No. 07-99005

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV–97-02577-PHX-ROS

RESPONDENTS-APPELLEES' SUPPLEMENTAL ANSWERING BRIEF PER ORDER OF FEBRUARY 1, 2013

Thomas C. Horne
Attorney General
(Firm State Bar No. 14000)

Kent E. Cattani
Division Chief Counsel

Jeffrey A. Zick
Section Chief Counsel

Jon G. Anderson
Assistant Attorney General
Capital Litigation Section
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686
Jon.anderson@azag.gov
CADocket@azag.gov
State Bar Number 005852

Attorneys for Respondents-Appellees

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ADDITIONAL QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should reconsider its third amended panel opinion in light of the analysis set forth in the withdrawn panel opinion in *Dickens v. Ryan*, 688 F.3d 1054 (9th Cir. 2012)?[1]

2. Whether the Arizona Superior Court order of January 18, 2013, has any effect on this Court's third amended panel opinion?

[1] This Court ordered rehearing en Banc in *Dickens*. *See Dickens v. Ryan*, 2013 WL 57802 (9th Cir. Jan. 04, 2013).

SUMMARY OF ARGUMENT

1. This Court properly rejected Schad's claim of ineffective assistance of counsel at sentencing. *See Schad v. Ryan*, 671 F.3d 708, 721-22 (9th Cir. 2011) (*per curiam*) (recognizing that *Cullen v. Pinholster*, 131 S. Ct. 1388 (2010) barred consideration of new evidence offered in the habeas proceeding and not considered by the state court). *Pinholster* is still the controlling law and bars relief on the claim. Federal habeas review is limited to the record before the state court when it denied the claim, and based on that record, the state court's denial of the ineffective assistance claim was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984).

The analysis of the withdrawn panel opinion in *Dickens* is erroneous under *Pinholster*. *Pinholster* necessarily overruled *Vasquez v. Hillery*, 474 U.S. 254 (1986), and related Ninth Circuit precedent, which had held that a federal court could consider new evidence if it did not fundamentally alter the claim. *Pinholster* makes clear that new evidence, whether substantially different or substantially the same as that presented to the state court, cannot enter into AEDPA review of an IAC claim decided on the merits by the state court. The analysis underlying the withdrawn *Dickens* opinion would turn the affirmative defense of procedural default, meant to protect the state's interest in finality, into an offensive weapon used against the state to further delay and upset state court

judgments.

Moreover, even if the *Dickens* analysis were proper, it would not affect this case, because: (1) Schad's ineffective assistance claim was addressed on the merits by the federal district, and there is no procedural default to excuse under the analysis in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); (2) the evidence here was, as the district court found, substantially similar to that presented in state court, not new evidence that fundamentally altered the claim; and (3) the district court alternatively addressed the new evidence, and still found no deficient performance or prejudice, so there is no need to remand to the district court.

2. The Arizona Superior Court's order of January 18, 2013, rejecting Schad's successive state petition for post-conviction relief does not affect this Court's third amended opinion. Four of the claims were already rejected by this Court, and the other two are clearly meritless. The state PCR court's rejection of a claim of ineffective assistance at sentencing based on new evidence is a matter of state law, and does not affect this Court's previous resolution of Schad's ineffective assistance claim.

ARGUMENTS

The analysis in the withdrawn *Dickens* opinion is erroneous and, in any event, is distinguishable under the facts of this case. Furthermore, the recent rejection by the Arizona Superior Court of Schad's successive state petition for post-conviction relief has no effect on this Court's review of Schad's claim.

I

PINHOLSTER STILL CONTROLS

This Court should not reconsider its third amended opinion in light of the analysis in the now-withdrawn panel opinion in *Dickens*. *Pinholster* still controls and there is nothing in the analysis of the withdrawn *Dickens* opinion that should cause this Court to reconsider its third amended opinion in this case.

A. PROCEDURAL HISTORY IN DISTRICT COURT.

Schad submitted to the district court substantial new material never presented to the state courts regarding the IAC-sentencing claim, Claim P. ER at 66–68. However, Schad failed to file a motion pursuant to Habeas Rule 7 to expand the record to include this new material (except regarding Dr. Sanislow's declaration, as discussed hereafter). Rather, Schad simply attached the new material to various pleadings filed with the district court. *Id*.

Schad also filed a motion for an evidentiary hearing, which the district court denied, without prejudice, on September 4, 2001. ER at 448, No. 82; 449 No. 102. On August 26, 2004, more than 3 years after the parties had completed

briefing the issues on the merits (See ER at 449, No. 98), Schad filed what he called a supplemental notice of authority, to which he attached a 92-page declaration from a psychologist, Dr. Charles Sanislow. ER at 450, No. 111. The district court granted Respondents' motion to strike the affidavit. *Id*., Nos. 112, 114. Schad then filed a motion to expand the record to include Dr. Sanislow's declaration, which Respondents opposed; the district court denied the motion to expand, without prejudice, pending a further order regarding Schad's claims on the merits. *Id*. at Nos. 115, 116, 120. See also ER, Set Two, at 452–548.

In its decision and order, the district court found that Schad had not been diligent in developing the factual basis for his claim in state court, and thus the new materials were not properly before the district court. ER at 69, 91–95. However, it further found that, even if Schad had been diligent and the new materials were properly before it, the IAC claim was meritless. ER at 69. The decision and order then discussed and analyzed the proffered new material. ER at 66–69.

B. *PINHOLSTER* STILL CONTROLS THIS CASE

Pinholster limits the review of a claim under § 2254(d)(1) to the record before the state court. *See Greene v. Fisher*, 132 S. Ct. 38, 44 (2011); *Pinholster*, 131 S. Ct. at 1398; *Stokley v. Ryan*, 659 F.3d 802, 808 (9th Cir. 2011) (noting that the bar on new evidence under *Pinholster* is "coterminous

with the scope of § 2254(d)"). The statute's focus is on the state court's adjudication on the merits. *Greene*, 132 S. Ct. at 45. The backward-looking text of § 2254(d)(1) "requires an examination of the state-court decision at the time it was made." *Pinholster*, 131 S. Ct. at 1398. Simply: "[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review." *Id.* at 1400.

Thus, federal review of Schad's claim of ineffective assistance of counsel at sentencing is limited to the factual allegations before the state trial court when it denied that claim on the merits. Schad's federal habeas attorneys had obtained a "great deal more information about his early and abusive childhood experiences" by the start of his federal habeas proceedings to support his IAC-sentencing claim. 671 F.3d at 721. "Schad sought to present mitigating evidence not submitted during sentencing or during his state post-conviction proceedings, including extensive mental health records of his mother, father, and brother, as well as several declarations discussing Schad's childhood and its effect on his mental health." *Id*. The district court concluded that Schad was not entitled to expand the record in federal court because he was not diligent in developing the evidence in state court. (ER 69.)

Following a remand from the United States Supreme Court based on *Pinholster*, this Court held that "[a]lthough Schad sought to present such evidence in the district court, the Supreme Court has now ruled that when a state

court has decided an issue on the merits, the federal courts many not consider additional evidence." *Id*. at 722 (citing *Pinholster*). This holding should stand.

C. THE *DICKENS* PANEL'S ANALYSIS WAS ERRONEOUS.

1. *The withdrawn Dickens panel's analysis.*

In *Dickens,* the district court's Certificate of Appealability ("COA") included the following issues:

> (1) Whether the Court erred in determining that the new factual allegations in Claim 19, concerning fetal alcohol syndrome and organic brain deficits, were procedurally barred.
>
> (2) Whether the Court erred in determining that Claim 19, alleging ineffective assistance of counsel at sentencing based on counsel's handling of mitigation expert Dr. Roy, lacked merit.

(*Dickens*, ER 116-17.) On appeal to this Court, one of Dickens' claims was that the district court erred by rejecting his claim that trial counsel was ineffective at sentencing for failing to investigate and present certain mitigating evidence at sentencing. *Dickens*, 688 F.3d at 1057. After the case was briefed and argued, the Supreme Court decided *Pinholster* and then *Martinez* and the panel received supplemental briefing on *Martinez*. The panel never reached the merits of the IAC claim under *Strickland*, but instead found that, although Dickens had failed to fairly present his claim to the Arizona courts, he might be able to show cause and prejudice under *Martinez*. *Id.* at 1067. It reasoned that the new factual allegations of FAS and organic brain deficits placed the claim in a "significantly

different" posture from how it was presented in state court. *Id.* at 1069.

However, instead of finding the new factual allegations themselves "procedurally defaulted" as the district court had, the panel held that the new evidence meant that Dickens' "*Strickland* claim is procedurally barred." *Id*. at 1070.[2] By finding the two additional factual allegations "procedurally defaulted," the district court had decided Claim 19—as required under *Pinholster*—based on the factual record before the state court.

The panel, relying on *Hillery*, and a subsequent line of opinions from this Court, held that that the "significantly altered" Claim 19 was "procedurally defaulted," and thus subject to a cause and prejudice analysis. *Id.* at 1070. It found a sufficient allegation of cause and prejudice under *Martinez*. *Id.* at 1071-1073. The panel vacated the district court's ruling on this claim and remanded to the district court to determine whether Dickens had actually established cause and prejudice. *Id.* at 1057, 1073.

[2] Specifically the panel ruled "[t]herefore, the *district court correctly determined* that Dickens' newly-enhanced *Strickland* claim is procedurally barred." 688 F.3d at 1069 (emphasis added). To the contrary, the district court expressly found "that counsel's performance at sentencing was neither deficient nor prejudicial. Applying the additional level of deference mandated by the AEDPA, the PCR court's denial of this claim did not constitute an unreasonable application of *Strickland*. Therefore, Petitioner is not entitled to relief of Claim 19." (*Dickens* ER 104.) The district court only found the newly-raised *factual allegations* of fetal alcohol syndrome and organic brain dysfunction "were procedurally defaulted." (*Dickens* ER 81.)

2. *The Dickens panel's analysis is erroneous under Pinholster.*

The withdrawn *Dickens* panel's analysis—concluding that the case should be remanded to the district court for a cause and prejudice determination—was erroneous under *Pinholster*. Such analysis allows an "end-run" around *Pinholster*'s holding and contravenes the purposes of AEDPA. Moreover, the *Dickens* panel's analysis conflicted with this Court's straightforward application of *Pinholster* in this case.

The *Dickens* panel's analysis uses *Hillery* to make procedural default a sword to be used against the State, rather than an affirmative defense meant to *protect* the State's interest in finality. Under pre-AEDPA law, the Court in *Hillery* approved the district court ordering Hillery to expand the state-court record. 474 U.S. at 257-60. The "sole question" was whether the district court's "valid exercise" of its power to expand the record had undermined the exhaustion requirement. *Id*. 258. The Court held that the supplemental evidence "did not fundamentally alter the legal claim" considered by the state court, and "therefore, did not require that respondent be remitted to state court for consideration of that evidence." *Id*. at 261. In other words, it was not improper, before AEDPA, for a federal court to expand the record with additional material filed in federal court that did not fundamentally alter the claim.

Enactment of AEDPA "dramatically altered the landscape" of litigation under § 2254. *Rhines v. Weber*, 544 U.S. 269, 274 (2005). The *Dickens* panel's reliance on *Hillery* is wrong because *Pinholster* answers a question left opened in *Hillery*—what happens if the additional evidence fundamentally alters a claim?[3] *Pinholster* holds not only that new evidence cannot fundamentally alter the claim, but also that new evidence cannot be considered when analyzing the state-court claim: "If a claim has been adjudicated on the merits by a state court [such as occurred in Dickens' case] a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Pinholster*, 131 S. Ct. at 1400.

AEDPA has no provision for supplementing federal proceedings with additional factual allegations to support a § 2254(d) claim decided on the merits in state court. *Cf. Mayle v. Felix,* 545 U.S. 644. 650 (2005) (an amended habeas petition does not relate back under AEDPA "when it asserts a new ground for

[3] This Court has previously declined to consider the tension between cases such as *Hillery and Pinholster*. *See Stokley*, 659 F.3d at 807 ("[w]e need not determine whether *Pinholster* bars the consideration of Stokley's new evidence, because the result is the same in either case.") It stated that *Pinholster* "expressly reserved the issue of 'where to draw the line between new claims and claims adjudicated on the merits' by the state courts." *Stokley*, 659 F.3d at 808 (quoting *Pinholster*, 131 S. Ct. at 1401 n.10). "Put another way, *Pinholster* leaves open the question of how to distinguish between a claim that was exhausted in state court and a claim that is transformed by new evidence into a different and novel contention presented for the first time in federal court." (*Id*.)

relief supported by *facts that differ in both time and type* from those the original pleading set forth") (emphasis added). Rather, AEDPA significantly limits the expansion of the record with new factual allegations, pursuant to §§ 2254(d) and 2254(e).

When this Court considered the *Pinholster* case, it was in a similar posture to Dickens' case. California contended "that some of the evidence adduced in the federal evidentiary hearing *fundamentally changed* Pinholster's claim so as to render it effectively unadjudicated." *Id*. at 1402 n.11 (emphasis added). Pinholster argued that the additional evidence that had not been part of the claim in state court "simply support[ed]" his alleged claim. *Id*. The Court said:

> We need not resolve this dispute because, even accepting Pinholster's position, he is not entitled to federal habeas relief. Pinholster has failed to show that the California Supreme Court unreasonably applied clearly established federal law on the record before that court, [citing the opinion], which *brings our analysis to an end*. Even if the evidence adduced in the District Court additionally supports his claim, as Pinholster contends, *we are precluded from considering it.*"

Id. (emphasis added.)

Because neither Pinholster nor Dickens nor Schad demonstrated that the adjudication of their *Strickland* claims on the state-court records resulted in a decision "contrary to" or "involv[ed] an unreasonable application" of Supreme Court precedent, the following applies: "*a writ of habeas corpus* '*shall not be*

granted' *and our analysis is at an end.* 28 U.S.C. § 2254(d)." *See Pinholster*, at 1411 n.20 (emphasis added.) As the Supreme Court said: "We are *barred* from considering the evidence Pinholster submitted in the District Court that he contends additionally supports his claim." *Id*. (emphasis added.).

In accordance with *Pinholster,* the additional factual allegations Schad presented to the district court are a nullity for purposes of federal review. The IAC-sentencing claim, without the additional factual allegations first presented in the federal district court, was decided on the merits in state court. The district court did not find that a "claim" was procedurally defaulted; therefore there is no reason for a "cause and prejudice" determination. Claims are defaulted, not facts. The district court addressed the claim on the merits. And it further determined that the new evidence showed neither deficient performance nor prejudice.

The procedural default doctrine is an affirmative defense that the state is allowed to assert to protect its interests in the finality of state convictions. *See Trest v. Cain*, 522 U.S. 87, 89 (1997) ("[P]rocedural default is normally a defense that the state is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter."). The purpose of AEDPA is "to ensure that federal habeas relief functions as a 'guard against extreme malfunctions in the state criminal justice systems,' and not as a means of error correction." *Greene*,

132 S. Ct. at 43 (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)). The vacated *Dickens'* analysis undermines rather than promotes AEDPA's goal of finality. *See Pinholster*, 131 S. Ct. at 1401. Moreover, the analysis does not comply with the text of § 2254(d)(1). *Id.* at 1400. Rather, applying *Dickens'* analysis to this case would allow Schad to evade the holding of *Pinholster.*

A broad reading of the narrow holding in *Martinez* to justify a remand to district court would conflict with the holding in *Pinholster.* *See Lopez v. Ryan*, 678 F.3d 1131, 1137 (9th Cir. 2012) (identifying the clear tension between *Pinholster* and *Martinez*, if *Martinez* could be read to include PCR counsel's ineffective failure to develop *the factual basis* of a claim). *See also Detrich v. Ryan*, 677 F.3d 958, 992-1000 (9th Cir. 2012) (McKeown, J., dissenting from the majority's avoidance of *Pinholster*), *rehearing en banc granted by Detrich v. Ryan*, 696 F.3d 1265 (9th Cir. 2012); *Gonzalez v. Wong*, 667 F.3d 965, 972, 1017-21 (9th Cir. 2011) (O'Scannlain, J., dissenting in part from a remand of a portion of a claim the state court had previously decided on the merits to allow the state court to consider newly-discovered evidence).

Because there was a state-court merits ruling on the IAC-sentencing claim, *Martinez* simply is not relevant. In *Martinez*, the problem that concerned the Supreme Court was the fact that there had been no merits ruling on *trial counsel's effectiveness* in state court; that issue had been procedurally defaulted.

Hence, there was no merits ruling for a federal court to review under § 2254(d). Here, here was a ruling on the merits for review under the AEDPA standards.

D. EVEN IF *DICKENS* HAD NOT BEEN VACATED, IT IS DISTINGUISHABLE.

Furthermore, the *Dickens* panel's analysis is inapplicable to this case, and presents no reason for a remand to the district court.

First, the new evidence in question did not fundamentally alter the claim here, but was similar to that already presented at sentencing. Schad presented evidence of his family background at sentencing, through Schad's statements, as recounted by Dr. Bendheim and in the pre-sentence report. The district court found: "The affidavits submitted by family members and psychologists repeat, rather than corroborate or elaborate on, the specific details of abuse included in the presentence report." (ER 73-74.) The district court noted that Dr. Sanislow's declaration, "when documenting the abuse Petitioner suffered," frequently relied "on the details contained in the presentence report." (ER at 74). The district court found the new material "is either cumulative or, . . . , contradictory to the portrait of Petitioner that trial counsel presented at sentencing." (ER 75.) This is easily distinguishable from *Dickens*, where the panel concluded that: "This new evidence creates a mitigation case that bears little resemblance to the naked *Strickland* claim raised before the state courts." 688 F.3d at 1069.

Second, unlike the situation in *Dickens*, the district court here did not find a procedural default, but rather rejected the claim on the merits; first in light of the state court record and then in light of the additional evidence. There is no reasoned basis to send this case back to district court to allow Schad to attempt to establish cause for a procedural default that was not found to exist.

Third, if the *Dickens en banc* court were to adopt the withdrawn panel opinion's analysis, it would not matter because Respondents have waived any procedural default defense on appeal. AEDPA does not prevent the state from waiving the procedural default defense. *See Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002). As discussed above, the procedural default doctrine is an affirmative defense meant to protect the state's interest in finality, not a sword to be used against the State to further delay federal habeas proceedings. Respondents did not assert procedural default of this claim on appeal. (Respondents' Supplemental Answering Brief, at 37-72.)

The Supreme Court has held that a federal court abuses its discretion by considering, *sua sponte*, an affirmative defense that has been deliberately waived by the state. *See Wood v. Milyard*, 132 S. Ct. 1826, 1830 (2012). It is an abuse of discretion for an appellate court to "override a State's deliberate waiver" of an affirmative defense. 132 S. Ct. at 1834-35. It would be an abuse of discretion in this case for this Court to find that the claim was procedurally

defaulted.

Finally, the district court, although denying Schad's motion to expand the record, alternatively considered the IAC-sentencing claim in view of the new material, and still found no colorable *Strickland* claim. See ER at 69. The district court found that Schad had not "demonstrated that trial counsel's performance at sentencing was either deficient performance or prejudicial." ER at 73. *See also Schriro v. Landrigan*, 550 U.S. 465, 481 (2007) (holding that "the mitigating evidence he seeks to introduce would not have changed the result."); *Franklin*, 290 F.3d at 1237 (prisoner did not establish prejudice under *Strickland* on IAC claim). There was no prejudice because, as the district court found, further evidence regarding Schad's abusive childhood and family history (including expert testimony) would either have been merely cumulative or actually contradictory to the primary defense theory at sentencing. ER at 75.

This Court must accord double deference in reviewing *Strickland* IAC sentencing claims; the prisoner must show not only that the state-court decision was wrong, but also that it was objectively unreasonable. *See Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (*per curiam*). Only then does expanding the record under 28 U.S.C. § 2254(e)(2) become an option. There can be no such finding of unreasonableness in this case, and thus there is no basis to expand the record, much less remand this long-pending appeal back to the district court.

Moreover, if this Court could consider a record expanded to include the new material, there would be no purpose in remanding to the district court. *See Stokley*, 659 F.3d at 809 ("Even considering the new evidence, we conclude that Stokley has not presented a colorable claim of ineffective assistance of counsel."): *Franklin*, 290 F.3d at 1232 ("In this instance, however, because the district court *did* reach the merits—indeed, was presented with no basis for not resolving them—we are not faced with the need to multiply judicial proceedings by remanding to the district court."). There is no need for a remand for an evidentiary hearing because Schad has already presented substantial new evidence to the district court; Schad has not argued there is additional probative evidence regarding family history that could be adduced on remand. *See Williams v. Woodford*, 306 F.3d 665, 688–89 (9th Cir. 2002) (expansion of the record is a permissible intermediate step that may avoid the necessity of an extensive and time-consuming evidentiary hearing); *Cardwell v. Greene*, 152 F.3d 331, 338 (4th Cir. 1998) ("Cardwell has failed to forecast any evidence beyond that already contained in the record, or otherwise explain how his claim would be advanced by an evidentiary hearing."), *overruled on other grounds, Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000) (*en banc*).

II

THE RECENT ARIZONA SUPERIOR COURT ORDER HAS NO EFFECT ON THIS COURT'S THIRD AMENDED OPINION OR THIS PROCEEDING.

The recent order from the Arizona Superior Court has no effect on this Court's third amended opinion. Schad's petition for post-conviction relief raised six claims, four of which were rejected on the merits by this Court in its third amended opinion. The successive PCR petition also raised, for the first time, two clearly meritless issues.[4]

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[4] Schad's first new claim was that he was denied a proportionality review on his appeal to the Arizona Supreme Court. However, the United States Supreme Court has never imposed a requirement upon the states to conduct proportionality review in capital cases. *See Pulley v. Harris*, 465 U.S. 37, 44-51 (1984); *Jurek v. Texas*, 428 U.S. 262, 273-274 (1976) (death sentence upheld even though state case law and statutory schemes did not provide for proportionality review)(cited in *Pulley*, 465 U.S. at 48-50). Moreover, the Arizona Supreme Court did a proportionality review in this case, pursuant to its policy at that time, and found it did not warrant leniency. *State v. Schad*, 788 P.2d 1162, 1173 (Ariz. 1989).

Schad's second new claim was that he was entitled to relief pursuant to *Lackey v. Texas*, 514 U.S. 1045 (1995). This type of claim has become known as a "*Lackey*" claim; it is not based on any holding by the Supreme Court, but rather on the dissent by Justices Stevens and Breyer from the denial of certiorari in *Lackey*. These two justices did not address the merits of the claim, but only argued that the Court should accept certiorari to decide whether the execution of a prisoner who had spent some 17 years on death row violates the Eighth Amendment. Justice Thomas later noted the lack of any possible merit to the issue in his concurrence to the denial of certiorari review in *Knight v. Florida*, 528 U.S. 990 (1999). This Court soundly rejected the claim in *McKenzie v. Day*, 57 F.3d 1461, 1466 (9th Cir. 1995) (en banc). Thus, not only is the claim unsupported by clearly established Supreme Court authority, it is contrary to the law of this Circuit. *See also Allen v. Ornoski*, 435 F.3d 946, 958-60 (9th Cir.

(continued ...)

Schad's successive petition presented a claim of ineffective assistance of counsel at sentencing, and argued that the state court should consider the new evidence because of *Martinez*. However, the state court found that *Martinez* was not applicable in Arizona post-conviction proceedings, and rejected the claim under Arizona law. (Minute Entry, January 18, 2013, pages 3-5.) In state post-conviction proceedings, the state court is not bound by Supreme Court or federal appellate court holdings regarding federal habeas law. *See State v. Crockett*, 635 N.W.2d 673, 677, fn.3 (Wis. App. 2001). A federal court has no authority to review a state court's interpretation of state law. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Accordingly, the Arizona Superior Court's rejection of this claim has no effect on this Court's review of this claim.

(... continued)

2006) (surveying opinions, all rejecting asserted *Lackey* claims).

CONCLUSION

For the above reasons, this Court should decline to reconsider its third amended panel opinion, and issue the mandate in this case.

Respectfully submitted,

Thomas C. Horne
Attorney General

Kent E. Cattani
Division Chief Counsel

Jeffrey A. Zick
Section Chief Counsel

s/ Jon G. Anderson
Assistant Attorney General

Attorneys for Respondents-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 11, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Barbara Lindsay
Legal Secretary
Criminal Appeals/
Capital Litigation Division
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 3,786 words.

s/ Jon G. Anderson
Assistant Attorney General