

No. 24-6989

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondents misstate the facts in asserting that Darrel Lee killed the victim. He did not. BIO at 20. The uncontroverted evidence is that Lee’s co-defendant Karen Thompson grabbed a rock and struck the victim in the head, killing him. App. A at 6-7. It is that factual understanding that led the prosecution to offer Lee a plea deal that would result in his serving a sentence of 25 years to life in prison for first degree murder in exchange for his testimony against Thompson. When Lee reneged on the deal, the prosecution offered the same plea to Thompson, who accepted it and testified against Lee. In Thompson’s guilt phase testimony, which was attached to Lee’s Excerpts of Record (“ER”) filed in the Ninth Circuit, 6-ER-1460, she acknowledged that she killed the victim. 6-ER-1460.

Respondents acknowledge, in their Brief in Opposition (“BIO”) at 14–15, the tension between *Williams v. Taylor*, 529 U.S. 420 (2000), with its proviso that “conduct of another” or “happenstance” may forgive a petitioner’s failure to develop the factual basis for a claim in state court, and the Ninth Circuit’s reliance here on *Davila v. Davis*, 582 U.S. 521, 528 (2017), in explaining that attorney error that does not violate the Constitution is attributable to the petitioner. *See Lee v. Thornell*, 108 F.4th 1148, 1161 (9th Cir. 2024). Respondents submit that error by the state post-conviction review (“PCR”) court or by Mary Durand, the mitigation specialist whose appointment was ultimately insisted upon by the initial PCR judge, was attributable to PCR counsel Matt Newman.

As such, Respondents argue that 28 U.S.C. § 2254(e)(2) imposed strict liability

on Lee for the failure of PCR counsel to develop the factual basis of Lee's claim of ineffective assistance of trial counsel ("IATC"). Yet, the *Williams* Court made clear that fault that rests with another in failing to develop the factual basis of the claim in state court, or with no one, is not attributable to a habeas petitioner. 529 U.S. at 432.

Certiorari should be granted to validate that aspect of *Williams*. As additional support for the granting of the Writ, Lee points to the fact that the Arizona District Court's decision to deny Lee expansion of the record with new facts in mitigation in support of his IATC claim rested, at minimum, on the proposition that mitigation specialist Mary Durand bore the same agency relationship to Darrel Lee as did his post-conviction relief ("PCR") counsel Matt Newman. The court ruled:

However, this Court can discern no distinction between a state court's appointment of a post-conviction attorney and an investigator; the actions of each are attributable to the petitioner for the purpose of determining diligence under 28 U.S.C. § 2254(e)(2). Because Petitioner was not diligent, the Court may not consider his new evidence.

Memorandum of Decision and Order, *Lee v. Ryan*, No. CV-04-39-PHX-MHM (D. Ariz. Sept. 30, 2010), Doc. No. 93 at 62 (filed sua sponte by the Court as an appendix to Lee's Petition for Writ of Certiorari). As such, the court found Lee failed to demonstrate diligence in developing the factual basis of his claim under 28 U.S.C. § 2254(e)(2).

The Ninth Circuit affirmed on a different basis. That court found that "even if Durand acted diligently but was prevented from completing her investigation by medical problems beyond her control, Newman had a duty to supervise her and take

corrective action in response to her failures.” App. A at 23. The Ninth Circuit then cited two of this Court’s precedents for the proposition that PCR counsel cannot render constitutionally ineffective assistance because there is no constitutional right to counsel in such proceedings and, therefore, the errors of PCR counsel are attributable to the petitioner. App. A at 23 (citing *Davila v. Davis*, 582 U.S. 521, 528 (2017); *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991)). The Court ruled that “Newman was responsible for Durand’s failures, so her errors were his errors. Thus, Newman’s failure to oversee Durand is attributable to Lee.” App. A at 24.

Neither the district court nor the Ninth Circuit cited case law or other authority for those propositions.

A. Respondents fail to treat the full breadth of Lee’s attribution of fault to the substitute PCR court as the “conduct of another” and chronic illness of the court-appointed mitigation specialist as “happenstance,” which excuse the lack of factual development of the IATC claim in state court under *Williams*.

Respondents unfairly reduce Lee’s argument to one in which he blames the substitute PCR court, Judge Richard Schafer, for failing to suggest to PCR counsel that he assume responsibility for the mitigation investigation when it became clear that Durand could not do so. BIO at 15. That mischaracterizes Lee’s reason for the Court to grant certiorari.

On March 21, 2000, PCR counsel moved for the appointment of Roseann Schaye as Lee’s mitigation investigator. Petition for Writ of Certiorari (“Petition”) at 11. Schaye had performed a significant amount of pro bono investigation in the case. *See* Petition at 10-12. At a status conference on April 17, 2000, the trial court judge,

the Honorable Michael Irwin, who later served as the initial PCR judge, stated that he had limited experience in appointing a mitigation specialist in a capital post-conviction case. Petition at 13. On July 20, 2000, the PCR judge indicated that he rejected Schaye's appointment because she resided in Tucson and would bill for travel between there and Phoenix, where much of Lee's mitigation would be investigated. Petition at 13-14. Judge Irwin consulted with the Maricopa County Superior Court capital case attorney Jonathan Bass,¹ and told PCR counsel to select one of two mitigation specialists recommended by Bass. Petition at 14.

Judge Irwin voir dired Durand on September 28, 2000, and appointed her despite her serving as the mitigation director for the Superior Court of Maricopa County and her work on 15 other death penalty cases. Petition at 14. The following nine months saw Newman report to the PCR court that Durand suffered from a debilitating mold issue in her house, which caused her several hospitalizations, and Durand reported to the court on May 8, 2001, that she suffered from pneumonia five times. Petition at 16. Durand acknowledged that the delay had been "my health's fault. No one else's." Petition at 16. Judge Irwin delayed the evidentiary hearing repeatedly due in large measure to Durand's serious health issue and never intimated that the matter would proceed to an evidentiary hearing without Durand having completed her investigation and produced her social history of Lee to the defense psychiatrist, Barry Morenz, M.D.

¹ Prior to working at the superior court, Bass served as Respondent's counsel in capital cases. *See e.g., Order, West v. Stewart*, No. CV 98-218-TUC-FRZ (1998 WL 36012542) (D. Ariz. Nov. 19, 1998).

Judge Schafer failed to show any understanding of the context within which PCR counsel and Judge Irwin operated. Yet, at his first appearance, he announced that PCR counsel already had “two strikes against him” with respect to asking the court to extend the time for the hearing. Petition at 17. His denial of Newman’s extension motion on November 13, 2001, Petition at 17, forced Newman to expend significant time in petitioning the state supreme court for special action and a request for extension of time. Petition at 17. That was an extraordinary action on PCR counsel’s part and demonstrated his diligence in seeking to produce a factual basis for Lee’s IATC claim.

B. Lee demonstrates *Strickland* prejudice from trial counsel’s unfortunate abandonment of his addiction medicine expert where the evidence would have supported Lee’s assertion that he suffered from organic brain damage.

Respondents submit that the sentencing court knew that Lee spent several hours without cocaine on the day his co-defendant killed the carjacking victim, and that “the crimes were initially committed for the purpose of obtaining money to obtain drugs.” BIO at 19. Respondents further assert that the court found Lee to have been in a state of “severe alcohol and cocaine intoxication” at the time of the homicide. BIO at 20. Respondents further submit that the court stated in its special verdict at sentencing that “the defendant was under the influence of cocaine at the time of the killing” but that Lee could appreciate the wrongfulness of his conduct and conform his conduct to the requirements of law, rejecting the statutory mitigating factor under A.R.S. § 13-703(G)(1). BIO at 20.

The sentencing court understood no more at sentencing than that Lee was a

recreational drug user. As such, Judge Irwin possessed only a lay person's understanding of what a craving for drugs meant. The admission of testimony from Murray Smith, M.D., Lee's addiction medicine expert in the Supplemental *Martinez* Remand, would have established that Lee suffered from organic brain damage as a result of hijacked brain chemistry and Lee would have been powerless to defend against its effects at the time of the carjacking and homicide.

In his report, Dr. Smith stated:

Decades of brain science research demonstrate the following clearly established scientific fact: drug addiction "is . . . a chronic, relapsing brain disease that is characterized by compulsive drug seeking and use, despite harmful consequences." See, National Institute on Drug Abuse Report on Drugs, Brains and Behavior: the Science of Addiction (2010) (Hereafter Brains and Behavior). "[Drug addiction] is considered a brain disease because drugs change the brain—they change its structure and how it works." (Brains and Behavior). These alterations in brain structure are physical, not merely psychological, and what is more, the changes in brain structure and function significantly impair a person's thinking, judgment, decision-making, perceptions and behavior.

Established science also demonstrates that these physical changes in brain structure and function will also result in impairment in thinking, judgment, decision-making, perceptions and behavior when drug withdrawal begins; and as explained below, this is particularly so with respect to a severely addicted person's withdrawal from cocaine.

Viewed through the lens of a neurochemically altered brain, drugs "hijack" the addict's brain chemistry to produce compulsive use of the substance regardless of adverse consequences. The hijacked brain chemistry transmits a false message to the addict's brain that causes a feeling that not to get and use the drug is like death. "Drugs of abuse are [best understood] as hijacking the neuro-biological mechanisms [of the] brain." (Agnes J. Jasinska, et al., Factors Modulating Neural Activity to Drug Cues in Addiction: A Survey of Human Neuroimaging Studies, 38 Neuroscience and Behavioral Reviews 1, 3 (2014)).

The neurochemical and functional changes in a person's brain as a result of cocaine and alcohol use are thoroughly documented in an extensive body of scientific literature developed over many years. Similarly, the behavioral changes that result from the neurochemical and functional brain pathology

caused by cocaine use by an individual are also extensively documented in a large amount of scientific literature.

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 the neuron terminal 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. These neurochemical changes in the brain induce a “Superman or Superwoman” feeling. The rapid delivery of intravenous cocaine intensifies the neurochemical changes in the brain and the corresponding “rush” of the pleasurable feelings; this in turn explains the central reason why intravenous cocaine produces an accelerated and powerful addiction.

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 the actions of others. The neurobehavioral effects of cocaine withdrawal are well established in the scientific literature and have been confirmed by my own experience over and over again during my decades-long clinical practice. Depending on the duration of the daily or near daily cocaine use, the person may require days or weeks to reverse the dopamine and receptor depletion and regain normal brain function.

Addiction (which includes associated withdrawal syndromes) is a primary medical illness with an etiology in brain chemistry changes and usually with a very strong genetic connection. The term primary medical illness refers to addiction not being caused by some other mental illness, although addiction may be influenced in time of onset, speed of progression, and other manifestations by psychosocial and environmental factors including other mental illnesses present in the individual.

The three findings that must be present to establish the diagnosis of addiction are preoccupation with obtaining and using the substance, repeated episodes of loss of control of the usage of the substance, and continued use of the substance despite problems caused by that use. Those problems may be physical, mental, emotional, occupational, relationship, or legal. An addict may experience craving, which is an irresistible urge to use the substance. The

Latin word from which the English word addiction is derived is "addictum" which describes the relationship of a slave to his or her master.

As explained above, in addiction there are structural and functional changes in the brain resulting in the loss of freedom of choice for the addict based on the "hijacking" of the addict's brain chemistry to produce compulsive use of the substance regardless of adverse consequences in the life of the addict.

2-ER-264–66.

Dr. Smith concluded:

Based on my Addiction Medicine evaluation of Mr. Darrell Lee, it is my professional opinion he is an addict with his drugs of choice being alcohol and cocaine. Mr. Lee clearly meets the criteria for the diagnosis of addiction to these drugs by experiencing preoccupation with getting and using the drugs, repeated episodes of loss of control of use of the drugs, and continued use despite legal, occupational, relationship, and medical problems. He also experienced severe craving episodes as a result of his Cocaine Withdrawal Syndrome.

It is also my professional opinion that on 8 March, 1993 La Paz County Superior Court Judge Michael Irwin had not been supplied adequate information regarding the degree of mitigation that Mr. Lee's addiction caused in defective perceptions, judgment, decision-making, and behaviors exhibited by him related to the events surrounding the murder of Mr. Anderson.

2-ER-273

Specifically with respect to cocaine withdrawal and abuse, Dr. Smith opined:

Cocaine Withdrawal Syndrome. The first brain function pathologic process present in Mr. Lee occurred because he was without cocaine for several hours on that morning. As a result of the deranged brain chemistry and associated brain dysfunction caused by the 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 offences 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.

Progressive alcohol and cocaine intoxication. 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 their relationship at that point would be to say Darrel was a puppet in her hands. I can conclude to a reasonable 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-273–74.

Had trial counsel not abandoned his plan to have Lee evaluated by Anatolio Muñoz, M.D., an addiction medicine specialist who refused to fly in a small plane to make the evaluation of Lee at the La Paz County Jail in rural Parker, Arizona, the mitigating diagnoses later described by Dr. Smith would have obtained. They would have established the statutory statutory mitigating factor that Lee could not conform his conduct to the requirements of law at the time of the homicide under A.R.S. § 13-703(G)(1).

Dr. Smith also concluded that Lee could not develop “a subjective appreciation that his actions would have had lethal consequences for the victim.” 2-ER-274. As a matter of law, Lee could not act with reckless disregard of human life, which would have barred his eligibility for the death penalty on Eighth and Fourteenth Amendment grounds under *Tison v. Arizona*, 481 U.S. 137 (1991). Trial counsel

rendered ineffective assistance at sentencing in violation of *Strickland v. Washington*, 466 U.S. 668 (1984).

CONCLUSION

The Court should grant certiorari on both Questions Presented.

Respectfully submitted this 28th day of May, 2025.

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