a report from the defense psychiatrist, Barry Morenz, M.D., might be completed, Newman indicated that Durand asked that Dr. Morenz’s report be delayed

until after Durand completed her social history investigation on Lee. 5-ER-1190. The court ordered an additional status conference in 60 days. 5-ER-1190.

At a status conference of April 30, 2001, which was not attended by Durand, Newman informed the court that Durand had been hospitalized “two or three times in the past couple of months,” which caused the court to inquire “is her situation such that we ought to looking at a replacement or she’s going to be available in the future to complete the job.” 5-ER-1182. Newman explained that Durand became allergic to her house, which had been sold, that she moved in with another family member, hired a graduate student to help her, continued to work on 13-14 death penalty cases and hoped to continue the work. 5-ER-1182-83. The court and parties agreed to a short date for an additional conference. 5-ER-1184.

At a status conference on May 8, 2001, Durand reported by phone that that she had pneumonia five times since September 2000, due to mold in her home but that she had moved away from the source and felt better. Durand acknowledged that the delay had been “my health’s fault. No one else’s.” 5-ER-1175-76. Durand stated that she had interviews yet to complete and would have to confer with Newman about producing the information to mental health experts. Judge Irwin apprised the parties that he was retiring at the end of June and that a retired judge would likely be called to take over the case. 5-ER-1177. Durand said at least ten more interviews needed to be done. 5-ER-1177. On June 25, 2001, at Judge Irwin’s final status conference before retirement, Durand indicated that Lee’s parents had been interviewed, other

witnesses had been located outside of Phoenix but not yet interviewed, and records were slow in coming in. 5-ER-1170-71.

On September 19, 2001, the substitute judge, Richard Schafer, filed an order setting the evidentiary hearing for November 14-16, 2001. 5-ER-1112. Newman reported that Durand's illness and heavy mitigation workload, which sat around 29 mitigation cases, delayed her work and she required another three to four months to finish her mitigation investigation. 5-ER-1154-55. In light of the court's setting the hearing for November, Judge Schafer indicated that Newman had "two strikes against [him] in getting a continuance." 5-ER-1160. The court vacated the November hearing and reset the matter for January 2002. 5-ER-1167.

On October 23, 2001, Newman moved to continue the hearing to April 2002. 5-ER-1121. Newman represented to the court that Durand had not yet completed her work and the defense psychiatrist, Dr. Morenz, indicated that he needed Durand's social history of Lee before he could perform his final interview of Lee and draft his report. 5-ER-1122. In an order of November 13, 2001, Judge Schafer denied the request for continuance and motions for additional paralegal and investigative services to assist Durand. 5-ER-1128-29.

On December 5, 2001, Newman filed in the Arizona Supreme Court a Petition for Special Action and Application for Interlocutory Stay of Proceedings, 5-ER-1068, in an effort to continue the evidentiary hearing until Durand completed her mitigation investigation. 5-ER-1074. On December 12, 2001, the Arizona Supreme Court filed an order staying the evidentiary hearing until April 16, 2002. 5-ER-1067.

E. The state PCR evidentiary hearing.

At the outset of the hearing on April 16, 2002, Newman moved to continue the hearing because Durand failed to perform the social history of Lee required to support the IATC claim based on Politi's failure to investigate and present mitigating evidence, citing Durand's multiple sclerosis, her lack of resources and overwork. 3-ER-650. Critically, Newman conceded that he could not prove deficient performance on the part of Lee's trial counsel, nor could he prove deficient performance or prejudice under *Strickland* in the absence of Durand's social history investigation. 3-ER-656. Newman argued:

If Politi gets on the stand and says I did everything just fine and I made strategic conditions (sic), there was nothing out there. I can't rebut that with anything because Ms. Durand didn't go look.

3-ER-657.

The court denied the request. 3-ER-657.

Durand testified at the PCR evidentiary hearing on April 17, 2002, that she remained employed as the part-time Coordinator of the Office of Mitigation Services for the Maricopa County courts. 4-ER-851. She had told Judge Irwin that she could not work full-time on the mitigation investigation in Lee's case because "none of her outlying county cases are full-time ventures because I have a part-time job." 4-ER-857-58. Even as she testified at the hearing, she was working on mitigation investigation in some 30 death penalty cases in seven Arizona counties, each one requiring 500 to 1,000 hours and taking one to one and one-half years to complete. 4-ER-853-55.

Durand testified that, although she was appointed by the court in October 2000, one and one-half years earlier, she was not able to perform the relevant document collection and locate and interview mitigation witnesses in Lee's case due to her heavy caseload and Maricopa County employment. 4-ER-858. The superior court's denial of Newman's motions for appointment of a paralegal who could gather records and an investigator who could perform interviews were denied and, due to Durand's workload, she could simply not do the work in Lee's case. 4-ER-855-57. She testified Lee would not get a full and fair determination in the PCR proceeding because she lacked adequate resources to investigate mitigation. 4-ER-858. Durand testified she was "not prepared to provide or present mitigation evidence because I can't confirm or deny what exists or does not exist." 4-ER-858-59. She testified that trial counsel Politi's mitigation investigation was deficient because he failed to move for appointment of a mitigation specialist and a review of his files showed the presence of virtually none of the relevant mitigation documents he should have gathered. 4-ER-861. In the absence of the gathering of relevant mitigation documents, Politi's expert could not adequately evaluate Lee. 4-ER-862.

On cross-examination, Durand testified, "I have presented nothing to Judge Schafer." 4-ER-848. She agreed with the attorney general that her work on this case was "grossly inadequate." 4-ER-884.

Dr. Morenz testified that he evaluated Lee in September 2000 and March 2002, and prepared a report prior to the evidentiary hearing. Dr. Morenz testified that Durand's social history was promised to him prior to the PCR hearing but it was

never provided. 4-ER-954. Dr. Morenz would later submit a Supplemental Psychiatric Evaluation, dated August 24, 2015, to the Federal Public Defender, 2-ER-277, in support of the IATC claim in the litigation pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), where he indicated that his March 2002 report and May 21, 2002, hearing testimony needed to be revised in light of a social history report of Lee that was finally performed by Jan Dowling. See 2-ER-340. Among other things, Dr. Morenz testified that he would not have found Lee to have suffered from the highly-aggravated diagnosis of Antisocial Personality Disorder, 4-ER-962-66, which he reported afflicted Lee in the absence of Lee's social history. 2-ER-277.

Politi testified that he relied on Lee's parents to gather records. 3-ER-698-99. He also retained an addiction medicine expert, Anatolio Muñoz, M.D., 5-ER-1269, but abandoned that strategy when Dr. Muñoz refused to fly in a small plane from Lake Havasu, Arizona, to rural Parker, Arizona, to evaluate Lee. 3-ER-744. He settled on Maricopa County Jail psychiatrist Leonard García-Buñuel, whose sentencing report also suffered from the absence of a social history that would have informed that doctor's opinions as to Lee's mental functioning at the time of the offenses.

The PCR court denied relief on May 13, 2003, 1-ER-133, finding no deficient performance in Politi's mitigation investigation because he "talked to Lee about his background, his parents, his drug use, he spoke to Lee's parents, his ex-wife, his brothers and sisters about his background, he instructed his investigator to search through Lee's medical records and school records, he had some things viewed by a mitigation expert, and he hired a doctor so he could present the results at sentencing.

1-ER-134. In fact, Lee has only one brother and sister, both of whom averred that Politi never spoke with them. *See* 2-ER-302; 2-ER-333. The court concluded:

[P]resent counsel showed me nothing at the Rule 32 hearing that Politi could have presented. That is due, he says, to the fact that his investigator was not given the time or money to search. I disagree; his investigator was on the case for 18 months and produced nothing and could not point to anything that was worth the court's money. I find from the evidence I heard that any lack of mitigation was due more to the fact that there was none, rather than Politi's lassitude or incompetence.

1-ER-134. That conclusion is belied by evidence unearthed by federal habeas counsel and attached to Lee's Supplemental *Martinez* Brief.

F. Federal habeas corpus proceedings.

Lee filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on November 29, 2004. *Lee v. Schriro*, No. CV-04-0039-MHM (D. Ariz. Nov. 29, 2004). In a procedural order on September 29, 2006, the district court denied Lee's request to expand the record and for an evidentiary hearing with respect to his IATC claim under the Sixth and Fourteenth Amendments based on Politi's failure to investigate and present social history and mental health evidence, because PCR counsel Matt Newman lacked diligence under *Williams v. Taylor*, 529 U.S. 420, 432 (2000), and 28 U.S.C. § 2254(e)(2). 1-ER-129. The court granted a certificate of appealability as to this claim in its Memorandum of Decision and Order, 1-ER-98.

The Ninth Circuit stayed the appeal to permit Lee to return to the district due to this Court's intervening decision in *Martinez*, 566 U.S. 1, to prove the ineffective assistance of PCR counsel that would excuse the procedural default of the present IATC claim, its new supporting facts, and his entitlement to relief on that claim.

Order, *Lee v. Ryan*, No. 10-99022 (Ninth Cir. Dec. 2, 2014), ECF No. 109. The district court admitted Lee's new facts but again found the IATC claim to be defaulted, 1-ER-7 (Apr. 9, 2019), and denied Lee's Motion for Reconsideration of that order. 1-ER-2 (May 1, 2019). The Ninth Circuit stayed the appeal due to an intervening decision of this Court, to wit, *Shinn v. Ramirez*, 596 U.S. 366 (2022), and ordered the parties to file replacement briefs. Order, *Lee v. Ryan*, No. 10-99022 (Ninth Cir. Jul. 18, 2022), ECF 87. On July 24, 2024, the Ninth Circuit affirmed the denial of habeas corpus relief. *Lee v. Ryan*, App. A. The court denied Lee's petition for panel rehearing and petition for rehearing en banc. Order, *Lee v. Ryan*, No. 10-99022 (Ninth Cir. Nov. 20, 2024), ECF No. 127.

In this Petition for Writ of Certiorari, Lee challenges the Ninth Circuit's affirmance of the denial of federal habeas relief in its opinion of opinion of July 24, 2024. App. A.

REASONS FOR GRANTING THE WRIT

At the outset of its opinion, the Ninth Circuit ruled that Lee failed to develop the factual basis of his IATC/mitigation claim in state court, which necessarily meant that the district court correctly applied federal law when it denied Lee's request for an evidentiary hearing. *Lee v. Thornell*, App. A-5-6. The court later explained that it is 28 U.S.C. § 2254(e)(2) that bars an evidentiary hearing in federal court if a petitioner "has failed to develop the factual basis of a claim in State court proceedings." App. A-21.

The court ruled that Lee’s PCR counsel failed to develop the factual basis for this claim and the district court correctly applied § 2254(e)(2) in denying Lee an evidentiary hearing. *Id.* at 1161-62. The court further ruled that Newman “had a duty to supervise [Mary Durand] and take corrective action in response to her failures.” App. A-23. The court ruled based solely on the record developed at the state court evidentiary hearing that the PCR court’s decision was not unreasonable in finding trial counsel Politi not to have performed deficiently and that Lee was not prejudiced. App. A-24-26.

A. The Ninth Circuit violated the rule of *Williams v. Taylor* where it failed to acknowledge that Newman’s diligent efforts were “thwarted by the conduct of another or by happenstance,” and, as a result, Lee was denied a full and fair hearing in state court.

Rule 10 of this Court explains that one compelling basis upon which a petitioner may rely in seeking 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 the Court”

As the Court noted in *Williams*, diligence with respect to the opening clause of 28 U.S.C. § 2254(e)(2) “depends on whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court” 529 U.S. at 435. PCR counsel Newman made a reasonable attempt, in light of information he knew to have gone uninvestigated by trial counsel Politi to “investigate and pursue claims in state court,” including the present IATC claim for which Newman satisfied the requirements for obtaining an evidentiary hearing in state court. Having done that, Newman secured the preliminary *pro bono* efforts of

Tucson mitigation specialist Roseann Schaye to conduct a thorough social history investigation that Newman repeatedly assured both PCR judges, Irwin and Schaefer, was critical to proving Lee's IATC claim. Schaye was prepared to do the work at that time. So, consistent with the Court's pronouncement in *Williams*, the lower federal courts here erred in denying Lee the opportunity to present new facts in support of his claim that he was denied the effective assistance of trial counsel ("IATC") at capital sentencing due to "the conduct of another or by happenstance." *Williams*, 529 U.S. at 432. "Fault lies, in those circumstances, either with the person who interfered with the accomplishment of the act or with no one at all." *Id.* As such, Lee was not given a "full and fair hearing" in state court, *id.* at 437, and that was not due to Newman's lack of diligence. He was entitled to an evidentiary hearing in federal court. *See Townsend v. Sain*, 372 U.S. 293, 313 (1963). The Ninth Circuit failed even to mention this explanation of "failure" in *Williams*. The Court should grant certiorari to remedy the paucity of decisional law in the circuits on the meaning of "conduct of another or by happenstance."

What is clear is that Judge Irwin and Newman sought to cede the mitigation investigation to a qualified mitigation specialist, for at no point did Judge Irwin suggest, in the midst of Durand's medical meltdown, that Newman stop his trial preparation and pause his law practice in a small rural county to shift gears and assume responsibility for the required mitigation investigation that would take place with witness interviews largely in Phoenix, where Lee grew up and resided for all of his life, and provide the results of that investigation to Dr. Morenz, a psychiatry

professor at the University of Arizona College of Medicine in Tucson and a clinician. See Dr. Morenz's addendum, 2-ER-180-82; Supplemental Psychiatric Evaluation, 2-ER-277-87.

It is critical to note that Judge Schaefer, once he took over for Judge Irwin, also failed to suggest to Newman that he assume responsibility for the mitigation investigation. At the hearing on September 28, 2001, Judge Schaefer merely noted that he proposed a hearing date in November 2001 and that he was "not inclined, at this point, to give *Ms. Durand* much more time after that to complete what she's doing." 5-ER-1157 (emphasis added). He further focused only on *Ms. Durand* later at that hearing, where he stated the hearing would occur in December 2001 or January 2002, stating, "*Ms. Durand* will have to get her work done before that hearing." 5-ER-1166 (emphasis added).

Newman's own mitigation investigation would have included a social history investigation that lawyers have no particular skills to perform. See *United States v. Kreutzer*, 61 M.J. 293, 302 (C.A.A.F. 2005). The *Kreutzer* Court quoted the Commentary to Guideline 4.1 of the *American Bar Association Guidelines for the Appointment and Performance Defense Counsel in Death Penalty Cases* (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 959 (2003), for the proposition, *inter alia*, that "[m]itigation specialists possess clinical and information gathering skills and training that most lawyers simply do not have." Newman argued on the first day of the evidentiary hearing that the matter should be continued until Durand performed her mitigation investigation. Newman conceded that he was ill-equipped to perform

the required investigation, stating, “I don’t know if [mitigation] is there. *I’m not an investigator*. I don’t know.” 3-ER-656-57 (emphasis added).

A mitigation investigation by Newman, like those proposed by Schaye and Durand, could have taken 700 hours to perform. Newman was paid \$100 per hour by La Paz County. See Motion for Compensation, *State v. Lee*, No. CR-92-01-13 (La Paz Cty. Super. Ct. Jul. 20, 1999). On the other hand, Schaye averred that she billed at a rate of \$70 per hour and only \$50 per hour for her travel time. 5-ER-1224. So, Schaye, who had already performed *pro bono* investigation in this case, prior to Newman seeking her appointment and who was prepared to start work immediately, at most, would have billed La Paz County \$49,000 while Newman, wearing both the hat of counsel and that of investigator would have billed the county some \$70,000 for mitigation investigation in addition to what he billed as appointed counsel for Lee. Schaye’s and Durand’s estimates of the time required to perform the mitigation investigation, “500, 750, to a thousand hours” were consistent with one another. 4-ER-854. Of course the matter would have proceeded to hearing a year or more earlier had Judge Irwin appointed Schaye to perform the mitigation investigation and an Arizona death row prisoner might have avoided execution, especially given Lee’s claim of innocence of the death penalty based on his having not acted with “reckless disregard of human life” under *Tison v. Arizona*, 481 U.S. 1337 (1987).

Judge Irwin presided at the guilt phase and bench sentencing. He understood well how limited Politi’s mitigation presentation was – summarized by Newman to have consisted of “an hour and fifty minutes of court time with no live witnesses.” 5-

ER-1209. Judge Irwin denied Newman's request for Schaye's appointment, which was made after Newman consulted with the Arizona Capital Representation Project. 5-ER-1207. Newman acted diligently in recommending two additional mitigation specialists to Judge Irwin after again seeking input from the Arizona Capital Representation Project, but the judge denied those requests as well. 5-ER-1205-07. Judge Irwin conceded that he had never presided over a death penalty case and knew little about the appointment and performance of mitigation specialists in capital cases. 5-ER-1213-14.

Judge Irwin and PCR counsel Newman sought to save Judge Irwin's appointment of Durand even after it became apparent that her health issues and overwork prevented an expeditious investigation of mitigation. At a status conference on April 30, 2001, Judge Irwin asked Newman, "Well, is her situation such that we ought to be looking at a replacement or she's going to be available in the future to complete the job?" 5-ER-1182. Judge Irwin indicated that the choices for replacement were limited and that a new mitigation specialist would spend time re-doing what had been accomplished to that point. 5-ER-1183-84.

Judge Schaefer denied Newman's request to extend the January 2002 hearing date to April and, when Judge Schaefer denied the request, Newman took the extraordinary step of asking the Arizona Supreme Court to intervene, which it did in moving the evidentiary hearing to April 2002. 5-ER-1067.

The conduct of both Judge Schaefer and Mary Durand constitutes "conduct of another" under *Williams* that should have compelled the Ninth Circuit and district

court to order an evidentiary hearing. Moreover, Durand's debilitating illness can only be described as "happenstance" and not attributed to Newman under *Williams*, 529 U.S. at 432.

B. Reversal of the Ninth Circuit's decision is required.

Trial counsel Politi was on the right track when he sought to have Lee evaluated by addiction medicine specialist Anatolio Muñoz, M.D. However, Politi abandoned that effort, and his mitigation investigation was rendered deficient under *Strickland* when he learned that Muñoz would not fly on a small plane to Lake Havasu for the drive to evaluate Lee at the La Paz County Jail in Parker, Arizona. Reasonably competent counsel would have investigated other ways to get Dr. Muñoz to Parker for the evaluation. In the absence of an addiction medicine evaluation, neither the state PCR court nor the lower federal courts could determine that there was no *Strickland* deficient performance by Politi or prejudice to Lee from Politi's failure to have the appropriate expert evaluate Lee.

Murray Smith, M.D., a superbly-credentialed addiction medicine doctor, found that Lee suffered from two "brain function pathologic processes" at the time of carjacking of John Anderson. Cocaine Withdrawal Syndrome, marked by the dysphoria and craving attendant to the "hijacking" of Lee's brain chemistry, was the *raison de'être* for the carjacking and kidnaping. 2-ER-273-74. Lee's acts were not the product of a recreational drug user, but nothing admitted at sentencing apprised the court of the distinction.

As Dr. Smith explained:

Cocaine causes physical changes in the Ventral Tegmental Area and Nucleus Accumbens circuit of the brain. This is commonly called the pleasure and reward circuit. Cocaine changes the brain by blocking neuron reuptake (recycling) of the neurotransmitter chemical dopamine from the synaptic space. The result of the re-uptake block is a flooding of the synaptic receptors with dopamine and a profound feeling of pleasure, energy, and zest for life.

When cocaine is used daily or almost daily for several days or weeks, the changes in the brain and its function become more severe. In that state, within a few hours, the absence of more cocaine produces a distinct form of neurochemical brain dysfunction known as Cocaine Withdrawal Syndrome. This withdrawal syndrome, which results from the physical and functional alteration of the brain, is characterized by the person craving more cocaine, anhedonia, anxiety, and decreased energy. In addition, the brain changes and associated brain malfunction are associated with fatigue, difficulty in concentration, difficulty in planning, severely impaired judgment and decision-making, as well as impaired ability to foresee or appreciate consequences of one's own actions, or actions of others.

2-ER-265-66.

With respect to Lee, Dr. Smith reported:

The first brain function pathologic process present in Mr. Lee occurred because he was without cocaine for several hours on that morning [of the carjacking]. As a result of the deranged brain chemistry, and associated brain dysfunction caused by Cocaine Withdrawal Syndrome, Mr. Lee suffered from significant impairments in his judgment and decision making. His ability to foresee or appreciate any possible consequences of his actions and also the actions of Ms. Thompson during the offenses was severely impaired. Mr. Lee was driven during his Cocaine Withdrawal Syndrome during that morning by an irresistible urge to get a means to obtain cocaine and his capacity to conform his conduct to the requirements of law was significantly impaired. The brain dysfunction of the Cocaine Withdrawal Syndrome resulted in Mr. Lee being unable to appreciate that the actions to obtain the means to obtain cocaine might result in the taking of a life. Additionally, violence had not been a pattern in Mr. Lee's behavior previously.

2-ER-273-74.

Dr. Smith made the further diagnosis:

The second pathologic brain process began when Mr. Lee began progressive intoxication with alcohol and cocaine as he and Ms. Thompson continued with the kidnapping and robbery of Mr. Anderson over a period of hours. The deranged brain chemistry and associated brain dysfunction predictably increased Mr. Lee's impulsive actions and impaired his perceptions, judgment, and decision making. He became increasingly paranoid and more susceptible to the influence of Ms. Thompson's directions. A fair description of the relationship at that point would be to say that Darrel was a puppet in her hands. I can conclude to a medical certainty that Darrel Lee's state of severe alcohol and cocaine intoxication, with brain chemistry changes and brain dysfunction at the time of the murder of Mr. Anderson, resulted in actions by him that reflected his inability to conform his conduct to the requirements of law and differed from his previous nonviolent pattern of behavior. I also conclude that Darrel Lee would not have had a subjective appreciation that his actions would have had lethal consequences for Mr. Anderson.

2-ER-274. Thus Dr. Smith's opinions would have supported the statutory mitigating factor under A.R.S. § 13-703(G)(1) that Lee could not conform his conduct to the requirements of law. Dr. Smith would also have found that Lee did not possess a subjective appreciation that lethal force would be employed against Mr. Anderson, thereby rendering Mr. Lee, a felony murderer, ineligible for a sentence of death because he did not exhibit a reckless disregard for human life under the Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987). Had a thorough social history of Lee been performed and produced to Dr. Smith, and had his opinions been elicited at capital sentencing, there is a reasonable probability that Judge Irwin would not have imposed the death penalty.

Facts contained in Lee's social history were independently mitigating. Larry Lee, Darrel's brother who then served as a Maricopa County Sheriff's deputy, averred that "drugs and alcohol turned [Darrel] into a completely different person." 2-ER-

338. His “behaviors were erratic and irrational.” 2-ER-338. His brother-in-law Carl Carter averred that “[i] was unbelievable to see the changes in Darrel.” 2-ER-330. His sister June averred that the cocaine caused him to “look unhealthy” because he lost weight and was sleep deprived. 2-ER-313. She found him in the cold on her porch curled up in the fetal position, shaking, out of his mind from the drug use, scared and merely wanting to go home. 2-ER-314. June and Carl sent Lee to the Local Area Recovery Center (“LARC”) just weeks before the carjacking to receive treatment for abscesses that developed due to intravenous drug use. 2-ER-313, 2-ER-330.

Contrary to the decisions of the federal courts below, the opinions of Dr. Leonardo García-Buñuel, the jail psychiatrist retained by Politi, were inadequate because his evaluation, according to Dr. Smith, “was not informed by a thorough social history that is part and parcel of a physician’s evaluation of a patient, whether he is an expert in addiction medicine or psychiatry.” 2-ER-273.

Had Lee’s social history been unearthed, and had it been produced to Dr. Smith and Dr. Morenz, those doctors have averred they would have diagnosed depression, perhaps chronic depression, due to an abusive and chaotic childhood that led Lee to self-medicate first with alcohol and, later, with cocaine. 2-ER-275; 2-ER-277, 285. This Court has noted that clinically diagnosed depression constitutes mitigation. *See Brewer v. Quarterman*, 550 U.S. 286, 289 (2007).

Also, had a thorough social history been performed, multiple family members reported that Lee’s depression deepened and virtually consumed him after the death

of his younger brother, Tad Lee, on October 9, 1981. 2-ER-418; 2-ER-327; 2-ER-336. Tad, then 15, was shot and killed by a woman during a burglary in which he entered her residence understanding that marijuana was present on the premises. Darrel Lee, then 24, and his sister June took Tad's death particularly hard because, due to their example, Tad thought smoking pot was okay. 2-ER-311.

Moreover, Dr. García-Buñuel's report was rife with factual errors, including that it was Darrel Lee who was 15 when 25-year-old Tad was shot and killed, 2-ER-275, depriving that tragic incident of much of its mitigating effect. Politi should have performed sufficient quality control over Dr. García-Buñuel's reporting to recognize those errors and to correct them. He did not.

Dr. Smith was critical of Dr. García-Buñuel, averring that

[w]ithout that social history, Dr. García-Buñuel was not aware of the extent of Darrel Lee's history of poly-substance abuse. Dr. García-Buñuel also did not recognize or diagnose Cocaine Withdrawal Syndrome, which Darrel Lee suffered at the inception of the kidnapping, and the severity of the effects of cocaine intoxication Mr. Lee suffered after Ms. Thompson used Mr. Anderson's ATM cards to get money with which to purchase cocaine.

2-ER-273.

Trial counsel Politi also failed to mitigate Lee's 1987 armed robbery conviction that was admitted as a statutory aggravating factor under A.R.S. § 13-703(F)(2). This Court has held that the failure to investigate and mitigate a prior conviction used to aggravate the sentence imposed for capital murder constitutes deficient performance and, if prejudice is shown, ineffective assistance of counsel. *Rompilla v. Beard*, 545 U.S. 374, 393 (2005). That is particularly so where the prosecution has placed defense

counsel on notice that it intends to introduce the prior conviction as aggravation at sentencing. *Id.* at 383. The evidence would have been mitigating because, as this Court noted in *Rompilla*, alcohol intoxication diminishes a defendant's blameworthiness. *Id.* at 378.

Politi knew the prosecution would admit Lee's 1987 conviction as statutory aggravation because the prosecution filed a pretrial notice on November 30, 1991, saying that it would. 5-ER-1338. At the aggravation/mitigation hearing on February 10, 1993, the prosecution filed "self-authenticated documents" to prove the conviction. 7-ER-1635; 7-ER-1649; 6-ER-1585, 1597.

Despite the prosecution's notice, Politi never investigated Lee's 1987 conviction. The records were readily available at the La Paz County Superior Court. 2-ER-393-416. Had he done so, Politi would have known that Lee voluntarily admitted himself to a Phoenix hospital prior to the armed robbery event because he was suffering from alcohol withdrawal. 3-ER-469. He was diagnosed with Alcohol Dependency Syndrome and treated with valium and other medications for his withdrawal symptoms. On September 8, 1987, he checked out of the hospital. 3-ER-471-72.

On September 20, 1987, Lee sought to check into LARC. He was kept overnight, fed and hydrated but not admitted as an inpatient because he had earlier withdrawn from LARC without completing a rehab program there. 2-ER-269. Just after leaving LARC on the morning of September 21, 1987, Lee was seen staggering drunk in a Phoenix roadway near Sky Harbor Airport by his brother, Larry Lee, a

Maricopa County Sheriff's deputy. 2-ER-337. Larry was on duty and could not pick up Darrel but he ordered him out of the roadway. Deputy Lee believed Darrel was still drunk from the night before when he was picked up by LARC and taken to the recovery center. 2-ER-337-38.

Several hours later, at 2:25 p.m., Lee approached Robert Eadie in his 1986 Chevy Suburban, pretended to have a weapon, and ordered him out of his vehicle. 3-ER-515. Eadie saw Lee drive away. Ten minutes later, police spotted the Suburban in a grocery store parking lot near Lee's parents' house, where Lee resided. 3-ER-217-18. The probation officer reported that Lee could not recall the incident because he was inebriated from "drinking heavily that morning." 2-ER-395-96. The probation officer further reported that Lee "appear[ed] genuinely remorseful for his actions but is powerless to control his drinking." 2-ER-399.

Dr. Smith reported in federal habeas that the sentencing court would not have been aware from Dr. García-Buñuel's pretrial evaluation of Lee that Lee attempted to check himself into LARC on September 21, 1987, but was turned away and that the F(2) statutory aggravating factor "was not adequately evaluated regarding the degree of mitigation Mr. Lee's alcohol intoxication caused in defective perceptions, judgment, decisions and behavior exhibited by him surrounding the events of that felony." 2-ER-274.

Politi's failure to perform or secure a thorough social history on Lee, and produce that history to an addiction medicine specialist constituted deficient performance under *Strickland*. Had Politi developed evidence of Cocaine Withdrawal

Syndrome and progressive alcohol and cocaine intoxication at the time of the carjacking and capital offense, chronic depression that led Lee to self-medicate in his teenage years with alcohol and, later, with cocaine, and Lee's alcohol toxicity at the time of the 1987 armed robbery of Mr. Eadie, there is a reasonable probability that the trial court would not have imposed a sentence of death.

CONCLUSION

For the foregoing reasons, Darrel Lee respectfully requests that the Court grant certiorari in his capital federal habeas corpus case and reverse the decision of the Ninth Circuit. App. A. In the alternative Lee requests that the Court vacate the Ninth Circuit's decision and remand for application of *Williams*, 529 U.S. at 432.

Respectfully submitted:

April 11, 2025

Jon M. Sands
Federal Public Defender
District of Arizona
Timothy M. Gabrielsen
(Illinois ARDC No. 6187040)
Assistant Federal Public Defender
407 West Congress Street, Suite 501
Tucson, Arizona 85701
Tel. (520) 405-9176
Email: tim_gabrielsen@fd.org

s/ Timothy M. Gabrielsen
Counsel for Petition Darrel Eston Lee

**Counsel of Record*