No. 24–6989

In the Supreme Court of the United States

DARREL ESTON LEE,
Petitioner,

v.

RYAN THORNELL, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit correctly determine that Lee was not diligent in developing his claim of ineffective assistance of counsel in state court?

2. Does Lee's new evidence entitle him to relief?

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INTRODUCTION

In 1991, Petitioner Darrel Lee and Karen Thompson kidnapped 57-year-old John Anderson and drove him around in his car for several hours as they used his ATM and credit cards to buy alcohol and drugs. For most of the time, Anderson was in the trunk of the car. As they drove, Lee and Thompson discussed how to kill Anderson. Eventually, Anderson was able to escape the trunk after Lee and Anderson had stopped to use drugs. Lee chased Anderson down and attempted to strangle him with a belt. When the belt broke, Lee held Anderson down while Thompson hit him in the head with a rock, killing him. The pair then buried Lee in a shallow grave.

Thompson entered into a plea agreement that required her to testify truthfully at Lee's trial. Lee turned down a similar plea offer. A jury convicted Lee and the trial judge sentenced him to death. The Arizona Supreme Court affirmed after conducting an independent review.

STATEMENT OF THE CASE

The Arizona Supreme Court set forth the facts underlying Petitioner Darrel Lee's crimes in its opinion affirming Lee's convictions and death sentence:

> On December 5, 1991, defendant Darrel E. Lee and a companion, Karen Thompson, approached 57-year-old John Anderson as he was leaving a Phoenix medical clinic and asked him for a ride. When Anderson agreed, they got into his car. Although unarmed, Lee announced that he had a gun and directed Anderson to drive south on the freeway. When they arrived in Chandler, Thompson demanded Anderson's wallet, which contained a small amount of cash, some credit cards, and an automatic teller machine (ATM) card. Thompson, accompanied by defendant, used the ATM and credit cards repeatedly throughout the next five days, both before and after Anderson's murder.
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> At some point, defendant suggested that they tie up Anderson and dump him alongside the road. After binding his hands and feet and placing him in a ditch, however, the couple decided not to leave him there. Instead, they put him in the trunk of the car. During most of this time, Anderson was pleading for his life.
>
> Defendant and Thompson drove back to Phoenix and then toward California, stopping frequently to use cocaine and alcohol. They eventually decided to kill Anderson to avoid apprehension. Defendant stated that he would asphyxiate Anderson with the car's exhaust fumes and obtained a hose for this purpose. The couple discussed the anticipated killing as they continued their journey. Approximately eight hours after placing Anderson in the trunk, defendant and Thompson turned back toward Phoenix.
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> Anderson somehow managed to get untied and pry open the trunk of the car. He found a windshield sun screen reading "NEED HELP; CALL POLICE," and held it out of the vehicle. Two men in another car saw the sign and the frightened victim and called the police at the first available telephone. At approximately 11:45 p.m., two officers responded to the call. Because of darkness and rugged terrain in the area, however, they were able to conduct only a rudimentary search.
>
> Meanwhile, defendant had exited the interstate highway and stopped the car at about 10:30 p.m. He and Thompson attempted to suffocate Anderson with car fumes by running the hose from the exhaust pipe into the trunk, but were unsuccessful because Anderson

> kept pushing up the trunk lid. During a pause in which the couple used more cocaine and discussed the situation, the victim escaped from the trunk and attempted to flee. Defendant chased Anderson and wrestled him to the ground. Thompson then brought defendant a belt, with which he attempted to strangle Anderson. The belt broke, and defendant yelled for Thompson to get a rock. As defendant choked Anderson with his hands, Thompson hit the victim in the head with the rock, fracturing his skull.
>
> Defendant and Thompson placed the body in the trunk of the car. After driving to California, and then back to Phoenix, the couple eventually went to Tucson. There, they purchased a shovel and buried Anderson in a shallow grave outside the city.

State v. Lee (*Lee I*), 917 P.2d 692, 695 (Ariz. 1996).

Both Lee and Thompson were charged with first-degree murder, kidnapping, theft, armed robbery, and credit card theft. *Id.* at 696. Thompson entered into a plea agreement that required her to testify truthfully at Lee's trial.[1] *Id.* Lee was convicted on all counts. *Id.* The trial court found three aggravating circumstances: Lee had a prior felony conviction (A.R.S. § 13–703(F)(2)); Lee had participated in the murder for pecuniary gain (A.R.S. § 13–703(F)(5)); and the murder was committed in an especially cruel manner (A.R.S. § 13–703(F)(6)).[2] *Id.* The court found that Lee proved the following mitigating factors, but that they were not sufficiently substantial to call for leniency: (1) Lee was remorseful; (2) Lee admitted his guilt (but only after being convicted); (3) Lee lacked education and had a low

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[1] Lee was offered a plea similar to Thompson's and at one point signed the agreement. He backed out of the agreement before the change of plea hearing. *See* App. D (4/19/09 Ruling), at 2.

[2] Respondents cite the provisions in effect at the time of Lee's crimes. The aggravating factors are currently found in A.R.S. § 13-751(F). In 2019, the Arizona Legislature amended A.R.S. § 13-751(F) to eliminate some aggravators and redefine others.

level of intelligence; (4) Lee had strong family support; (5) Lee was a "follower" by nature; (6) Thompson had received a life sentence; and (7) the prosecutor had recommended against the death penalty. *Id.* The court also found that Lee was under the influence of cocaine at the time of the murder, but that he was able to appreciate the wrongfulness of his conduct and could "conform his conduct to legal requirements." *Id.* at 701. The Arizona Supreme Court affirmed Lee's convictions and death sentence after its independent review. *Id.* at 702.

After exhausting his state remedies, Lee filed an amended federal habeas petition on November 29, 2004. The district court issued a procedural ruling finding several claims procedurally defaulted. The court also denied Lee's requests for discovery, expansion of the record, and an evidentiary hearing. After considering the merits of the remaining claims, the court denied relief and granted a certificate of appealability on three of Lee's claims of ineffective assistance of trial counsel (Claims 9-A, 9-B, and 9-D). App. C, at 78.[3]

Lee filed a notice of appeal. Before briefs were filed, however, this Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), holding that, in some circumstances, the ineffective assistance of post-conviction counsel may provide cause to excuse the default of a claim of ineffective assistance of trial counsel. The Ninth Circuit remanded non-defaulted Claims 9-A and 9-D for the district court to determine

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[3] This Court expanded Lee's Appendix to include the district court's 9/30/10 Ruling dismissing Lee's habeas petition, and its 4/9/19 Ruling after the *Martinez* remand. Respondents refer to the 9/30/10 Ruling as "App. C," and the 4/9/19 Ruling as "App. D."

whether Lee's evidence proffered for the first time in the district court fundamentally altered the claims, rendering them procedurally defaulted under *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014), and, if so, whether the defaults of the fundamentally altered claims could be excused under *Martinez*. The district court held that neither claim was fundamentally altered by Lee's new evidence, and it therefore did not reconsider its merits rulings on the claims. App. D, at 9, 13. The court granted a certificate of appealability on the remanded Claims 9-A and 9-D. *Id*. at 14.

Returning to the Ninth Circuit, Lee filed an opening brief challenging the district court's finding that Claims 9-A and 9-D were not fundamentally altered by his new evidence. After this Court's ruling in *Shinn v. Ramirez*, 596 U.S. 366 (2022), the court granted Lee's request to file a replacement opening brief. Among other things, Lee argued (for the first time) that his post-conviction counsel was diligent in developing the state-court record on Claim 9-D, which alleged that trial counsel was ineffective in investigating and presenting mitigation. As a result, he argued, the district court erred by failing to hold a hearing on the claim. *See* 28 U.S.C. § 2254(e)(2).

Once the replacement briefing was completed the court held oral argument, after which it dismissed Lee's claims. *See Lee v. Thornell* (*Lee II*), 108 F.4th 1148 (2024). In particular, the Ninth Circuit rejected Lee's argument that his post-conviction counsel was diligent in developing Claim 9-D in state court. *Id.* at 1160–61. As a result, the Ninth Circuit found that evidentiary development on the claim

was prohibited by 28 U.S.C. § 2254(e)(2), and it reviewed Lee's claim without considering the evidence he developed in these federal proceedings. *Id*. at 1161–62. On the state court record, the court affirmed the district court's ruling that Lee's trial counsel performed reasonably in investigating and presenting mitigation. *Id*. at 1162. It further found that the state court reasonably concluded that "the absence of additional mitigating evidence was due more to the fact that there was none, rather than to [trial counsel's] lassitude or incompetence." *Id*. at 1162–63 (quotation marks omitted).

REASONS FOR DENYING THE PETITION

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Lee has presented no such reason. In particular, Lee has not established that the state court has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Rather, Lee "assert[s] error consist[ing] of erroneous factual findings [and] the misapplication of a properly stated rule of law," for which this Court "rarely grant[s]" certiorari review. Sup. Ct. R. 10. Because Lee merely seeks correction of the Ninth Circuit's alleged error in denying his ineffectiveness claim, this Court should deny the petition.

I. THE NINTH CIRCUIT CORRECTLY FOUND THAT LEE WAS NOT DILIGENT IN DEVELOPING THE STATE COURT RECORD ON HIS INEFFECTIVENESS CLAIM.

A. AEDPA's requirements for consideration of new evidence.

The Antiterrorism and Effective Death Penalty Act (AEDPA) prevents a federal court from considering new evidence "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). This section provides in full:

> 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.

This Court has explained 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 the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000). "Diligence for purposes of the opening clause [of § 2254(e)(2)] depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id*. at 435.

> If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.

Id. at 437.

"[U]nder § 2254(e)(2), a prisoner is 'at fault' even when state post-conviction counsel is negligent." *Ramirez*, 596 U.S. at 384. Accordingly, post-conviction counsel's failure to develop the factual basis of a claim precludes evidentiary development in federal habeas unless the other stringent requirements of 28 U.S.C. § 2254(e)(2)(A) and (B) are met. Lee does not assert he can satisfy those requirements.

B. Background facts.

The state court held an evidentiary hearing on Claim 9-D, after which it concluded that counsel did not perform deficiently in investigating and presenting mitigation, and that Lee was not prejudiced.[4] App. C, at 59–60. In his federal habeas proceeding, Lee presented new evidence supporting the claim, including "declarations from his mother, sister, and brother-in-law; a social history report prepared by a mitigation specialist; prison records from his robbery conviction; and medical records." *Id.* at 61. The district court held that "[t]here is little question that PCR counsel could have obtained and presented to the state court the newly-proffered declarations and records; thus, [Lee] was not diligent in developing these facts in state court." *Id.* As a result, the court held that it "may not consider [Lee's] new evidence because he failed to develop the factual basis of the claim in state court and has not satisfied the requirements of 28 U.S.C. § 2254(e)(2)." *Id.* at 70. Nevertheless, the court held that, "even considering the new social history report, … Petitioner has not demonstrated prejudice." *Id.*

In affirming, the Ninth Circuit agreed that Lee was not diligent in developing the factual basis in state court. *Lee II*, 108 F.4th at 1160–61. The Ninth Circuit described post-conviction counsel's inadequate efforts to develop this claim in state court:

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[4] Lee's post-conviction counsel conceded that he could not demonstrate prejudice. *See* App. C, at 69.

> In the state postconviction proceedings, [counsel] sought and was granted an evidentiary hearing. But the evidence he presented at that hearing was limited by the failure of his mitigation specialist, Mary Durand, to conduct an effective investigation. In an effort to show diligence, Lee points out that [counsel] requested continuances of the hearing and the appointment of an additional investigator. When [counsel's] motion to continue the hearing was denied, he asked the Arizona Supreme Court for special action to grant the continuance, which it did. And after the postconviction relief court refused to appoint another investigator to help Durand, [counsel] sought reconsideration of that ruling.
>
> By themselves, however, those actions are not sufficient to demonstrate diligence. In denying reconsideration of the order denying an additional investigator, the court explained that [counsel] had "supplie[d] no more specifics than he did in the original motion—who, where, when, how much it will cost the state, how it is relevant." Diligence would have entailed providing the information necessary to verify the need for an additional investigator. *See Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir. 2000) (explaining that "[m]ere requests for evidentiary hearings will not suffice" to demonstrate diligence when a petitioner fails to present affidavits he could easily have obtained).

Lee II, 108 F.4th at 1160–61.

C. The Ninth Circuit correctly held that Lee was not diligent in developing the state court record on this claim.

Lee asserts the Ninth Circuit misapplied *Williams* in finding he was not diligent, because his failure to develop the record on this claim was "due to 'the conduct of another or by happenstance.'" *Id.* at 23–24 (quoting *Williams*, 529 U.S. at 432). He claims that "[t]he conduct of both [the post-conviction court] and [mitigation specialist] Mary Durand constitutes 'conduct of another' under *Willliams* that should have compelled the Ninth Circuit and district court to order an evidentiary hearing." *Id.* at 27–28. The Ninth Circuit explained, however, that post-conviction counsel "was responsible for Durand's failures, so her errors were

his errors." *Lee*, 108 F.4th at 1161. And "'[a]ttorney error that does not violate the Constitution'—including attorney error in postconviction proceedings, where there is no constitutional right to counsel—'is attributed to the prisoner under well-settled principles of agency law.'" *Id.* (quoting *Davila v. Davis*, 582 U.S. 521, 528 (2017)) (internal quotation marks omitted). Lee does not dispute these settled legal principles.

Lee nevertheless attempts to distance himself from Durand's actions by noting that the post-conviction court "failed to suggest to [post-conviction counsel] that he assume responsibility for the mitigation investigation" "in the midst of Durand's medical meltdown." Pet. at 24–25. But post-conviction counsel was *always* responsible for the mitigation investigation; the court did not need to "suggest" that counsel take on this responsibility. And counsel understood that the investigation was his responsibility: "It's my fault. I accept responsibility, too. I should have stayed on top of Mary Durand better, and I didn't."[5] R.T. 4/16/02, at 8.

Lee also asserts that Durand's "debilitating illness can only be described as 'happenstance' and not attributed to [post-conviction counsel] under *Williams*." Pet. at 28. But the record establishes that Durand's illness was *not* the cause of her failure to complete her investigation. Durand was appointed as mitigation

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[5] To the extent Lee asserts that the court's failure to appoint a different mitigation specialist at the outset of the post-conviction proceeding was "conduct of another" severing post-conviction counsel's responsibility for Durand's failures, he is incorrect. *See* Pet. at 26 (asserting "the matter would have proceeded to hearing a year or more earlier had Judge Irwin appointed Schaye to perform the mitigation investigation"). While post-conviction counsel initially proposed Schaye as a mitigation specialist, he did not object to Durand's appointment. Nor did he ever ask to replace Durand.

specialist during a hearing on September 28, 2000. At that hearing, Durand informed the court that she could begin work "within the next two weeks." R.T. 9/28/00, at 4. When the court asked Durand if she "would … like to work with [counsel]," she responded "I would be happy to work with him. I find him easy to work with and I would be happy to." *Id*. at 7. On December 18, 2000, counsel informed the court that he delivered "all the boxes of the case … four or five big bankers boxes down to [Durand's] home." R.T. 12/18/00, at 2. By February 2001, Durand "had a chance to go through everything, index and prepare a plan of attack … on who needs to be interviewed and when and how." R.T. 2/26/01, at 2.

When counsel informed the court of Durand's health problems on April 30, 2001, the court asked whether "we ought to be looking at a replacement." R.T. 4/30/01, at 2. Counsel stated, "I'm really not sure," telling the court that Durand was "allergic to her house," and "moving out of her house has made a tremendous difference." *Id*. at 2–3. Counsel also told the court that Durand had hired an assistant "to help with the cases that she's got." *Id*. at 3. On May 8, 2001, Durand told the court she was recovered, stating, "I haven't felt this good in years" and that she was "back to work on the case." R.T. 5/8/01, at 2. Durand informed the court that "[w]e are very close to be [sic] totally complete in record checks and the interviews will be done next Monday." *Id*. at 3. She expected the investigation to be completed "before the end of the summer." *Id*.

At the September 28, 2001 hearing, post-conviction counsel told the court that Durand had "put on some extra staff" and could complete her report in "three

to four months." R.T. 9/28/01, at 5, 7. Post-conviction counsel also told the court that the current November hearing date was not reasonable because Durand had not yet completed her work. *Id*. at 6. The court was reluctant to continue the hearing because "this case has gone on for so long," but nevertheless continued it until mid-January 2002, giving Durand an additional 3½ months to complete her investigation and report. *Id*. at 11, 18.

On November 13, 2001, counsel again moved to continue the hearing date until April 16, 2002, to allow Durand and his expert to complete their work. The court denied the motion. *See* ME 11/8/01. Counsel then filed a special action in the Arizona Supreme Court, which granted an interlocutory stay of the evidentiary hearing until April 16, 2002. Despite the evidentiary hearing having been continued until April 2002—the date Lee requested—counsel again requested a continuance on the first day of the evidentiary hearing, explaining:

> Mary Durand's not ready, and she's gonna get on the stand and tell you that; and I think that we're asking for further review from the supreme court or maybe the federal courts.
>
> She's gonna honestly testify to you that she has not done the job that she needs to do for Mr. Lee and that she needs more time.
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> …
>
> … Miss Durand is actually going to get on the stand and say I was deficient. I did not properly do this case….

R.T. 4/16/02, at 5, 7. Counsel also took responsibility for the failure to investigate, and he asked for an additional three months to allow Durand to complete her work. *Id*. at 7. The court denied the request. *Id*. at 11.

Post-conviction counsel later stated in his affidavit:

> I am aware of voluminous mitigating evidence developed by Mr. Lee's federal habeas corpus counsel, including the report of mitigation specialist Janet Dowling; the 2015 declaration of Mr. Lee's sister, Hazel June Lee; the 2015 supplemental psychiatric report of Dr. Morenz; and the 2015 report of addiction medicine specialist Murray Smith, M.D. *The compelling mitigating evidence contained in those documents is precisely the type of evidence I hoped to acquire with Ms. Durand's assistance*. At a minimum, I owed Mr. Lee a duty to perform an investigation that would have uncovered that evidence.

2-ER-255, ¶ 16 (emphasis added). Thus, post-conviction counsel admitted that he failed to conduct the investigation needed to obtain the evidence proffered in the district court.

Lee has not established that the Ninth Circuit erred in attributing Durand's failures to counsel, and in turn to Lee, to conclude Lee was not diligent in developing the state court record. Counsel obtained numerous continuances of the evidentiary hearing yet still failed to present the mitigation he believed was necessary to prove his claim of ineffective assistance of trial counsel. Because counsel was not diligent in developing the factual basis for this claim in state court, the Ninth Circuit correctly found that § 2254(e)(2) precluded the district court from holding an evidentiary hearing or otherwise considering Lee's new evidence. *See Ramirez*, 596 U.S. at 381–82.

II. EVEN CONSIDERING LEE'S NEWLY-PROFFERED EVIDENCE, HE IS NOT ENTITLED TO RELIEF.

Lee asserts that the evidence he developed in his federal habeas proceeding entitles him to relief on his ineffective assistance claim. Pet. at 28–35. He is incorrect.

A. Cocaine withdrawal.

Lee first claims that his "addiction medicine doctor," Dr. Smith, found that Lee was experiencing "Cocaine Withdrawal Syndrome" when he kidnapped his victim. Pet. at 28. He further asserts that Dr. Smith's opinions "would have supported the statutory mitigating factor … that Lee could not conform his conduct to the requirements of law." *Id*. at 30.

But the sentencing court knew that Lee had not used cocaine between 9:30 a.m. and 3:00 p.m. on the day of the murder and that the crimes were initially committed for the purpose of obtaining money to buy drugs. Thompson testified that she and Lee left the motel room around 9:30 in the morning with the goal of stealing a car. R.T. 11/17/92, at 18–20. After kidnapping Anderson, they used his bank card to obtain $200 at 12:44 pm. *Id*. at 27–28. But rather than obtain drugs immediately, Lee and Thompson "drove around for quite awhile" and eventually decided to tie Anderson up with electrical cords and leave him in a ditch. *Id*. at 28–31. They did so, but reconsidered and placed Anderson in the trunk of the car so he could not escape. *Id*. at 31–32. Only after doing this did they go to the trailer park to buy drugs, around 2:00 or 3:00 p.m. *Id*. at 33–34. Thus, the sentencing court

knew that Lee and Thompson did not use any drugs until approximately 3:00 p.m. on the day of the murder and that the desire for cocaine drove their actions.

The court also knew, based on the trial testimony, that Lee was in a "state of severe alcohol and cocaine intoxication" when he killed the victim. Pet. at 30 (quotation marks omitted). The court explained, "[i]t is clear that the defendant was under the influence of cocaine at the time of the killing. He had injected cocaine numerous times on December 5, 1991 from approximately 2:00 p.m. through immediately before the killing." Special Verdict 3/8/93, at 5. It nevertheless found that Lee was able to conform his conduct to the requirements of the law:

> … ***The defendant's actions, however, indicate that he was able to appreciate the wrongfulness of his conduct and had the ability to conform his conduct to the law.*** Just prior to the killing the defendant attempted unsuccessfully to poison the victim with automobile exhaust. The defendant took quick action to thwart the victim's attempted escape. The defendant returned the victim's body to the trunk in order to remove it from the scene and hinder detection.

Id. (emphasis added). Dr. Smith's opinion would not have changed the fact that Lee's actions showed that he was in control and able to conform his conduct to the law's requirements. *See Lee I*, 185 Ariz. at 558 (expert's opinion that Lee could not conform his conduct to the law "was contradicted by defendant's conduct during the commission of these crimes, as well as by his testimony at trial"). There is no reasonable probability that Dr. Smith's opinions would have caused the sentencing court to find that Lee could not conform his conduct to legal requirements.

Lee asserts that Dr. Smith "would also have found that Lee did not possess a subjective appreciation that lethal force would be employed against Mr. Anderson"

and thus, he claims, he is ineligible for the death penalty under *Tison v. Arizona*, 481 U.S. 137 (1987). Pet. at 30. But there is no reasonable probability that the state court would have believed that Lee did not understand that lethal force would be used on Anderson. As the sentencing court noted, Lee had already attempted to kill Anderson with the car's exhaust fumes. In addition, Lee attempted to strangle Anderson with a belt, and when the belt broke he held Anderson down so Thompson could inflict the death blows with a rock to his head. *Lee I*, 917 P.2d at 695; *see id.* at 559 ("There is no reasonable doubt here that defendant intended Anderson's death. He planned it, discussed it, and participated in its execution."). There is no reasonable probability that the sentencing court would not have found that Lee was sufficiently culpable under *Tison*. *See Tison*, 481 U.S. at 158 ("[M]ajor participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* [*v. Florida,* 458 U.S. 782 (1982)] culpability requirement."). And even if *Tison*'s requirements were not met, Lee clearly satisfied *Enmund* because he both attempted *and* intended to kill. *See Enmund*, 458 U.S. at 796.

B. Social history.

Lee asserts that his "social history" was "independently mitigating." Pet. at 30. He notes that the evidence developed in habeas includes that his brother indicated that "drugs and alcohol turned [him] into a completely different person;" his brother-in-law stated that "the changes in [Lee]" were "unbelievable;" and his sister stated that Lee "look[ed] unhealthy" because of his cocaine use. *Id.* at 30–31

(quotation marks omitted). Lee also notes that he went to a recovery facility to treat "abscesses that developed due to intravenous drug use." *Id*. at 31. The district court, however, explained that the social history report prepared by Lee's habeas mitigation specialist "does not … add any significant new information that was not before the sentencing judge." App. C. at 71.

> The sentencing judge was aware, through Dr. Garcia-Buñuel's report, Petitioner's high school records, Mrs. Lee's letter, and the PSR that Petitioner was a high-strung, low intelligence child who dropped out of high school, that he was loved and supported by his family, that his father was at one time an alcoholic who beat his wife before starting to attend church and becoming a "new person," that his grandfather was an alcoholic, that at some point a brother had died and this was a devastating loss for Petitioner, that he was an alcoholic who tried to get sober by joining Alcoholics Anonymous and checking himself into a rehabilitation facility, that he had two failed marriages due to his alcohol abuse and infidelity, that he had started using drugs at a young age, that at the time of the offense his life was directed to the habitual consumption of cocaine and he was under the influence of the drug during the crime, and that he was remorseful. The court expressly found that Petitioner had proven by a preponderance of the evidence the following mitigating factors: remorse, admission of guilt, lack of education, low intelligence, strong family support, the fact that the defendant was a follower, Thompson's life sentence, and the prosecution's recommendation of a life sentence.

Id. at 70–71. There is no reasonable probability that the Lee would have received a life sentence had his additional evidence been presented to the sentencing court.

C. Depression.

Lee next claims that the opinions of his sentencing expert, Dr. Garcia-Bunuel, were inadequate because Dr. Garcia-Bunuel did not have Lee's "thorough social history." Pet. at 31. He claims that his experts now diagnose "depression, perhaps chronic depression, due to an abusive and chaotic childhood that led Lee to

self-medicate first with alcohol and, later, with cocaine." *Id*. The sentencing court, however, had this information.

The presentence report, which the sentencing court reviewed, noted that Lee's father was an alcoholic who had abused Lee's mother. App. C, at 50. At the post-conviction hearing, Lee presented two expert reports, both of which contained evidence of his abusive childhood. Dr. Barry Morenz, Lee's psychiatric expert, wrote in his report that, "[w]hen his father was drinking, Mr. Lee would hide from him. His father left bruises and welts on him. His mother also drank, sometimes to excess, but not as badly as his father. His mother had a temper as well and could sometimes be physically abusive." 4-ER-1035. Neuropsychologist Dr. Anne Herring wrote that Lee's "father was an alcoholic and was physically abusive to him, his mother and the other children." 5-ER-1280.

The reports of other experts also indicated Lee's abusive childhood. Dr. Bayless noted that Lee "reported that his father used to be an alcoholic and at times would become quite abusive toward the children." 5-ER-1331. And Lee told Dr. Youngjohn that "his father [was] pretty violent when he was drunk." 4-ER-1041. Dr. Youngjohn wrote:

> I asked Mr. Lee to describe his childhood. He stated that it was bad, up until his parents started going to church and his father stopped drinking. Prior to that he never knew when both of his parents would come home drunk. His mother drank too. His father would get violent and hit her sometimes. Then the children would be sent to Kansas to visit relatives. They would come home, things would be okay for awhile, but then his father would get violent again and the children would go back to Kansas. Mr. Lee stated that the worst occasion was when his father held his mother over the stove and burned her. Mr. Lee stated that his father is a different man now.

4-ER-1042. The mitigating value of this evidence, or any additional evidence of abuse, is limited by the fact that Lee was 34 years old when he killed Mr. Anderson. *See State v. Ellison*, 140 P.3d 899, 927, ¶ 136 (Ariz. 2006) ("[Defendant's] childhood troubles deserve little value as a mitigator for the murders he committed at age thirty-three.").

Lee also presented evidence of depression in the post-conviction proceeding. In his 2002 report, Dr. Morenz noted that Lee was taking an antidepressant and "had taken Elavil [for depression] for eight [or] nine years but the antidepressant was stopped because of side effects on his heart." 4-ER-1032. Lee told Dr. Morenz that he "derived little pleasure" from activities he usually enjoyed. *Id*. Lee also indicated that "he is sad sometimes" and was "hopeless but not suicidal." 4-ER-1033. And he told Dr. Morenz that he became depressed when he was with his first wife:

> … Lee had some suicidal feelings but never acted on them or received treatment for his depression. He also felt depressed after he lost his job at the truck parts business.… Mr. Lee never sought nor received any treatment for his depressive symptoms.… He admits to considerable anxiety and worry along with depressive symptoms over the years.

4-ER-1036. Dr. Morenz concluded that Lee's "mood was one of mild depression." 4-ER-1038. Dr. Morenz also suggested that Lee was self-medicating his depressive symptoms: "When Mr. Lee came to prison and was placed on antidepressant medications, he lost his desire for illicit drugs." 4-ER-1036.

Lee also told Dr. Ahern that "he had been diagnosed with [depression] at the prison and had been on Elavil for about 8–9 years." 5-ER-1285. And Lee told Dr.

Herring that "he has been depressed 'all [his] life.'" 5-ER-1281. Dr. Ahern and Dr. Herring did not testify at the post-conviction hearing, but Dr. Morenz summarized their findings and their reports were admitted as exhibits. Dr. Youngjohn agreed that Lee's score on the depression scale of the MMPI-2 was "significantly elevated." R.T. 5/21/02, at 68. Thus, post-conviction counsel established Lee's history of depression.

Lee asserts that, with his complete social history, Dr. Morenz now diagnoses him with depression. *See* Pet. at 31. But Dr. Morenz's recent diagnosis of depression appears to be based on essentially the same information he had in 2002. First, as established above, Dr. Morenz knew about Lee's history of depression. He also knew about Lee's "abusive and chaotic childhood" and that Lee's brother had been killed at a young age. Not only did Lee tell Dr. Morenz in 2002 about his brother's death, but Dr. Morenz had Dr. Garcia-Buñuel's report, which also reported the death.

D. The death of Lee's brother.

The state courts also heard evidence that the death of Lee's 15-year-old brother negatively impacted Lee and his family. *See* Pet. at 31–32. Dr. Garcia-Buñuel noted in his report that Lee's brother's death "was a devastating blow to [Lee] and his family" and that Lee "went into a reckless abuse of drugs which would last for the next twenty years. His family was deeply affected and this may explain

why his parents, decent people, have tended to overprotect him despite his irresponsible and criminal deeds."[6] 6-ER-1627.

Before the post-conviction hearing, Lee told Dr. Youngjohn the circumstances of his brother's death: "[H]is brother was acquainted with a couple who were drug dealers. His brother tried to steal their weed and the wom[a]n shot him in the head." 4-ER-1042; *see* 4-ER-1035 (Dr. Morenz noting that "[w]hen Mr. Lee was about age 19 or 20, his brother was shot and killed while he was committing a burglary"). And Lee's mother testified at the post-conviction hearing that Lee's brother's death sent Lee on a downward spiral of drug and alcohol abuse; "[h]e just couldn't deal with it." R.T. 4/17/02, at 153.

E. Alcoholism.

Lee asserts that trial counsel was ineffective in failing to "mitigate" the (F)(2) aggravating circumstance with the fact that he was intoxicated when he committed the 1987 crime supporting the aggravator. Pet. at 32. But Dr. Garcia-Bunuel's report presented this information at sentencing:

> In 1986, having been a long-standing alcoholic, [Lee] bought a 90-proof bottle of schnapps which he drunk [sic] in full. He became very ill physically, vomitting [sic] blood; so, he stole a pick-up truck from someone in order to get home, to his parents. He was arrested; he claims he was introduced to cocaine while at the Madison Street Jail (Maricopa County Sheriff's Office).

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[6] Lee asserts that "Dr. Garcia-Bunuel's report was rife with factual errors." Pet. at 32. But the only error he identifies is that Dr. Garcia-Bunuel stated that Lee was 15 years old when his 25-year-old brother was killed. *Id*. In fact, Lee's brother was 15 years old when he was killed. There is no reasonable probability that the sentencing court would not have sentenced Lee to death had Dr. Garcia-Bunuel correctly stated the relative ages of Lee and his brother.

> He was released on probation but he violated it often by getting drunk so that he was violated and sent to prison where, once more, he got back to using cocaine. His statement to me was that it was easier to get cocaine there than it was in the streets….

6-ER-1627–28. The 1987 presentence report Lee asserts should have been utilized contains the same information, but is arguably less compelling than Dr. Garcia-Bunuel's account. *See* Pet. at 33–34. Further, the presentence report contains information about Lee's other criminal activity that counsel could have reasonably wanted kept from the sentencing court. *See, e.g.*, 2-ER-399 ("[Lee's] alcoholism, combined with his propensity to behave without regard for the law, is an indicator that [he] will likely reoffend in the future.").

While Lee arguably provided more details to the federal courts about his activities prior to committing the robbery, he did not significantly add to the information presented in the state court, which established he was intoxicated when he stole the truck. *See* Pet. at 33–34. Additionally, as just discussed, his newly-proffered mitigation was a two-edged sword, as it demonstrates that Lee was a long-term habitual alcoholic who was prone to violence and other antisocial behavior when intoxicated, and was beyond rehabilitation. Counsel could have reasonably chosen not to present additional evidence of Lee's intoxication during the 1987 offense.

Lee notes that Dr. Smith opined in his report presented during the federal proceeding that Lee's intoxication "caused … defective perceptions, judgment, decisions and behavior exhibited by him surrounding the events of that felony." *Id.* at 34 (quotation marks omitted). But as discussed earlier, Dr. Garcia-Bunuel's

report informed the sentencing court that Lee was extremely intoxicated, physically ill, and vomiting blood just before committing the 1987 robbery. Dr. Smith adds no new information to the mitigation evaluation.

Lee also notes that he voluntarily admitted himself into the hospital in 1987 to treat his alcohol addiction. Pet. at 33. But he also checked himself out of the program three days later, without completing the program. *Id.* In any event, Lee's mother testified at trial that Lee was rejected from a substance abuse treatment center "because he left early," and he had to wait 6 months to go back into the program. R.T. 11/13/92, at 102. And Dr. Morenz explained in his report given to the post-conviction court that Lee sought treatment numerous times for his alcohol abuse, but he failed to complete any of the programs because he was unable to maintain sobriety. 4-ER-1033, 1037. The records Lee presented in federal court of his voluntary admission to an alcohol treatment program are repetitive of the evidence presented in the state courts. There is no reasonable probability that the sentencing court would have weighed the (F)(2) aggravating circumstance differently had counsel presented additional evidence of the events leading up to the events of his 1987 robbery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted this 14th day of May, 2025.

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