NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD, Petitioner - Appellant, v. CHARLES L. RYAN, Arizona Department of Corrections, Respondent - Appellee.	No. 07-99005 D.C. No. CV-9702577-PHX-ROS District of Arizona, Phoenix ORDER

Before: SCHROEDER, REINHARDT, and GRABER, Circuit Judges.

After the Supreme Court denied Schad's petition for certiorari and motion for rehearing of his petition for certiorari, Schad filed an Emergency Motion to Continue Stay of the Mandate Pending En Banc Proceedings in *Dickens v. Ryan*, No. 08-99017. On February 1, 2013, we denied the motion, as such, but instead construed it as a motion to reconsider our prior denial of Schad's Motion to Vacate Judgment and Remand in light of *Martinez v. Ryan*, 139 S. Ct. 1309 (2012). We requested further briefing and have carefully considered the responses we received from both parties.

I.

Martinez "changed the landscape with respect to whether ineffective assistance of counsel may establish cause for procedural default." *Lopez v. Ryan*, 678 F.3d 1131, 1133 (9th Cir. 2012). This changed landscape has been the cause of much uncertainty in courts of appeals, including our own. Our court decided to take the issue presented in the case before us en banc in *Dickens v. Ryan*, No. 08-99017. *See* Respondent-Appellee's Motion for Panel Rehearing and Rehearing En Banc, *Dickens v. Ryan*, No. 08-99017 (9th Cir. Aug. 17, 2012), Dkt. 69 (noting the conflict between that case and our decision in *Schad*); Petitioner-Appellant's Response to Petition for Panel Rehearing and Rehearing En Banc, *Dickens v. Ryan*, No. 08-99017 (9th Cir. Sept. 13, 2012), Dkt. 72. In addition, at oral argument before an en banc court in *Detrich v. Ryan*, December, 2012, pursuant to a pending *Martinez* motion, the court ordered counsel to address the circumstances under which a remand under *Martinez* was warranted. Order, *Detrich v. Ryan*, No. 08-99001 (9th Cir. Dec. 7, 2012), Dkt. 159. We have reviewed the briefs regarding the motion to remand in that case as well, and listened to the oral argument.

In light of these developments, it has become clear that Schad's case raises the same issues our court is currently considering en banc. Because Arizona has already scheduled Schad's execution, we cannot hold this case, as would be our

normal practice, until en banc proceedings have concluded. Thus, we have determined that it is proper to reconsider the earlier order in which we stated only, without any explanation at all, that the motion is "denied." For the reasons set forth below, we remand to the district court to determine whether, under *Martinez*, Schad's post-conviction counsel was ineffective, whether Schad suffered prejudice as a result, and, if both questions are answered in the affirmative, the merits of Schad's underlying claim.

II.

In order to determine whether a remand to the district court is appropriate in this case, we assume, without deciding, that Schad must meet the heavy burden of satisfying the requirements for a stay of mandate after the Supreme Court has denied certiorari. *See Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) (explaining that because the mandate should otherwise issue automatically following the Supreme Court's denial of a petition for certiorari, the petitioner must meet not only the standard for a stay but also the threshold "requirement of exceptional circumstances"); *see also Stokley v. Ryan*, 705 F.3d 401 (9th Cir. 2012). For the reasons set forth below, we conclude that Schad has met that standard. For those same reasons and because "[u]ntil the mandate issues, a circuit court retains jurisdiction of the case and may modify or rescind its opinion,"

Beardslee, 393 F.3d at 901, we exercise our inherent authority to remand for the district court to consider Schad's claim under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (citations omitted). We consider four factors before granting a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Leiva-Perez v. Holder, 640 F.3d 962, 964 (9th Cir. 2011) (per curiam) (quoting *Nken*, 556 U.S. at 434). "The first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 434. Important here is whether Schad can meet the first factor—showing a likelihood of success on the merits. As *Leiva-Perez* notes, the "likely to succeed on the merits" factor "does not require the moving party to show that [its] ultimate success is probable," rather, at least in some types of cases, a showing that the party's "chance of success on the merits [is] better than negligible" will satisfy the "likely to succeed on the merits" factor. 640 F.3d at 697-98 (internal alterations omitted) (quoting *Nken*, 556 U.S. at 434).

As to the first *Leiva-Perez* factor, Schad raised his "new claim" of ineffectiveness of sentencing counsel for the first time before the district court by submitting newly discovered evidence of his "mental illness" as an adult. We did not review the claim on appeal because the district court found that Schad was not diligent in presenting the evidence of mental illness to the state court under § 2254(e)(2) and, therefore, excluded that evidence. *Schad v. Schriro*, 454 F. Supp. 2d 897, 955-956 (D. Ariz. 2006). We nonetheless concluded that "if [the new evidence] had been presented to the sentencing court, [it] would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigation factors present in this case." *Schad v. Ryan*, 595 F.3d 907, 923 (9th Cir. 2010), *vacated on other grounds by Ryan v. Schad*, 131 S. Ct. 2092 (2011). Because, under *Martinez*, Schad may be able to present that new evidence as part of a "new claim" for relief on federal habeas review, and we have already held that such evidence would result in some likelihood of a different sentence, we hold that his "chance of success on the merits is better than negligible," and, therefore, the first factor is met. *Leiva-Perez*, 640 F.3d at 964.

Two of the remaining three factors favor granting a remand. Schad will likely be executed in one week if we fail to do so, and, consequently, stands to suffer the ultimate irreparable injury—loss of his life. The public interest in not

executing a man who may have been denied his constitutional right to counsel during the penalty phase of his capital trial also favors granting the remand. One factor, however, weighs against a grant. Arizona will suffer an injury if we grant the remand, because as a co-equal sovereign power it has a strong interest in punishing serious crimes and in the finality of its state court judgments. *Cf. Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) (describing the important interest in finality of state court judgments that is jeopardized when a court of appeals recalls the mandate after issuance). In the end, however, we believe that in this case, the final factor is outweighed by the other three, all of which strongly favor the granting of the motion for a remand.

Next, the threshold requirement of "exceptional circumstances" for granting a "remand" following the Supreme Court's denial of Schad's petition for certiorari is met here. *Beardslee*, 393 F.3d at 901. The combination of several factors gives rise to exceptional circumstances in this case. First, as we have noted, the Supreme Court's decision in *Martinez* "changed the landscape with respect to whether ineffective assistance of counsel may establish cause for procedural default." That decision fundamentally altered the procedural posture of Schad's claim for ineffective assistance of sentencing counsel. *Lopez*, 678 F.3d at 1133. Second, in the history of Schad's case, we have already concluded that "if [the new evidence]

had been presented to the sentencing court, [it] would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigation factors present in this case." *Schad*, 595 F.3d at 923 (subsequent history omitted). Third, the pending en banc consideration of the same questions raised by Schad favors a finding of exceptional circumstances, because Schad should not be executed merely because the en banc proceedings are lengthy. Fourth, only today the Arizona Supreme Court denied Schad's request that it consider his ineffective assistance of counsel claim under *Martinez*.[1] Fifth, Schad's pending execution itself is an exceptional circumstance. *Beardslee*, 393 F.3d at 901. Finally, unlike a case in which we have already issued a reasoned decision, here, we issued only a one-line order denying Schad's request without any explanation whatsoever—a denial that left unanswered several serious legal questions.

In *Stokley*, we also required a showing of prejudice under the *Brecht* standard for "substantial and injurious effect" in order to meet the requirement of

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[1] The Arizona Supreme Court's decision today in effect reiterated the Superior Court's reasoned decision rejecting Schad's claim. As the State advised us in its supplemental briefing, the Superior Court's decision (and now the Arizona Supreme Court's decision) "has no effect on this Court's [the Ninth Circuit's] review of this claim" because it decided the *Martinez* issue only under Arizona state law and it was not bound to follow *Martinez*. Respondents-Appellees' Supp. Br. at 18, Dkt. 103.

exceptional circumstances. 705 F.3d at 401; *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). We have described the *Brecht* standard as being met if:

> one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

Merolillo v. Yates, 663 F.3d 444, 454 (9th Cir. 2011) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). We conclude that the *Brecht* standard is met here.

The facts of Schad's case stand in stark contrast to those of *Stokley*, in which the panel concluded that "Stokley cannot demonstrate actual prejudice because he has not shown that the error, if any, had a substantial and injurious impact on the verdict." *Stokley v. Ryan*, 705 F.3d 401 (9th Cir. 2012). Stokley presented a dramatically weak case for prejudice. In *Stokley* the state court found that there were *no* mitigating factors and that the three aggravating factors were particularly egregious—"the victims were minors," two 13-year-old girls, one of whom Stokley had raped before choking her to death; "Stokley committed multiple homicides; and he committed those crimes in an *especially heinous, cruel, or depraved manner*." *Stokley v. Ryan*, 659 F.3d 802, 804-05 (9th Cir. 2011)

(emphasis added). The evidence that the trial court may have improperly ignored in *Stokley* went only to his "family history" and "his good behavior in jail during pre-trial incarceration." *Stokley*, 705 F.3d at *3. It was on the basis of these less than overwhelming unconsidered facts that the panel, in holding that the standard for "exceptional circumstances" had not been met, concluded that Stokley failed to meet the applicable prejudice standard. *Id.*

In sharp contrast, Schad's case involved a single homicide of an adult male. The trial court found three aggravating factors, but none was particularly egregious: "previous conviction of an offense for which a sentence of life imprisonment was possible, previous conviction for a crime involving violence, and commission of the murder for pecuniary gain." *State v. Schad*, 163 Ariz. 411, 417 (1989). Most important, unlike in *Stokely*, the sentencing court did *not* find that Schad's crime was *especially heinous, cruel, or depraved*. Unlike Stokley, Schad's crime did not involves sexual abuse, let alone forcible sexual rape of two teenage girls. Also, unlike *Stokley*, Schad never confessed to the crime and all the evidence was circumstantial. *Schad v. Ryan*, 671 F.3d 708, 717 (9th Cir. 2011). Perhaps most important, Schad's new mitigating evidence, which was never presented to the state court, was exponentially stronger than that in *Stokley*, and likely would have affected the outcome. The evidence Schad would have

presented in mitigation, had it not been for sentencing counsel's and post-conviction counsel's errors, would have demonstrated that Schad was suffering from "several major mental disorders" at the time of the crime, specifically extremely serious mental conditions such as bipolar disorder, schizoaffective disorder, and dissociative disorders, among others. **ER 540.** As we have stated previously, these facts provided

> [t]he missing link [to] what in [Schad's] 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.[2]

With the missing evidence before it, however, the sentencer could well have concluded that due to his serious mental illnesses, Schad did not bear the same level of responsibility for the crime as would someone with normal mental functioning.

In sum, Stokley's *aggravating* factors were far greater than Schad's, and Schad's *mitigating* factors that were *not* before the sentencing court provided a far greater reason for not executing a capital defendant than did the insubstantial evidence not considered by Stokley's sentencer. More important, we conclude that

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[2] *Schad v. Ryan*, 581 F.3d 1019, 1034 (9th Cir. 2009) (subsequent history omitted).

absent the ineffectiveness of sentencing counsel, the picture of Schad that would have been presented to the sentencer would have been far different from the one that was. Because the aggravating factors in Schad's case were weak and the omitted evidence, which showed that he suffered from serious mental illnesses as an adult, would have mitigated his culpability for the crime, we "cannot say, with fair assurance . . . that the judgment was not substantially swayed by the error." *Merolillo*, 663 F.3d at 454. This error in failing to investigate and present evidence of Schad's serious mental illnesses, therefore, "had substantial and injurious effect or influence in determining the [sentence]," and Schad meets the standard for prejudice under *Brecht*. 507 U.S. at 623.

III.

Under *Martinez* a federal court can find "cause" to excuse the procedural default of a claim when petitioner can establish (1) that post-conviction counsel was ineffective, and (2) "that the underlying ineffective-assistance-at-trial claim is substantial." *Martinez v. Ryan*, 132 S. Ct. 1309, 1312 (2012). *Martinez* is not "an independent basis for overturning [a] conviction" but only an equitable rule that allows a federal habeas court to decide a claim, such as ineffective assistance of (sentencing) counsel, that would have been properly before the state post-conviction court, and thereafter before the federal habeas court, *but for* the

ineffectiveness of post-conviction counsel. *Id.* We conclude that Schad's new factual allegations set forth a new or different claim that was procedurally defaulted and that is "substantial." We remand to the district court for further findings on the remaining issues.

Although the district court did not find that Schad's claim was procedurally defaulted, it was. A claim is procedurally defaulted "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991). Thus, if Schad's new claim was not exhausted, he has procedurally defaulted that claim because Arizona prevents him from asserting a successive claim in state court. *See Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002) (describing Arizona's procedural default rules). Our rules for exhaustion focus not only on the legal claim but also on the specific facts that support it. Thus, an ineffectiveness of counsel claim may be a "new claim," and therefore unexhausted, if the "specific facts" it asserts were not presented to the state court and they give rise to a claim that is "so clearly distinct from the claims . . . already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim." *Valerio v. Crawford*, 306 F.3d 742, 768 (9th Cir. 2002) (quoting

Humphrey v. Cady, 405 U.S. 504, 517 n. 18 (1972)). *Martinez* permits a federal court to hear an unexhausted, and, thus, procedurally defaulted, claim that was not presented to the state court due to postconviction counsel's ineffectiveness.[3]

Schad raised an ineffective assistance of sentencing counsel claim before the state court based on counsel's failure to investigate and present additional evidence regarding his tragic history of child abuse—a claim designed to elicit a "reasoned moral response" to Schad as a "uniquely individual human being." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal citations and alterations omitted). **ER 333-37, 343-49.** The factual allegations he raised before the district court, however, amounted to a new and different claim: a claim that his counsel failed to investigate and present evidence of his mental illnesses as an adult—evidence that would have afforded an explanation of *why* he committed the crimes of which he was convicted. **ER 459.** The evidence Schad submitted in support of the new claim included a psychological report that addresses his "several major mental disorders" including, among others, : "Bipolar Disorder; Major Depression; . . . Obsessive-Compulsive Disorder; Schizoaffective Disorder; . . . Dissociative Disorders . . . ." **ER 540.**

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[3] *Cullen v. Pinholster*, which bars federal courts from considering evidence never presented to the state court does not apply to "new claims." 131 S. Ct. 1388, 1401 n.10 (2011).

Schad's new evidence constitutes a new claim that is "so clearly distinct from the claims . . . already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim." *Valerio*, 306 F.3d at 768 (quoting *Humphrey*, 405 U.S. at 517 n. 18). Because Schad did not present this claim in his original petition for post-conviction relief to the state court, it is procedurally defaulted.[4] If Schad meets the requirements of *Martinez*, however, he may well have established cause for that procedural default.

Martinez has two requirements in order to establish cause: (1) that post-conviction counsel was ineffective, and (2) "that the underlying ineffective-assistance-at-trial claim is substantial." 132 S. Ct. at 1312. The second requirement, whether the "claim is a substantial one" may be met if the petitioner "demonstrate[s] that the claim has some merit." *Id.* at 1318-19 (citing *Miller–El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue)). We conclude that Schad has shown that his claim is substantial because, as we previously held, "if [the new evidence] had been

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[4] The district court did not treat Schad's claim as procedurally defaulted because it did not recognize that Schad was advancing a new claim. Although the district court analyzed Schad's claim, including the new evidence on the merits, we believe that its assessment was fundamentally flawed as a result of its mistaken belief that Schad's new evidence was merely cumulative. *Schad v. Schriro*, 454 F. Supp. 2d at 944. The district court should reconsider its prior analysis on remand, now that it is clear that Schad advances a new claim.

presented to the sentencing court, [it] would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigation factors present in this case." *Schad v. Ryan*, 595 F.3d at 923 (subsequent history omitted). In fact, his claim is more than substantial. As we stated in Part II, *supra*, Schad's counsel's failure to investigate and present evidence of his serious mental illnesses "had substantial and injurious effect or influence in determining the [sentence]." *Brecht*. 507 U.S. at 623.

Therefore, we remand to the district court for determination of the first requirement under *Martinez*, whether post-conviction counsel was ineffective. 132 S. Ct. at 1312. If so, cause has been established and the district court must then determine whether Schad has shown prejudice sufficient to excuse the procedural default. *Id.* at 1316. Should Schad meet these requirements, the district court must then consider the merits of his new or different claim—his claim of ineffective assistance of counsel based on sentencing counsel's failure to investigate and present mitigating evidence of his mental illnesses as an adult.

It is so ORDERED.

SCHROEDER, Circuit Judge, concurring:

I agree with the order remanding in light of *Martinez*. The issue is whether the district court can consider evidence of Schad's serious mental illness that was not presented in state court habeas proceedings due to claimed ineffective assistance of counsel. We held in 2009 that the district court should consider the evidence. Within the past two years, however, the Supreme Court has issued two decisions that point in different directions when applied to this case.

The first was *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). After it came down we amended our decision to state that the evidence could not be considered. We said "the Supreme Court has now ruled that when a state court has decided an issue on the merits, the federal courts may not consider additional evidence." *Schad v. Ryan*, 671 F.3d 708, 722 (9th Cir. 2011).

Then the Supreme Court decided *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). It there held that in some circumstances failure of state habeas counsel to present similar mitigation evidence could establish cause excusing the procedural default of a state court ineffectiveness claim based on such evidence. *Id.* at 1320–21.

We have previously considered the nature of the evidence and concluded that had it been considered by the sentencing court it could well have affected the result. We described the evidence as "much more powerful" than the "cursory

discussion" that was presented at sentencing. *Schad v. Ryan*, 581 F.3d 1019, 1034 (9th Cir. 2009). In my view the requisite standard for prejudice has been met.

Whether this case presents a claim that should be treated the same as the claim in *Martinez* raises difficult questions, some of which may eventually be resolved by an en banc court. In the meantime, Schad's execution has been ordered, and his case deserves to be considered expeditiously, but thoughtfully.

GRABER, Circuit Judge, dissenting:

I would deny the motion to stay the mandate and, therefore, respectfully dissent.

In Stokley v. Ryan, No. 09-99004, 2012 WL 5883592, at *1 (9th Cir. Nov. 21, 2012) (order), our court considered whether an intervening change in the law constituted an exceptional circumstance that could justify staying the mandate after the Supreme Court's denial of certiorari. We held that exceptional circumstances did not exist because the petitioner could not show prejudice under the applicable standard of Brecht v. Abrahamson, 507 U.S. 619 (1993): "In light of the Arizona courts' consistent conclusion that leniency was inappropriate, there is no reasonable likelihood that, but for a failure to fully consider Stokley's family history or his good behavior in jail during pre-trial incarceration, the Arizona

courts would have come to a different conclusion." Stokley, 2012 WL 5883592, at *3.

In my view, a prejudice analysis comes out similarly for Schad. See State v. Schad, 788 P.2d 1162, 1172 (Ariz. 1989) (concluding, after an independent review, that the mitigating circumstances were "insufficient to outweigh a single aggravating factor"[5]); State v. Schad, 633 P.2d 366, 383 (Ariz. 1981) (concluding that leniency was not warranted). Although the original panel previously concluded that the additional mitigating evidence created "at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating factors present in the case," Schad v. Ryan, 595 F.3d 907, 923 (9th Cir. 2010) (per curiam), that conclusion does not mean that Schad has established prejudice. Schad "must establish not merely that the [alleged error] . . . created a possibility of prejudice, but that [it] worked to his actual and substantial disadvantage, infecting the entire proceeding with constitutional error." Stokley, 2012 WL 5883592, at *1 (alterations in original) (internal quotation marks omitted). He cannot meet that standard, and the panel's earlier conclusion of "some likelihood" is insufficient to require us to find actual and substantial prejudice if applying the "law of the case"

[5] There were "at least" two aggravating factors: The defendant committed the murder for pecuniary gain, and he had a prior murder conviction. Schad, 788 P.2d at 1172.

doctrine. Therefore, I vote to deny the motion and dissent from the order.