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 REPLY 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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I. This Court Should Remand For Application Of *Martinez*

This Court should remand for application of *Martinez*, because: (1) Schad's *Strickland* claim as presented in federal court was not exhausted during initial post-conviction proceedings, and the state is estopped from claiming otherwise; and (2) *Pinholster* does not bar relief, because *Pinholster* only applies to claims adjudicated on the merits in state court, but Schad's current *Strickland* claim in federal habeas is a "new claim" that was not adjudicated on the merits under 28 U.S.C. §2254(d).

A. Schad's *Strickland* Claim Was Not Exhausted In Initial Post-Conviction Proceedings, It Is Therefore Subject To *Martinez*, And The State Is Estopped From Claiming Otherwise

The critical point articulated in Schad's supplemental brief but wholly ignored (or misstated) in the state's supplemental brief is this: Under 28 U.S.C. §2254, exhaustion of a claim requires a "fair presentation" of *both* the legal theory *and* the facts in support of that claim. Schad has explained that point in detail, citing not only Supreme Court but Ninth Circuit precedent. Schad's Supp. Brief, pp. 13-14.

As Schad has also shown, the state *has fully agreed* with that position during federal habeas proceedings, having told the District Court that presentation of new evidence in federal habeas creates a new, previously-unadjudicated claim, because it "places the claim in a significantly different evidentiary posture in federal court, ***violating the exhaustion requirement***." R. 116, p. 4 (State's Opposition To Motion

To Expand Record), *cited* in Schad's Supplemental Brief, p. 15. In fact, the state succeeded in preventing consideration of Dr. Sanislow's compelling mitigating narrative in federal court by arguing, in essence, that Schad was presenting a "new claim," one that was "in a significantly different evidentiary posture than it was in before the state court, thereby *violating the fair presentation requirement*." *Id*., p. 9. To use the state's own words, Schad's fully developed claim including *inter alia* the Sanislow Declaration (as well as the Leslie Lebowtiz, Ph.D., Declaration) was not exhausted. It was not fairly presented to the state court.

The state, however, now takes a different tack, using sleight-of-hand to claim that "Claims are defaulted, not facts." State's Supp. Brief, p. 11. That new assertion, however, is wholly at odds with what the state argued previously, *viz*., that Schad's claim was unexhausted given the significant difference in the facts and evidence presented in federal court. Having taken a different position previously, the state is estopped from changing its position now. *See Russell v. Rolfs*, 893 F.3d 1033 (9th Cir. 1990), *Whaley v. Belleque*, 520 F.3d 997 (9th Cir. 2007).

Even so, the Supreme Court has made clear that, to exhaust a claim for federal habeas review, a petitioner must present in state court both the law *and* the facts in support of his claim. The Supreme Court made that clear in *Picard v. Connor*, 404 U.S. 270 (1971) and *Gray v. Netherland*, 518 U.S. 152 (1996), cases which the state

doesn't mention. This Court made that clear in *Castillo v. McFadden*, 399 F.3d 993 (9th Cir. 2004) and *Shumway v. Payne*, 223 F.3d 982 (9th Cir. 2000), still other cases which the state doesn't mention. *Castillo* makes plain that a claim is unexhausted unless the state courts had a "fair opportunity to apply controlling legal principles to the facts bearing upon [the] constitutional claim." *Castillo*, 399 F.3d at 998. Plainly, a state court cannot apply law to facts that are not before it. So these cases properly hold that for fact bound claims, a failure to present the controlling *facts* to a state court constitutes a failure to exhaust a *claim*--a procedural default. That is the case here.

Schad has also shown that his new, developed *Strickland* claim is unexhausted (and thus procedurally defaulted) under the law and logic of the Fourth Circuit in *Moses v. Branker*, 2007 U.S.App.Lexis 24750 (4th Cir. 2007), where the court found a newly-developed *Strickland* claim defaulted under circumstances nearly identical to those presented here. *Moses* likewise confirms the accuracy of the conclusions drawn by the panel in the now-withdrawn opinion in *Dickens v. Ryan*, 688 F.3d 1054 (9th Cir. 2012), which concluded that Dickens' *Strickland v. Washington*, 466 U.S. 668 (1984), claim was unexhausted, procedurally defaulted, and therefore subject to *Martinez*.

Given precedent from the Supreme Court, this Court, and the Fourth Circuit,

as well as the state's own arguments in the District Court, it clearly appears that Schad's *Strickland* claim as presented in federal habeas was not exhausted by initial post-conviction counsel, and thereby procedurally defaulted. It is a new claim that was not adjudicated on the merits during those initial proceedings. Schad's claim therefore falls squarely within the scope of *Martinez*, which allows Schad to show "cause," thereby permitting federal habeas review of his ineffective-assistance-of-trial-counsel claim.

B. *Pinholster* Does Not Control Because Schad Presents A "New Claim" Not Adjudicated During Initial Post-Conviction Proceedings, And As Justice Sotomayor Explained In *Pinholster*, This Is Precisely The Situation In Which A Petitioner Is Entitled To Show "Cause And Prejudice," As Schad Seeks To Do Under *Martinez*

The fallacy of the state's position about *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), is exposed once one realizes the sleight-of-hand with which the state characterizes Schad's current ineffectiveness claim. The state tries to claim that Schad's current ineffectiveness claim was somehow "adjudicated on the merits" under 28 U.S.C. §2254(d). The state, however, does not assert (or show) that the Arizona courts during initial post-conviction proceedings ever had "a fair opportunity to apply controlling legal principles *to the facts bearing upon [Schad's] constitutional claim*," which included, *inter alia*, the Sanislow and Leibowitz

Declarations. *Castillo*, 399 F.3d 998. There was no such fair opportunity, given the abject failures of post-conviction counsel.

As noted *supra*, it is hornbook habeas law that a substantive claim is not simply an invocation of a legal case (like *Strickland*): It is invocation of *law* plus presentation of the relevant facts to which that law applies. That was the Fourth Circuit's point in *Moses*. That was the point of the withdrawn panel opinion in *Dickens*. That is precisely the point here. As the state agrees, especially when new facts (as here) alter a claim dramatically, the resulting claim is new, and not exhausted.

While claiming that *Pinholster* should apply here, the state also overlooks the critical fact that in *Pinholster* itself, Justice Thomas alluded to the very situation presented here as a situation in which the rule of *Pinholster* **would not apply**. As Justice Thomas explained in footnote 10 of the majority opinion, there is a distinction "between new claims and claims adjudicated on the merits," and a claim "involving new evidence" "may well present a new claim," i.e. a claim that was not adjudicated on the merits in state court. *Pinholster*, 131 S.Ct. at 1401 n. 10. Any "new claim" not presented to the state courts is not subject to *Pinholster*, because such a claim has not been adjudicated on the merits within the meaning of 28 U.S.C. §2254(d) – just like Schad's claim, and the claims presented in *Dickens* and *Moses*.

In fact, as Justice Sotomayor explained, footnote 10 means that when presenting a new claim (as Schad does), a habeas petitioner like Schad can be heard in federal habeas if he has "cause" for having failed to present that new claim in state court. As she explained, footnote 10 "presumably means to suggest that the petitioner might be able to obtain federal-court review of his new evidence *if he can show 'cause and prejudice' for his failure to present the 'new' claim to state court*." 131 S.Ct. at 1418 (Sotomayor, J., dissenting)(emphasis supplied). That is the very situation here. It is precisely the situation to which *Martinez* applies – which is why *Martinez* applies here. In fact, by agreeing long ago that Schad's current claim is a claim in a "significantly different evidentiary posture than it was in before the state court, thereby *violating the fair presentation requirement*." (R. 116, p. 9), the state has admitted that Schad's claim is a "new claim" under *Pinholster* that was *not* adjudicated on the merits. It couldn't have been, when the facts were not before the state courts.[1]

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[1] As Schad explained in his opening supplemental brief, the Yavapai County Superior Court found Schad's current claim precluded from post-conviction review, given the initial unsubstantiated *Strickland* claim raised by initial post-conviction counsel. The Superior Court dismissed Schad's claim "without examining the facts" of the claim. *State v. Schad*, No. P1300CR8752, In The Superior Court of Yavapai County, Jan. 18, 2013, p. 4. In *dicta*, the court then noted that the United States District Court had ruled against Schad on the merits of the new claim. The Superior Court mistakenly believed that this Court has agreed with the District Court's logic. It did not. Plainly, the district court's reasoning,

Thus, *Pinholster* does not apply but *Martinez* does, allowing Schad to establish "cause" for failing to exhaust the new claim in state court during initial post-conviction proceedings. *Pinholster*, 131 S.Ct. at 1418 (Sotomayor, J., dissenting)(emphasis supplied). He has that cause, given the severe failings of post-conviction counsel.

CONCLUSION

This Court should vacate its prior opinion and remand Schad's case to the United States District Court, for an adjudication of his procedurally defaulted *Strickland* claim as required by this Court's published decision in *Martinez v. Ryan*, 680 F.3d 1160 (9th Cir. 2012). This Article III Court should also issue any other

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which applied the now repudiated Arizona causal connection test to discount the relevance of Schad's new evidence, was erroneous. *See* ER 75. In any event, because the Superior Court's statement on this point was *dicta*, it does not affect Schad's entitlement to relief under *Martinez*. The Warden agrees. Resp. Supp. Brf. pp. 17-19. Even so, this Court (which found the District Court's determination to be wholly erroneous) has yet to address Schad's new claim containing all of his mitigating evidence, on the merits. Thus, this Court is only left with two options, *viz*., remanding for application of *Martinez*, or otherwise fully adjudicating the merits of Schad's fully developed, new claim, and granting him habeas corpus relief (as the Court indicated was appropriate on the initial appeal). The latter is the appropriate course if this Court were to accept the state's contention that Schad's fully-developed, new claim is not procedurally defaulted after all. Because Schad's present motion to reconsider only involves *Martinez*, however, additional briefing and argument would be required to pursue the latter option, so that the Court could effectively consider all of Schad's mitigating evidence in light of the appropriate legal standards.

orders necessary and proper to protect its jurisdiction and Ed Schad's federal constitutional rights. *See* 28 U.S.C. §§ 1651, 2241, 2243, 2251.

Respectfully submitted this 14th day of February, 2013.

BY: *Kelley J. Henry*
Kelley J. Henry
Denise I. Young

Counsel for Edward H. Schad

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing supplemental reply brief contains 1,773 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 14th day of February, 2013, I electronically filed the foregoing Supplemental Reply 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 Anderson, 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.

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