No. 07-99005

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,
Petitioner-Appellant

v.

CHARLES RYAN, Warden
Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
DISTRICT COURT NO. CIV 97-227-PHX-ROS

APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO RECONSIDER MOTION TO VACATE JUDGMENT AND REMAND IN LIGHT OF *MARTINEZ V. RYAN*, 566 U.S. ___ (2012)

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STATEMENT REGARDING ORAL ARGUMENT

The issues presented in this capital case are of great importance and counsel believes that the Court will be aided by oral argument. Counsel therefore respectfully requests oral argument in this matter.

JURISDICTION

The District Court's jurisdiction over these capital habeas corpus proceedings was invoked under Article III of the United States Constitution, and 28 U.S.C. § 2241, *et seq*.. This Court has jurisdiction over this appeal, which is not yet final, under Article III of the United States Constitution, as well as 28 U.S.C. § 2253. This Court also has jurisdiction under 28 U.S.C. § 1651 (court has the authority to issue "all writs necessary or appropriate in aid of their respective jurisdictions"); 28 U.S.C. § 2243 (requiring the disposition of habeas petitions as "law and justice require"); and 28 U.S.C. § 2251 (power of the United States Courts to stay state court proceedings when necessary to aid in the exercise of the Court's jurisdiction.)

ISSUES PRESENTED FOR REVIEW

Pursuant to this Court's order of February 1, 2013, the issues presented for review are:

1. Whether this Court should independently remand Schad's procedurally defaulted ineffective-assistance-of-counsel-at-

sentencing claim to the district court for a determination of cause pursuant to the Supreme Court's intervening decision in *Martinez v. Ryan*, 566 U.S. ___, 132 S.Ct. 1309 (2012)?

2. What is the effect, if any, of the Yavapai County Superior Court of Arizona's January 18, 2013 decision finding Schad's newly discovered evidence of ineffective-assistance-of-counsel-at-sentencing to be precluded under Arizona law and also finding that Arizona law does not provide a forum to exhaust an equitable (or constitutional) claim of ineffectiveness under *Martinez*?

SUMMARY OF ARGUMENT

For more than two decades, federal courts have steadfastly applied the holding of *Coleman v. Thompson*, 501 U.S. 722 (1991) as precluding the defense of ineffective assistance of post-conviction counsel as cause for a procedural default in habeas cases. The United States Supreme Court decision in *Martinez v. Ryan,* creating an equitable defense of ineffective assistance of initial-review-collateral-relief counsel for ineffective-assistance-of-counsel claims, worked "a sea change in habeas law." Br. Of Amici Curiae Utah and 24 Other States in Support of Respondent, *Trevino v. Thaler*, No. 11-10189, p.2 (Jan. 22, 2013)(Amici include Arizona). This Court, and Ed Schad, did not have the benefit

of the Supreme Court's decision in *Martinez* on initial submission. As *Martinez* is an intervening decision which makes clear that Schad has a valid cause for the procedural default of his ineffective-assistance-of-sentencing-counsel claim as presented for the first time in federal court, this Court should remand his substantial claim to the district for further proceedings in light of *Martinez*.

The January 18, 2013 decision of the Yavapai County Superior Court reinforces the validity of a remand here. The Yavapai County Superior Court's decision makes clear that Arizona does not, and will not, recognize the right to effective assistance of initial-review-collateral-proceeding counsel equitable or otherwise. January 18, 2013 Minute Entry, pp.4-5. As such, the Arizona courts have found Schad's newly developed ineffective-assistance-of-sentencing-counsel claim (the same one presented in federal habeas and at issue here) precluded under Arizona law. *Id.*, p. 4. It is clear that there is no available remedy for Schad to exhaust his procedurally defaulted claim, nor his equitable defense thereto, in state court. The only avenue for vindication of Ed Schad's substantial and meritorious claim of the denial of his Sixth, Eighth, and Fourteenth Amendment rights, lies with the federal courts under *Martinez*.

This Court should vacate its previous decision and remand this case for further proceedings.

ARGUMENT

This Court Should Remand Schad's Ineffective Assistance Of Counsel Claim For Further Proceedings Under *Martinez v. Ryan*, 566 U.S. ___ (2012)

Ed Schad presents a substantial ineffective-assistance-of-counsel-at-sentencing claim that has not been reviewed in federal habeas because was it was not properly exhausted by counsel during initial post-conviction proceedings. Under *Martinez v. Ryan*, 566 U.S. ___ (2012), however, Schad can establish "cause" for the default by showing that initial post-conviction counsel ineffectively failed to raise and exhaust his claim. *Id.* at ___ (slip op. at 11). Because Schad can satisfy *Martinez*'s "cause and prejudice" standard, this Court should remand for further proceedings to allow him to do so, as it did in *Martinez v. Ryan*, 680 F.3d 1160 (9th Cir. 2012). *See also Creech v. Hardison*, No. 10-99015 (9th Cir. June 20, 2012)(remanding in light of *Martinez*)(Ex. 1); *Runningeagle v. Ryan*, No. 07-99026 (9th Cir. July 18, 2012) (same)(Ex. 2); *Lopez v. Ryan*, No. 09-99028 (9th Cir. Apr. 26, 2012)(same)(Ex. 3).

A. *Martinez v. Ryan*, 566 U.S. ___ (2012), is an Intervening Decision of the United States Supreme Court Which **for the First Time** Establishes Cause for Procedural Default Based on Equitable Principles, *viz.* Ineffective Assistance of Post-conviction Counsel

In *Martinez v. Ryan*, 566 U.S. ___ (2012), the Supreme Court

acknowledged the right to counsel as "the foundation of our adversary system," with the "right to the effective assistance of counsel at trial" being "a bedrock principle in our justice system." *Id*. at ___ (slip op. at 9), 132 S.Ct. at 1317. An incarcerated inmate, however, faces significant difficulties "vindicating a substantial ineffective-assistance-of-trial-counsel claim," because "while confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Id*. at ___ (slip op. at 8, 9), 132 S.Ct. at 1317.

To properly raise and exhaust an ineffectiveness claim, a state inmate requires the "help of an adequate attorney" who has both an "understanding of trial strategy" and the ability to undertake the "investigative work" necessary to raise the claim. *Id*. at ___ (slip op. at 8), 132 S.Ct. at 1317. In other words: "To present a claim of ineffective assistance at trial in accordance with the State's procedures . . . a prisoner likely needs an effective attorney." *Id*. at ___ (slip op. at 9), 132 S.Ct. at 1317.

If, however, state post-conviction counsel fails to properly raise a claim that trial counsel was ineffective, "it is likely that no state court at any level will hear the prisoner's [ineffectiveness] claim." *Id*. at ___ (slip op. at 7), 132 S.Ct. at 1316. Were federal habeas review of such an ineffectiveness claim also barred, an

inmate would receive *no* review of his foundational constitutional claim in any court: "No court will review the prisoner's claims." Id. In *Martinez*, the Supreme Court recognized the inequity in such a situation.

Thus, to ensure that fundamental claims of ineffective-assistance-of-counsel may actually be reviewed by *some* court, *Martinez* provides that a federal habeas court may review an otherwise procedurally defaulted ineffectiveness claim when the default resulted from the ineffectiveness of *post-conviction counsel*:

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Cf. Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue).

Martinez, 566 U.S. at ___ (slip op. at 11), 132 S.Ct. at 1318-1319. Restated, *Martinez* provides that the ineffective assistance of post-conviction counsel *plus* a substantial ineffectiveness claim provide "cause" for an otherwise unexhausted, procedurally defaulted ineffectiveness claim:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at ___ (slip op. at 15), 132 S.Ct. at 1320. Ed Schad's ineffective-assistance-of-trial-counsel claim fits precisely within the ambit of *Martinez*, and his case should therefore be remanded, as Schad now explains.

B. Schad Can Establish "Cause" Under *Martinez*: He Has A Substantial Ineffective-Assistance-Of-Counsel Claim That Was Procedurally Defaulted In Initial State Post-Conviction Proceedings Because Of The Ineffectiveness Of Post-Conviction Counsel

For purposes of applying *Martinez*, there are three operative questions: (1) Does Ed Schad have a substantial ineffectiveness claim? (2) Is that claim procedurally defaulted? and (3) Was initial post-conviction counsel ineffective for failing to properly exhaust the claim? The answer to all three questions is a resounding "Yes," which ultimately means that a remand is in order, so that Schad may establish "cause" for his defaulted ineffectiveness claim, secure full habeas review of that claim, and ultimately obtain habeas corpus relief.

1. As This Court Recognized On Initial Submission, Ed Schad's Underlying Ineffectiveness Claim Is Substantial

As this Court explained on initial submission, Schad's ineffective claim is a

claim on which he may be entitled to relief. The Court wrote, in "the district court, Schad presented evidence that, we conclude, if it had been presented to the sentencing court, would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating factors present in the case." *Schad v. Ryan*, 606 F.3d 1022, 1044 (9th Cir. 2010). This Court discussed how Schad could have received a life sentence had counsel presented the significant mitigating evidence now presented in federal habeas:

> The evidence showed how Schad's childhood abuse affected his mental condition as an adult. Had the sentencing court seen this evidence, which was so much more powerful than the cursory discussion of Schad's childhood contained in [Dr.] Bendhein's testimony and the presentence report, it might well have been influenced to impose a more lenient sentence. There was ample evidence presented at sentencing to illustrate Schad's intelligence, good character, many stable friendships, and church involvement, at least while he was in prison. Although Schad had a prior Utah conviction for second-degree murder, that charge arose out of an accidental death. The missing link was what in his past could have prompted him to commit this aberrant violent act of intentionally killing Grove. Without this psychological link, the crime appeared to be nothing but the act of a ruthless and cold blooded killer in the course of a robbery, and Schad was therefore sentenced to death. The extensive evidence of repressed childhood violent experiences could have supplied that link and mitigated his culpability for the crime.

Id. Given this Court's prior opinion, Schad's claim easily meets *Martinez*'s requirement "that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at ___ (slip op. at 11), 132 S.Ct. at 1318-1319.

Indeed, Schad's *Strickland* claim is supported by significant mitigating expert testimony, lay testimony, and documentation. Taken together, that evidence presents a compelling mitigating narrative that, had it been presented at sentencing, would have made a significant difference. Schad's father (Ed, Sr.) was sent off to combat in World War II days after Ed's birth in 1942, only to suffer horrific conditions as a prisoner of war in Stalag-17. Upon his return, Ed Sr. was a "changed man." An abusive alcoholic who suffered disabling anxiety and post-traumatic stress disorder, he was seriously mentally disturbed, and extremely abusive toward Ed, particularly so because Ed Sr. believed Ed was not actually his child. Even so, Ed Sr. suffered hallucinations, delusions, and paranoia throughout Ed's childhood and adolescence, and was later diagnosed with psychosis. This profoundly disturbed man, however, profoundly distorted Ed's development. And while Ed's alcoholic father was debilitated by serious mental illness, Ed's mother lacked the ability to properly care for him. She neglected Ed, and through neglect and/or denial, watched helplessly as Ed's infant sister died from illness, dehydration, and malnutrition. Ed's mother, too, was dependent upon substances, including narcotics. And the family lived in poverty.

Importantly, the sentencing judge never heard significant mitigating expert testimony such as that from Charles Sanislow, Ph.D., of the Yale University

School of Medicine, which compellingly weaves together the tragedy and trauma of Ed Schad's life which so terribly damaged him, resulting in lifelong, ongoing mental disturbance. As Dr. Sanislow explains, from a very early age, Ed Schad suffered "severe stresses"that damaged him psychologically, placing him at high risk for mental illness and disturbance, and making him unable to cope with life:

> The environment in which Ed Jr. was raised included many factors that placed him at high risk. Among these are: a physically disabled and psychologically damaged father by horrific war experiences; an uneducated, unskilled, fairly young mother burdened with full responsibility for several children, some of them quite ill, facing an uncertain future with a husband in a POW camp; isolation in a semi-rural area, with mother and children totally dependent on a mentally ill father for transportation; both parents with substance abuse problems which worsened over time; no medical care for the first five to nine years of the children's lives; economic poverty in a depressed area with obligations of assistance to extremely large extended families.

Declaration Of Charles A. Sanislow, Ph.D., ¶58, p. 28. Ed Sr.'s unpredictable violence and chaotic behavior and abuse stunted Ed's "ability to regulate his affect and his ability to respond to stressful situations which increased his developing mental illness." *Id*., ¶85, p. 41. Ed's parents socially isolated Ed, and he became withdrawn, viewing himself with the same sense of contempt and uselessness showered upon him by his own parents. *Id*., ¶¶104-105, pp. 49-50. Ongoing instability in the home led to continued chaos in Ed's life during adolescence,

leading him into juvenile criminal activity. *Id*., ¶¶109-112, pp. 51-52.

Having endured this horribly toxic home environment, Ed simply could not overcome the chaos and trauma that damaged him and formed him in those early years. Thus, for example, at age twenty, when it looked as if Ed might succeed in the Army, he impulsively committed petty offenses which led to his discharge from the service. Ed's life continued to be marked by mental instability – "impulsivity, agitation, restlessness, anxiety, manic behavior, disorganized thought processes." *Id*, ¶134, p. 62; *Id*. ¶¶131-150, pp. 59-72. This was not surprising, given the horrible dysfunction in which he was molded. This ultimately culminated with Schad being imprisoned in Utah in 1970, his being released in 1977, followed by mental deterioration, manic behavior, and his arrest for this murder. *Id*., ¶¶172-193, pp. 80-90. All the while, mental health professionals noted that he suffered mental problems, including paranoia, depression, and obsessive-compulsive tendencies. *Id*., ¶¶178-179, pp. 82-83.

As Dr. Sanislow emphasized, throughout his life, Ed Schad "exhibited many symptoms of a severe and chronic mental illness" traceable to the sheer chaos and insanity of his upbringing. *Id*., ¶194, p. 90. As this Court has recognized, it is that link between the trauma and chaos of Ed's early life that very well could have resulted in a life sentence. *Schad*, 606 F.3d at 1044. That is precisely why Schad's

claim is substantial: Had the mitigating narrative of Ed's life been presented at sentencing, as it could have been by a mental health professional like Dr. Sanislow, a life sentence was reasonably probable.

In fact, Schad's *Strickland* claim is similar to any number of *Strickland* claims from Arizona which this Court has found to be substantial and/or meritorious, given the very types of mitigating explanation presented in Schad's case. *See e.g.*, *Stanley v. Schriro*, 598 F.3d 612 (9th Cir. 2010)(finding a *prima facie* case for relief under *Strickland* and remanding for further proceedings where counsel failed to present expert mitigating mental health evidence at sentencing); *Robinson v. Schriro*, 595 F.3d 1086 (9th Cir. 2010)(counsel ineffective at sentencing for failing to present mitigating evidence of, *inter alia*, poverty, unstable and abusive upbringing including sexual abuse, and personality disorder); *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009)(counsel ineffective at sentencing for failing to present mitigating evidence of serious childhood abuse and mental disturbance); *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008); *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007) (sentencing counsel ineffectively failed to investigate and present mitigating evidence of abusive childhood, mental condition, and drug dependency). *See also Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009).

Ed Schad meets *Martinez*'s substantiality requirement.

2. Schad's Substantial Ineffectiveness Claim Was Procedurally Defaulted By Initial Post-Conviction Counsel

Schad's substantial ineffectiveness-at-sentencing claim, however, was never properly presented to the state courts by initial post-conviction counsel. It is thus considered procedurally defaulted and ultimately subject to *Martinez*, where post-conviction counsel provided the state courts *none* of the mitigating evidence underlying Schad's federal habeas claim.

a. Exhaustion Requires Presentation Of Both The Facts And Legal Theory In Support Of A Claim

Before presenting a claim in federal habeas proceedings, a petitioner must exhaust state court remedies. 28 U.S.C. § 2254(b). Exhaustion requires a petitioner to present to the state court both the legal theory and the facts supporting a claim, so that the state court may have the first opportunity to apply the law to those facts. As the Supreme Court explained in *Gray v. Netherland*, 518 U.S. 152 (1996): "In *Picard v. Connor*, 404 U.S. 270 (1971), we held that, for purposes of exhausting state remedies, a claim for relief in habeas corpus *must include* reference to a specific federal constitutional guarantee, as well as *a statement of the facts that entitle the petitioner to relief*." *Gray*, 518 U.S. at 162-163 (emphasis

supplied). *See also McCaskle v. Vela*, 464 U.S. 1053, 1055 (1984)(O'Connor, J., dissenting) (exhaustion requires presentation of "all facts necessary to support a claim" and identification of legal claim arising from those facts).

As this Court has likewise explained, to "fairly present" a federal claim to state court and avoid a procedural default, a federal habeas petitioner must:

> describe both *the operative facts* and the federal legal theory on which his claim is based so that the state courts could have *a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim*.

Castillo v. McFadden, 399 F.3d 993, 998 (9th Cir. 2004)(emphasis supplied). "For purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts the entitle the petitioner to relief." *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). *See also Carney v. Fabian,* 487 F.3d 1094 (8th Cir. 2007)(to exhaust state remedies, petitioner must fairly present the facts and substance of his claim to state court); *Longworth v. Ozmint*, 377 F.3d 437, 448 (4th Cir. 2004)(exhaustion requires that petitioner "fairly present to the state court both the operative facts and the controlling legal principles associated with each claim."); *Wilson v. Briley*, 243 F.3d 325, 327-328 (7th Cir. 2001)(to fairly present claim, petitioner must "present both the operative facts and the legal principles

that control each claim.")

Even the state acknowledges as much, having argued that unless facts in support of an ineffectiveness claim are actually presented to the state courts, the claim in federal court is not exhausted: "The problem with presenting to the federal court new evidence never presented to the state courts is that it places the claim in a significantly different evidentiary posture in federal court, violating the exhaustion requirement." R. 116, p. 4 (Respondent's Opposition To Motion To Expand Record).

b. Post-Conviction Counsel Failed To Properly Exhaust Schad's *Strickland* Claim As Presented In Habeas

Under these standards, it thus appears that Schad's ineffectiveness claim, as presented in Amended Petition ¶28, Claim P, is not exhausted and thus procedurally defaulted for purposes of *Martinez*. To be sure, while Schad did raise ***a*** *Strickland* claim in his initial state post-conviction proceedings, he did not raise ***the*** *Strickland* claim presented to the federal courts in Amended Petition ¶28, Claim P, as supported by the vast evidence presented in federal habeas. Post-Conviction counsel simply did not present to the state court the operative facts and evidence underlying ¶28, Claim P.

As this Court itself has concluded: "The record is clear that Schad did not

succeed in bringing out relevant mitigating evidence during state habeas proceedings. *Schad*, 606 F.3d at 1044. Schad's federal habeas claim is thus *not* the claim raised in state court, because, as the District Court noted, it is based upon "a number of exhibits that contain information never presented to the state courts." R. 121, p. 57 (Memorandum).

Indeed, in state court, post-conviction counsel presented no evidence (whether affidavits, declarations, or documents) to show that trial counsel was ineffective at sentencing. Even when asking for more time to represent Schad, post-conviction counsel did not present any documentary evidence or proposed testimony from any witness (lay or expert) to support a new sentencing hearing under *Strickland*. Counsel did provide an affidavit from investigator Holly Wake, but that affidavit merely identified corrections department records to be obtained, while noting that family members also should be interviewed. To quote the state itself, post-conviction counsel simply

> presented no names of potential witnesses, no description of their proposed testimony, no affidavit from anyone stating what that person would testify to at a hearing, and no argument why that information would probably have changed the sentencing hearing if it had been presented.

R. 116, p. 7.

The state has thus asserted that Schad's current *Strickland* claim was not

fairly presented to the Arizona courts, especially where ¶28, Claim P, is based upon the comprehensive affidavit of Charles Sanislow which was never considered by the Arizona courts:

> [A]llowing Petitioner to expand the record with the declaration at issue would place the claim in a significantly different evidentiary posture than it was in before the state court, thereby violating the fair presentation requirement. *See Nevius*, 852 F.2d at 470; *Aiken*, 841 F.2d at 883.

R. 116, p. 9. Schad's current claim in federal habeas, therefore, quite clearly appears defaulted precisely because "Schad did not succeed in bringing out relevant mitigating evidence during state habeas proceedings." *Schad*, 606 F.3d at 1044.

Under virtually identical circumstances, the United States Court of Appeals for the Fourth Circuit found such a *Strickland* claim procedurally defaulted. *Moses v. Branker*, 2007 U.S.App.Lexis 24750 (4th Cir. 2007). In *Moses*, the habeas petitioner claimed in state post-conviction proceedings that counsel was ineffective under *Strickland* based solely on allegations and proof that trial counsel should have called two additional witnesses at the capital sentencing proceeding, Dennis and Johnson. *Id*. *6. With Moses having presented that limited claim to the state court, the state court denied relief, concluding that trial counsel's performance with regard to those two witnesses was not deficient. *Id*.

In federal habeas proceedings, however, unburdened by ineffective state post-conviction counsel, Moses presented a very different claim – very much like Schad's habeas claim – in which he presented abundant, new mitigating evidence showing the prejudice flowing from trial counsel's failures:

> The claim in the federal petition is not limited, however, to counsel's failure to call Dennis and Johnson as mitigating witnesses. Instead, the federal petition asserts that counsel had 'conducted an inadequate investigation of Petitioner's childhood background and family circumstances' and 'consistently ignored important mitigation leads.' [citation omitted] The petition describes in detail the type of mitigating evidence that could have been presented if counsel had undertaken a full investigation of Moses's background. Attached to the petition are affidavits from seventeen persons who would have offered mitigating testimony, including a caseworker and two psychologists from the Massachusetts Department of Youth Services, two teachers from Moses's elementary school, and twelve family members, including Johnson. The petition asserted that testimony from these witnesses would have detailed the 'daily horror of Moses's childhood home' while also portraying Moses as someone with 'a life worth preserving.'

Id. *7. Having made such a different presentation of mitigating evidence that should have been presented at sentencing, Moses had thus "fundamentally alter[ed] the ineffective assistance of counsel claim he presented to the state . . . court," as his federal claim "required the presentation of a set of facts not introduced in the state . . . proceeding." *Id*. *8.

The Fourth Circuit thus concluded "that the ineffectiveness claim in

Moses's [federal] petition was fundamentally different than the one presented to the state court," and accordingly, "Moses failed to exhaust in state court the ineffective assistance of counsel claim now presented in his federal habeas petition." *Id*. *8-9. His claim was therefore procedurally defaulted (and the court rejected his claim that the ineffectiveness of post-conviction counsel should be considered "cause" for his default). *Id*. *9.[1]

The Arizona Superior Court's recent order in *State v. Schad*, No. P1300CR8752 confirms this conclusion. During Schad's initial post-conviction proceedings, post-conviction counsel did not present any of the evidence underlying Schad's new *Strickland* claim as presented in federal habeas. In a second Rule 32 motion filed in 2012, however, Schad did present all of that evidence, thus providing the state courts all the facts in support of his federal habeas claim as well as his legal theory.

Under Ariz.R.Crim.P. 32.2(a)(3), however, a claim is "precluded from relief . . . upon any ground . . . that has been waived . . . in any previous collateral proceeding." "[W]ithout examining the facts," the Yavapai County Superior Court thus found Schad's current *Strickland* claim precluded from review, waived under

[1] The situation in both *Schad* and *Moses* is similar to that described in *Dickens v. Ryan*, 9th Cir. No. 08-99017, which is pending *en banc* review in this Court.

Rule 32.2(a)(3). *State v. Schad*, No. P1300CR8752, In The Superior Court of Yavapai County, Jan. 18, 2013, p. 4. In doing so, the Superior Court applied *Stewart v. Smith*, 202 Ariz. 446, 450 (2002), to conclude that given the mere fact that Schad raised a *Strickland* claim in his initial post-conviction proceedings, his new claim could not be heard. As the Arizona Supreme Court emphasized in *Smith*, the "ground of ineffective assistance of counsel cannot be raised repeatedly," but Schad's case "fits squarely within the parameters addressed in *Stewart*." *State v. Schad*, No. P1300CR8752, In The Superior Court of Yavapai County, Jan. 18, 2013, p. 4. Having been barred by the recent order of the Yavapai Superior Court, Schad's federal petition ¶28, Claim P, thus appears defaulted for this additional reason.[2]

3. Initial Post-Conviction Counsel Was Ineffective Under *Martinez*

Under *Martinez*, therefore, the lone remaining question is whether initial post-conviction counsel was ineffective for failing to present the defaulted *Strickland* claim that Schad now presents in federal habeas. It certainly appears

[2]Having found Schad's claim precluded and thus defaulted, the court went on in dicta to misread this Court's prior decision as holding that Schad's claim was not meritorious. That was a clearly unreasonable reading of this Court's decision, as this Court emphasized that such a conclusion was erroneous. *See also* 28 U.S.C. § 2254(d)(unreasonable state court decision cannot bar federal habeas corpus relief).

that way. In fact, the State itself has repeatedly emphasized that post-conviction counsel lacked diligence and unreasonably failed to present the mitigation claim now presented by Schad – because the mitigating evidence presented in federal court was readily available to post-conviction counsel. The State's own position proves that Schad has made more than the minimal *prima facie* showing necessary for a *Martinez* remand.

Indeed, the state has emphasized that post-conviction counsel didn't present the state court any evidence in support of a *Strickland* claim "[d]espite extensive continuances and investigation." R. 116, p. 5. To reiterate, the state itself has maintained that post-conviction counsel:

> presented no names of potential witnesses, no description of their proposed testimony, no affidavit from anyone stating what that person would testify to at a hearing, and no argument why that information would probably have changed the sentencing hearing if it had been presented.

Id. at 7. Having laid the blame for this state of affairs at the feet of post-conviction counsel, the state had further acknowledged that post-conviction counsel's failures were unreasonable under the circumstances, thus meeting *Strickland*'s definition of ineffectiveness. As the state has already informed this Court:

> **Schad did not make 'a reasonable attempt, in light of the information available at the time, to investigate and pursue' his claim of ineffective assistance of counsel.**

Schad v. Ryan, 9th Cir. No. 07-99005, Respondents'-Appellees' Petition For Rehearing And Rehearing *En Banc*, R. 58-1, p. 3 (Sept. 23, 2009)(emphasis supplied). This is the very definition of ineffectiveness under *Strickland*. As the Supreme Court explained in *Porter v. McCollum*, 558 U.S. 30, ___ (slip op. at 10), 130 S.Ct. 447, 453 (2009)(per curiam), counsel performs deficiently when s/he "ignore[s] pertinent avenues of investigation of which [s/]he should have been aware." *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (counsel ineffectively failed to conduct complete investigation of mitigating evidence).

Even the state agrees that post-conviction counsel was ineffective.

4. Schad Thus States A *Prima Facie* Case For Relief Under *Martinez*

All told, therefore, Ed Schad's case falls squarely within the scope of *Martinez*. As presented in federal court, Amended Petition ¶28, Claim P, is substantial, as this Court has already recognized. This claim was not presented to the Arizona courts and is thus unexhausted and procedurally defaulted under *Martinez*. Also, as the state has essentially admitted, counsel during initial post-conviction proceedings was ineffective for failing to present the claim, having failed to reasonably investigate and pursue the claim in light of evidence available at the time. *Martinez* applies with full force here.

C. This Court Should Remand For Further Proceedings Under *Martinez*, So That Schad May Finally Receive One Full And Fair Adjudication Of His Sentencing Ineffectiveness Claim

Because Ed Schad presents a substantial sentencing-ineffectiveness claim that was procedurally defaulted in initial post-conviction proceedings given the ineffectiveness of post-conviction counsel, *Martinez* thus applies, and Ed Schad is entitled to a proper and full application of *Martinez* to the facts of his case. Without doubt, the forum for that consideration is the United States District Court, given the need for factfinding on the questions of trial counsel's ineffectiveness, post-conviction counsel's ineffectiveness, and the prejudice resulting from their failures. In fact, no federal court has yet to consider Schad's expert mitigating evidence. Thus, "remand for factual development of the record is the appropriate course of action." *Mendoza v. Carey*, 449 F.3d 1065, 1071 (9th Cir. 2006).

A remand is required under circuit precedent, as Schad's case is controlled by this Court's published opinion in *Martinez v. Ryan*, 680 F.3d 1160 (9th Cir. 2012), which remanded to the District Court for application of *Martinez* in the first instance. *See Phelps v. Alameida*, 569 F.3d 1120, 1126 (9th Cir. 2009)(published opinions are controlling). Similarly, this Court has ordered *Martinez* remands in *Creech v. Hardison*, No. 10-99015 (9th Cir. June 20, 2012)(Ex. 1), *Runningeagle v. Ryan*, No. 07-99026 (9th Cir. July 18, 2012)(Ex. 2), and *Lopez v. Ryan*, No. 09-

99028 (9th Cir. Apr. 26, 2012)(Ex. 3). That unquestionably is the proper course here as well, especially where the United States District Court for the District of Arizona is already considering the identical issues in light of this Court's *Martinez* remands in *Martinez*, *Runningeagle*, and *Lopez*.

CONCLUSION

As this Court recognized on initial submission, Ed Schad has a substantial claim of ineffectiveness-at-sentencing. That claim, however, was defaulted by post-conviction counsel, whom even the state acknowledges performed unreasonably, and was therefore ineffective. Ed Schad has made a clear *prima facie* showing entitling him to relief under *Martinez*, and this Court must therefore remand Schad's case to the United States District Court, as required by this Court's published decision in *Martinez v. Ryan*, 680 F.3d 1160 (9th Cir. 2012).

Respectfully submitted this 11th day of February, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 5,257 words which is in compliance with this Court's February 1, 2013 supplemental briefing order.

/s/ Kelley J. Henry
Counsel for Mr. Schad

CERTIFICATE OF SERVICE

I certify that on this 11th day of February, 2013, I electronically filed the foregoing Supplemental Brief using the Court's CM/ECF filing system. A true and correct copy of the foregoing will be served via the Court's automated system on opposing counsel, Mr. Jon Andersen, Assistant Attorney General, 1275 W. Washington, Phoenix, AZ 85007-2997, who is a registered user of the system. I also separately emailed a copy of the foregoing supplemental brief to opposing counsel, Mr. Anderson, and to Ms. Margaret Epler, Capital Case Staff Attorney for the Ninth Circuit United States Court of Appeals.

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