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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Derek Don Chappell, Petitioner, v. Ryan Thornell, et al., Respondents.	No. CV-15-00478-PHX-SPL **ORDER** DEATH PENALTY CASE

Before the Court is Petitioner Derek Don Chappell's motion to reconsider the Order denying his motion to stay this case. (Doc. 134.) Respondents object. (Doc. 136.) For the reasons below, the Court will deny reconsideration.

I. BACKGROUND

In 2011, Chappell was sentenced to prison and death following his conviction for child-abuse and murder. (R.O.A. 385–86, 532–33, and 603.) The Arizona Supreme Court affirmed, *State v. Chappell*, 236 P.3d 1176, 1180–81, 1190 (Ariz. 2010), *abrogated in part on other grounds by Cruz v. Arizona*, 598 U.S. 17, 21–22 n.1 (2023), and filed a notice for postconviction relief (PCR) in the trial court. Chappell then filed a petition for PCR, raising claims of ineffective assistance of trial counsel (IAC), which the PCR court denied in June 2014. (Doc. 70 at 10–17.)

In 2015, Chappell commenced his habeas proceedings in this Court and later filed a petition raising, among other IAC claims, two IAC claims ("the Claims") not previously raised in any court, which challenged the sufficiency of his trial counsel's investigation

and presentation of evidence. (Doc. 25 at 79–84, 93–105.) He concedes the Claims are procedurally defaulted as waived in state court but argues that the failure of PCR counsel to present the Claims in his PCR case establishes cause and prejudice to excuse their procedural default. (*Id*.) The parties completed briefing of the petition in November 2016, and completed briefing of a request for evidentiary development[1] in May 2017. (Docs. 33, 87, and 107–08.) Decision on the briefs remain pending.

In December 2023, Chappell noticed the filing of a successive state PCR case and sought a stay of this habeas case while he sought relief on the Claims in his successive PCR case. (Doc. 127; Doc. 127-1 at 1–10; Doc. 130-1 at 41–77). Chappell sought the stay under this Court's inherent powers and *Rhines v. Weber*, 544 U.S. 269 (2005), which allows a federal court, in certain circumstances, to stay a habeas case containing both exhausted and unexhausted claims while a petitioner returns to state court to exhaust the unexhausted claims. (Doc. 127 at 1, 4–8.)

This Court denied the stay motion because it concluded that the Claims would be found waived and precluded in the successive PCR case under Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure, and *Stewart v. Smith*, 46 P.3d 1067 (Ariz. 2002), *State v. Spreitz*, 39 P.3d 525, 526 (Ariz. 2002), and *State v. Traverso*, 537 P.3d 345 (Ariz. Ct. App. 2023). (Doc. 132 at 4–9.) The Court found that Chappell's argument that the Claims would not be found precluded was speculative. (*Id*.) For these reasons, the Court concluded that *Rhines* did not apply because the Claims were "technically exhausted," and Chappell did not otherwise justify a stay under the Court's inherent power. (*Id*.)

After this Court denied Chappell's stay motion, Chappell moved in the PCR court to stay his successive PCR case, pending the Arizona Supreme Court's (1) opinion in *State v. Anderson*, No. CR-23-0008-PR, and (2) the petition for review in *Traverso*, No. CR 23-0264-PR. (Doc. 134-1 at 28–29, 31–32.) On May 2, 2024, the PCR court stayed the successive PCR case because decisions in *Anderson* and *Traverso* "could provide clear

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[1] Chappell seeks leave, in part, to develop evidence to support the existence of cause and prejudice and the merits of the Claims. (Doc. 105 at 26–29, 35–39.)

guidance" on whether the Claims should be found precluded under state law. (*Id*. at 2.)

That same day, the Arizona Supreme Court issued its decision in *Anderson*, 547 P.3d 345 (Ariz. 2024). *Anderson* involved the following facts. In 2000, Anderson was convicted at trial of conspiracy to commit first-degree murder and sentenced to prison for "life without the possibility of *release* on any basis until the service of twenty-five years." *Anderson*, 547 P.3d at 348, ¶ 4 (emphasis added). Prior to trial, Anderson rejected an alleged plea deal that would have resulted in a sentence of 18 to 22 years, after trial counsel advised him that if convicted at trial, he would be eligible for parole after 25 years. In the early 2000s, Anderson twice petitioned for PCR alleging IAC claims; both PCR cases were dismissed with prejudice. *Id*., ¶ 5. In 2022, as Anderson was preparing to apply for an "educational program," he learned that contrary to trial counsel's advice, he was *not* eligible for parole. *Id*., ¶ 6. Anderson then filed a third PCR asserting a new IAC claim based on trial counsel's erroneous advice about parole eligibility. *Id*. The PCR court found the claim was *not* precluded under Rule 32.2(a)(3), despite not being raised in Anderson's prior PCR cases, but denied relief on the merits. *Id*. at *2, ¶ 10. The Arizona Court of Appeals found the claim *was precluded* under Rule 32.2(a)(3) because it had not been raised in Anderson's previous PCR cases. *Id*., ¶ 11 (citation omitted).

The Arizona Supreme Court reversed the Arizona Court of Appeals, finding the claim was *not* precluded. *Id*. at 353–54, ¶ 36. It reasoned that, like in *State v. Diaz*, 340 P.3d 1069 (Ariz. 2014),[2] *Anderson* posed "unusual, albeit different circumstances," such

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[2] In *Diaz*, the Arizona Supreme Court found that petitioner's third PCR case was not precluded because two different attorneys had failed to file a PCR petition after petitioner had timely filed PCR notices in his first two PCR cases, resulting in the dismissal of the PCR cases. 340 P.3d at 1069, ¶ 1; *see also id*. at 1070–71, ¶ 10. Because counsel had never filed a petition, petitioner had never previously raised his IAC claims through no fault of his own. *See id*. at 1069–71. After petitioner noticed a third PCR, a third attorney timely filed a petition alleging claims for the first time, including that trial counsel rendered ineffective assistance regarding proffered plea agreements. *Id.* at 1070, ¶ 5. The Arizona Supreme Court found the IAC claim raised in the third PCR was not precluded under the unusual circumstances of *that* case. *Id*. at 1069, ¶ 1. The circumstances in *Diaz* are not present in Chappell's successive PCR.

that the successive PCR was not precluded. It described that in 1993, the Arizona Legislature abolished "parole," but due to confusion about the abolition when Anderson filed his first two PCR cases, "defendants, attorneys, and courts did not know of or recognize" that telling a defendant that he was eligible for "parole," rather than "release," e.g., executive clemency or commutation, was erroneous.[3] *Id.*, ¶ 18 (citing *Chaparro v. Shinn*, 459 P.3d 50, 54 (Ariz. 2020), holding that "parole" was not synonymous with other forms of "release"). The Arizona Supreme Court explained that trial counsel's erroneous advice was not just a problem of "individual IAC" but also a "systemic failure to recognize" parole's abolition. *Id.* Citing this unique circumstance, the court found that Anderson could not have reasonably raised his IAC claim until his 2022 PCR notice. *Id.* That is, it found that the claim was not cognizable as a claim when Anderson filed his prior PCRs. *Id.* For that reason, it found the claim was not precluded under Rule 32.2(a)(3).

In doing so, the Arizona Supreme Court noted that this exception to Rule 32.2(a)(3) preclusion did not apply "broadly to IAC claims" based on erroneous advice about "plea agreements." *Id*. at 351, ¶ 26. It further noted that Anderson's IAC claim arose under "extremely rare" circumstances: the "pervasive confusion about parole and the extraordinary remedies th[e c]ourt and the legislature fashioned to deal with it." *Id*. at 351–52, ¶ 26 (citations omitted).

Chappell asks the Court to reconsider denying his stay motion based on *Anderson* and the PCR court's stay of his successive PCR case. (Doc. 134 at 1-2.) The motion is fully briefed. (Docs. 136, 137.)

II. Standard for Reconsideration

Motions for reconsideration should be granted only in rare circumstances. *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995)*; see* generally

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[3] The Arizona Supreme Court observed that both it and the Arizona Court of Appeals had "published decisions as late as 2013 indicating parole was still available for those convicted of felonies with the possibility of release after twenty-five years," citing cases. 547 P.3d at 350, ¶ 6.

LRCiv 7.2(g)(1). A motion for reconsideration is appropriate where the district court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Such motions should not be used for the purpose of asking a court "'to rethink what the court had already thought through – rightly or wrongly.'" *Defenders of Wildlife*, 909 F. Supp. at 1351 (*quoting Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). A motion for reconsideration "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Nor may a motion for reconsideration repeat any argument previously made in support of or in opposition to a motion. *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 586 (D. Ariz. 2003). Mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988).

III. Discussion

Chappell asks the court to reconsider the denial of a stay in light of *Anderson* and the stay of his successive PCR case. (Doc. 134 at 1–2.) In its Order, the Court found Chappell had failed to meet the *Rhines* standard, which Chappell does not meaningfully dispute. The Court further concluded that the PCR court would find the Claims precluded under Rule 32.2(a)(3)[4] and *Smith*, 46 P.3d at 1071, ¶ 12 (holding that IAC claims raised for the first time in a successive PCR are per se barred). (Doc. 132 at 4.) The Court found speculative Chappell's contention to the contrary. (*Id.*) Chappell asks the Court to reconsider its determination that the PCR court would find the Claims precluded based on

[4] Rule 32.2(a)(3) precludes IAC claims that were waived at trial, on direct appeal, or in a prior PCR case, "except when the claim" asserts a denial of a "constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant." Ariz. R. Crim. P. 32.2(a)(3); *see also* Ariz. R. Crim. P. 32.1(a); *State v. Goldin*, 365 P.3d 364, 368, ¶ 14 (Ariz. Ct. App. 2015); Ariz. R. Crim. P. 32.1(a) cmt.).

Anderson and the PCR court's stay of his successive PCR pending *Anderson* and a decision on a petition for review in *Traverso.* (Doc. 134 at 5.)

Anderson centers on Rule 32.2(a)(3)'s requirement that a petitioner "raise all known" PCR claims in his first petition. *Anderson*, 547 P.3d at 350, ¶ 21 (citing *Diaz*, 340 P.3d at 1071, ¶ 12). In *Anderson*, the Arizona Supreme Court recognized a very narrow exception to that requirement. That is, when an IAC could not have been raised at the time of the petitioner's first PCR case. *Id*. at 349–52, ¶¶ 13–26. It reasoned that the claim was not a cognizable claim at the time of Anderson's prior PCR cases because, through no fault of Anderson, the claim could not have been reasonably raised in those PCRs due to a widespread legal error. *Id*. at 353, ¶ 36. *Anderson*, in effect, clarified that preclusion in that circumstance did not apply.

The Claims at issue in Chappell's successive PCR, however, were fully cognizable during his first PCR case, and he fails to cite any analogous widespread legal error that made it reasonably unlikely for him to raise the Claims in his first PCR. The Claims challenge trial counsel's investigation and presentation of evidence. (Doc. 25 at 79–84, 93–105; Doc. 130-1; Doc. 137-1.) Unlike the IAC claim in *Anderson*, there is no pervasive confusion about trial counsel's duty to investigate and present evidence, as that duty has been well-established. *Cf. Anderson*, 547 P.3d at 353, ¶ 32 n.1 (noting that "the prevailing confusion surrounding parole would taint any attorney's research"). Similarly, the duty of PCR counsel to raise every IAC claim in the first PCR case is and was also well-established at the time of Chappell's first PCR case. *See Smith*, 46 P.3d at 1071, ¶ 12 (explaining that IAC "cannot be raised repeatedly" or piecemeal); *Spreitz*, 39 P.3d at 526. Indeed, Chappell argued in his successive PCR that PCR counsel could have reasonably raised the Claims but did not. (Doc. 130-1 at 76–77.) In short, *Anderson* does not alter this Court's conclusion that the PCR court would find the Claims precluded. Reconsideration on this basis will be denied.

Nor does the PCR court's stay of Chappell's successive PCR, pending decision on the petition for review in *Traverso*, alter the Court's determination that the PCR court will

find the Claims precluded, or that Chappell's contentions to the contrary are speculative. In *Traverso*, the PCR court found that Traverso's successive PCR petition was not precluded, but Arizona Court of Appeals reversed finding that the Arizona Supreme Court had held in *Smith* that successive IAC claims are *per se* barred in a successive PCR case, even if Rule 32.2(a)(3)'s personal-waiver exception might otherwise have applied. 537 P.3d at 347–49, ¶¶ 8–13. It noted that the *per se* bar recognized in *Smith* conformed to the purposes of preclusion in Rule 32.2(a)(3): to bar repeated, piecemeal litigation. *See* 46 P.3d at 1071, ¶ 12.

Chappell argues that the PCR court's refusal to apply the court of appeals' decision in *Traverso,* pending Traverso's petition for review, renders his contention that the PCR court may find the Claims not precluded less speculative. (Doc. 134 at 2–3, 5 n.2.) It is speculative whether the Arizona Supreme Court will grant review, much less grant relief. Further, even if the Arizona Supreme Court grants review in *Traverso* and then overturns the *per se* bar, the Claims would still be barred under Rule 32.2(a)(3). *See Traverso*, 537 P.3d at 349, ¶ 14 (aside from the *per se* bar aside, Rule 32.2(a)(3) also barred the claim). Chappell did not raise the Claims in his first PCR case, and he does not show that the Claims fall within Rule 32.2(a)(3)'s personal-waiver exception. (*See* n.6, *supra*.) Chappell otherwise does not cite case law to support that Arizona courts inconsistently apply Rule 32.2(a)(3) preclusion to claims that were reasonably knowable at the time of the first PCR, and that do not fall within the personal-waiver exception. Thus, notwithstanding *Traverso*, the Claims are barred under Rule 32.2(a)(3). Chappell's contention that the PCR court will not find the Claims precluded remains speculative.

Chappell has not shown that the denial of a stay was clearly erroneous, cited an intervening change in controlling law, or cited newly discovered evidence, to the extent that such evidence could be considered under the AEDPA. Chappell's motion for reconsideration will be denied. [5]

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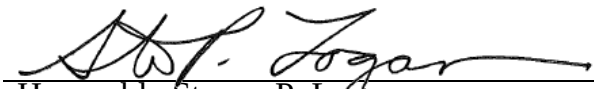
[5] Chappell asks this Court to defer to the PCR court's impending ruling on preclusion in light of the stay of his successive PCR case. (Doc. 137 at 2–5.) As the Court previously

Accordingly,

IT IS ORDERED denying Chappell's Motion for Reconsideration of Order Denying Temporary Stay (Doc. 134).

Dated this 1st day of August, 2024.



Honorable Steven P. Logan
United States District Judge

observed, "In deciding whether to grant a *Rhines* stay, this Court must decide if a petitioner currently has a remedy available in state court." (Doc. 132 at 4, citing *Armstrong v. Ryan*, No. CV-15-00358-TUC-RM, 2017 WL 1152820, at *3 (D. Ariz. Mar. 28, 2017)). Further, a petitioner must make a "greater showing" to support his request for an indefinite or indeterminate stay under the Court's inherent stay power. (*Id.* at 8–9.) It is clear that the Claims will be found precluded in state court, a finding they are *not* precluded is speculative. This request will be denied.