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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Isiah Patterson,

10 Petitioner,

11 v.

12 Ryan Thornell, *et al.*,

13 Respondents.
14

No. CV-20-02068-PHX-JJT

DEATH PENALTY CASE

ORDER

15 Pending before the Court is Petitioner Isiah Patterson’s motion to stay this habeas
16 proceeding and hold it in abeyance “for the purpose of returning to Arizona state court to
17 raise a claim for relief under *Cruz v. Arizona*,” 143 S. Ct. 650 (2023). (Doc. 46 at 1.)
18 Respondents oppose the motion. (Doc. 49.) The motion will be denied.

19 **I. Factual Background**

20 Patterson was convicted of first-degree murder and sentenced to death in 2009 for
21 the murder of Consquelo Barker. The Arizona Supreme Court, in their opinion affirming
22 the conviction and sentence, outlined the facts of the crime as follows:

23 At approximately 1:30 a.m. on March 17, 2006, Patterson and Consquelo,
24 his girlfriend, were in his Mesa apartment with their three-year-old son when
25 they began fighting. A downstairs neighbor heard loud crashes and things
26 rolling on the floor. After about ten minutes, the noises stopped. After
27 another ten minutes or so had passed, Consquelo ran from the apartment,
naked and screaming for help.

28 Patterson chased Consquelo through the outdoor common areas of the
apartment complex. He caught her at a sand volleyball pit, sat over her, and

1 stabbed her thirteen times in the face, torso, and arm. The wounds perforated
2 her lungs, diaphragm and spleen, and fractured her arm. Patterson continued
3 stabbing Consquelo until a neighbor, awakened by her screams, yelled for
4 him to stop. Consquelo then stumbled from the volleyball pit, asking for help
5 before collapsing beneath a bush, where she died. Patterson walked back
toward his apartment, telling neighbors, “That’s what happens when you try
to turn a whore into a housewife.”

6 *State v. Patterson*, 230 Ariz. 270, 272–73, 283 P.3d 1, 3–4 (2012) (footnote omitted).

7 After unsuccessfully pursuing post-conviction relief (“PCR”) in state court,
8 Patterson filed a statement of intent to pursue habeas corpus relief in this Court. (Doc. 1.)
9 The Court appointed counsel and Patterson filed his habeas petition on September 20, 2021.
10 (Doc. 17.) Briefing on the petition was complete with the filing of Patterson’s reply on
11 January 18, 2023. (Doc. 42.) On February 22, 2023, the United States Supreme Court
12 issued its opinion in *Cruz*. 143 S. Ct. 650. Patterson filed the pending motion on March 13,
13 2023. (Doc. 46.)

14 **II. Legal Background**

15 In *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994), the United States Supreme
16 Court held that when a capital defendant’s future dangerousness is at issue, and the only
17 sentencing alternative to death is life imprisonment without the possibility of parole, due
18 process entitles the defendant to inform the jury of his parole ineligibility. The Court
19 explained that the “State may not create a false dilemma by advancing generalized
20 arguments regarding the defendant’s future dangerousness while, at the same time,
21 preventing the jury from learning that the defendant never will be released on parole.” *Id.*
22 at 171.

23 Until 2012, Arizona law permitted imposition of a parole-eligible life sentence for
24 defendants convicted of first-degree murder. *See* A.R.S. § 13–703(A) (2000), renumbered
25 as A.R.S. § 13–751(A). In 1994, however, Arizona had abolished parole for all felonies
26 committed after 1993. A.R.S. § 41–1604.09(I)(1). Therefore, “the only ‘release’ available
27 to capital defendants convicted after 1993 was, and remains, executive clemency.” *Cruz*,
28 143 S. Ct. at 655.

1 In *Lynch v. Arizona*, 578 U.S. 613 (2016), the Supreme Court applied *Simmons* to a
2 capital sentencing in Arizona. Lynch was convicted of murder and other crimes. Before the
3 penalty phase of his trial began, the state successfully moved to prevent his counsel from
4 informing the jury that if he did not receive a death sentence he would be sentenced to life
5 in prison without possibility of parole. *Id.* at 614. The jury sentenced him to death. *Id.* On
6 appeal, Lynch argued that because the state had made his future dangerousness an issue,
7 the jury should have been given a *Simmons* instruction stating that the only non-capital
8 sentence he could receive was life imprisonment without parole. *Id.* The Arizona Supreme
9 Court affirmed, holding that the failure to give the *Simmons* instruction was not error
10 because Lynch could have received a life sentence that would have made him eligible for
11 release after 25 years, even though any such release would have required executive
12 clemency or legislative reform. *Id.* at 615.

13 The United States Supreme Court reversed. *Id.* The Court reiterated that under
14 *Simmons* and its progeny, “where a capital defendant’s future dangerousness is at issue,
15 and the only sentencing alternative to death available to the jury is life imprisonment
16 without possibility of parole,” due process “entitles the defendant to inform the jury of [his]
17 parole ineligibility, either by a jury instruction or in arguments by counsel.” *Id.* at 613–14
18 (internal quotations omitted).

19 Finally, in *Cruz*, the defendant argued at trial and on appeal that under *Simmons* he
20 should have been allowed to inform the jury that a life sentence in Arizona would be
21 without parole. The trial court and the Arizona Supreme Court held that Arizona’s capital
22 sentencing scheme did not trigger application of *Simmons*. *State v. Cruz*, 218 Ariz. 149,
23 181 P.3d 196 (2008). After *Cruz*’s conviction became final, the United States Supreme
24 Court issued its holding in *Lynch*. *Cruz* then sought to raise the *Simmons* issue again in a
25 PCR petition under Arizona Rule of Criminal Procedure 32.1(g), which permits a
26 defendant to bring a successive petition if “there has been a significant change in the law
27 that, if applicable to the defendant’s case, would probably overturn the defendant’s
28 judgment or sentence.” The Arizona Supreme Court denied relief, concluding that *Lynch*

1 was not “a significant change in the law.” *State v. Cruz*, 251 Ariz. 203, 487 P.3d 991 (2021).
2 The United States Supreme Court disagreed, vacating and remanding the case. *Cruz*, 143
3 S. Ct. at 662. The Court found that *Lynch* “overruled binding Arizona precedent” and
4 represented a “clear break from the past.” *Id.* at 658–59.

5 **II. Discussion**

6 Patterson seeks a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), which authorizes
7 a district court to stay a petition in “limited circumstances” to allow a petitioner to present
8 unexhausted claims to the state court without losing the right to federal habeas review
9 pursuant to the relevant one-year statute of limitations. *Rhines*, 544 U.S. at 273–77. Under
10 *Rhines*, “a district court must stay a mixed petition”—that is, a petition containing both
11 exhausted and unexhausted claims—“only if: (1) the petitioner has ‘good cause’ for his
12 failure to exhaust his claims in state court; (2) the unexhausted claims are potentially
13 meritorious; and (3) there is no indication that the petitioner intentionally engaged in
14 dilatory litigation tactics.” *Wooten v. Kirkland*, 540 F.3d 1019, 1023 (9th Cir. 2008) (citing
15 *Rhines*, 544 U.S. at 278).

16 A claim is exhausted if (1) the petitioner has fairly presented the federal claim to the
17 highest state court with jurisdiction to consider it or (2) no state remedy remains available
18 for the claim. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996). The latter form of
19 exhaustion is described as “technical exhaustion” through procedural default. *See Coleman*
20 *v. Thompson*, 501 U.S. 722, 732 (1991); *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir.
21 2007); *Woodford v. Ngo*, 548 U.S. 81, 92 (2006). In Arizona, Rule 32 of the Rules of
22 Criminal Procedure provides that a petitioner is procedurally barred from relief on any
23 constitutional claim that could have been raised on appeal or in a prior PCR petition. Ariz.
24 R. Crim. P. 32.1(a); 32.2(a)(3). A petitioner generally may not return to state court to
25 exhaust a claim unless it falls within the category of claims for which a successive PCR
26 petition is permitted. *See* Ariz. R. Crim. P. 32.1(b)–(h), 32.2(a) & (b).

27 A *Rhines* stay would be inappropriate in a federal habeas case if the claims for which
28 a petitioner seeks a stay are technically exhausted through procedural default. *See e.g.*,

1 *Armstrong v. Ryan*, No. CV-15-00358-TUC-RM, 2017 WL 1152820 (D. Ariz. March 28,
2 2017); *White v. Ryan*, No. CV-09-2167PHX-FJM-LOA, 2010 WL 1416054, *12 (D. Ariz.
3 March 16, 2010) (“Because the Petition in this case contains claims that are either actually
4 or technically exhausted, it is not a mixed Petition and *Rhines* does not apply.”).

5 Patterson’s petition is not mixed—it contains no unexhausted claims—so *Rhines* is
6 inapplicable and he is not entitled to a stay. While Patterson argues that *Cruz* provides a
7 pathway to exhaust a *Simmons* claim in state court, he did not raise such a claim in his
8 habeas petition. Patterson cites no authority for the proposition that the court can issue a
9 stay under *Rhines* to allow a petitioner to exhaust a claim he has not raised.

10 In his petition, Patterson raised a Sixth Amendment claim (Claim VI) alleging
11 ineffective assistance based on trial counsel’s failure to request a parole ineligibility
12 instruction under *Simmons*. (See Doc. 17 at 97–101.) *Cruz* does not establish a mechanism
13 for such a claim to be exhausted in state court.

14 If Patterson were to return to state court and attempt to exhaust this ineffective
15 assistance claim, the claim would be found waived and untimely under Rules 32.2(a)(3)
16 and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an
17 exception to preclusion. See Ariz. R. Crim. P. 32.2(b); 32.1(d)–(h). Therefore, Claim VI is
18 “technically” exhausted but procedurally defaulted because Patterson no longer has an
19 available state remedy. *Coleman*, 501 U.S. at 732, 735 n. 1.

20 Patterson counters by citing cases where courts in this district have granted stays
21 pursuant to *Cruz*. (Doc. 50 at 3.) These cases are inapposite. In *Fitzgerald v. Thornell*, the
22 court granted two unopposed stays of the briefing schedule, the first pending the United
23 States Supreme Court’s decision in *Cruz* and the second pending the Arizona Supreme
24 Court’s decision on remand. *Fitzgerald*, No. 19-CV-5219-PHX-MTL, Doc. 56 (D. Ariz.
25 Oct. 5, 2022), Doc. 58 (March 10, 2023). Patterson argues that in *Fitzgerald* and other
26 cases “[c]ourts have ruled that, regardless of a petitioner’s failure to raise the [*Simmons*]
27 issue, a stay must be granted to allow for exhaustion.” (Doc. 50 at 3.) *Fitzgerald*, however,
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1 on which Patterson principally relies, did not involve a request for a *Rhines* stay, so the
2 issue of exhaustion was not addressed.

3 *Cropper v. Thornell* and *Morris v. Thornell*, also cited by Patterson, likewise
4 granted the parties' unopposed motions for a stay in the briefing of the habeas petition
5 pending the Arizona Supreme Court's decision on remand in *Cruz*. *Cropper*, 19-CV-5618-
6 PHX-GMS, Doc. 89 (D. Ariz. March 7, 2023); *Morris*, 17-CV-926-PHX-DCG, Doc. 77
7 (D. Ariz. March 8, 2023). In neither case did the petitioner seek a stay under *Rhines*, so the
8 court did not consider the question of whether the petition was mixed.

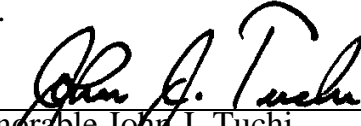
9 **III. Conclusion**

10 Patterson's habeas petition is not mixed. It contains neither unexhausted claims nor
11 the *Simmons* claim for which Patterson seeks a stay. *Rhines* therefore does not apply, and
12 Patterson's request for a stay is denied.

13 Accordingly,

14 **IT IS HEREBY ORDERED** denying Patterson's motion for a stay. (Doc. 46.)

15 Dated this 24th day of April, 2023.

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18 Honorable John J. Tuchi
19 United States District Judge
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