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. CIV-97-02577-PHX-ROS

RESPONDENTS-APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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

Kent E. Cattani
Solicitor General

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

Attorneys for Respondents-Appellees

STATEMENT OF COUNSEL PURSUANT TO RULE 35(B)

Pursuant to Rule 35(b)(1) of the Federal Rules of Appellate Procedure, Respondents assert that this Court's recent order of February 26, 2013,conflicts with opinions of the United States Supreme Court and this Court regarding issues of great importance: (1) whether this Court has jurisdiction to stay issuance of the mandate after the Supreme Court has denied certiorari review and a petition for rehearing; (2) whether this Court finding for the first time that Schad procedurally defaulted on a claim is a changed circumstance that justifies reconsidering its third amended opinion and prior order denying Schad's motion to vacate judgment and remand; (3) whether this Court can use the affirmative defense of procedural default against the State when the district court did not find a procedural default and Respondents abandoned any procedural default defense on appeal; and (4) whether Schad has presented a substantial *Martinez* claim when the district court has already considered the new evidence presented in federal court and found it did not show deficient performance by sentencing counsel or prejudice. Moreover, although all four of these issues merits further consideration by the panel or the en banc court, under the last issue there is no reason to send this case back to the district court for a merits review of the IAC claim when the district court already rejected the claim on the merits, even when

viewed with the new evidence, and this Court previously affirmed the district court's judgment.

Accordingly, Respondents seek rehearing by the panel. *See* Rule 40, Fed. R. App. Proc.; Circuit Rule 40. If the panel declines to reconsider its opinion, Respondents respectfully request that the case be heard *en banc*. *See* Rule 35, Fed. R. App. Pro.; Circuit Rule 35.

SUMMARY OF THE CASE

In the state post-conviction-relief (PCR) proceedings, Schad claimed that counsel at sentencing failed to present evidence "regarding physical and emotional abuse to which Schad was subjected as a child and teenager." (ER 345.) However, the state court found Schad had only shown that such evidence "might exist," and concluded: "Defendant is simply asking to go on a fishing expedition with no showing of what would be turned up that the court did not already know at sentencing time and how that might effect [sic] sentencing. The claim has no merits." (ER 144-145.)

Schad's federal habeas petition similarly raised an IAC-sentencing claim, which the district court summarily rejected:

> Petitioner has failed to show that the PCR court's denial of his claim of IAC at sentencing was an unreasonable application of federal law. The Court further finds, with respect to Petitioner's attempt to introduce factual information that was not presented to the state court, Petitioner was not diligent in developing these facts. See infra, pp. 82-84. Moreover, the Court finds that even if

> Petitioner had been diligent and the new materials were properly before the Court, Claim P is without merit.

Schad v. Schriro, 454 F.Supp.2d 897, 940 (D. Ariz. 2006). Regarding the reasonable application of *Strickland*:

> Petitioner has not demonstrated that trial counsel's performance at sentencing was either deficient or prejudicial. Instead, the Court finds that trial counsel presented a strategically sound case in mitigation and that the information Petitioner now contends should have been presented is not of sufficient weight to create a reasonable probability that, if it had been presented, the trial court would have reached a different sentencing determination.

Id. at 941. The district court alternatively ruled that Schad had not established an IAC claim even with all of the new evidence he had offered to the federal court. *Id.* at 941-944.

On appeal, the panel's second amended majority opinion affirmed the district court's rulings on all claims regarding the conviction. *Schad v. Ryan*, 606 F.3d 1022, 1032 & 1048 (9th Cir. 2010). Respondents filed a petition for writ of certiorari in the Supreme Court. The Court granted certiorari, vacated this Court's judgment, and remanded for further consideration in light of *Pinholster*. *Ryan v. Schad*, 131 S. Ct. 2092 (2011). After further briefing and consideration regarding the application of *Pinholster*, the panel affirmed the district court's denial of the IAC claim in a third amended opinion. *See Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011) (*per curiam*).

Schad filed a Motion to Vacate Judgment and Remand in light of *Martinez v. Ryan*, 139 S. Ct. 1309 (2012), which this Court summarily denied on July 27, 2012. (Ninth Circuit Docket Numbers 88, 91.)

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, this Court denied the motion, as such, but instead construed it as a motion to reconsider its prior denial of Schad's Motion to Vacate Judgment and Remand in light of *Martinez v. Ryan*, 139 S. Ct. 1309 (2012).

On February 26, 2013, the panel issued an order granting the motion and remanding the matter to the district court. (Order, attached hereto.) Judge Graber dissented and would have denied Schad's motion to stay the mandate. (Order, at 17-19.)

ARGUMENTS IN SUPPORT OF PETITION

I

THIS COURT HAS NO JURISDICTION TO STAY THE MANDATE AFTER THE SUPREME COURT DENIED CERTIORARI REVIEW.

This Court had no jurisdiction after denial of certiorari review to do anything other than issue the mandate. The panel's third amended opinion

rejected Schad's IAC sentencing claim, Schad's petition for rehearing was denied without any active judge of this Court voting for rehearing, and the panel denied other post-decision motions filed with this Court, including the *Martinez* motion. The Supreme Court rejected Schad's petition for certiorari and petition for rehearing. This Court can take no action other than to issue its mandate. *See Bell v. Thompson*, 545 U.S. 794, 804 (2005) (assuming *arguendo* that Rule 41(b), Federal Rules of Appellate Procedure authorized a stay of the mandate following denial of certiorari, the Sixth Circuit *had abused its discretion because it had delayed issuing its mandate even after the Supreme Court denied rehearing*).

II

THERE ARE NO CHANGED CIRCUMSTANCES JUSTIFYING RECONSIDERATION OF THIS COURT'S THIRD AMENDED OPINION AND ORDER DENYING SCHAD'S MOTION TO VACATE JUDGMENT AND REMAND. THIS COURT'S SUA SPONTE FINDING A PROCEDURAL DEFAULT THAT THE DISTRICT COURT DID NOT FIND AND THAT RESPONDENTS HAVE ABANDONED IS NOT A CHANGED CIRCUMSTANCE.

This Court's *sua sponte* finding a procedural default on the IAC claim that was not found by the district court or asserted by Respondents on appeal is an abuse of discretion. This Court previously decided the issue on the merits, and rejected Schad's *Martinez* motion.

A. *Lack of changed circumstances*

The circumstances have not changed. This Court already considered Schad's *Martinez* motion, summarily denying it after full briefing by the parties. After that motion was denied, the Supreme Court denied Schad's petition for certiorari. The fact that this Court summarily denied the previous motion is not an exceptional circumstance justifying reconsideration at this point. *Cf. Rhoades v. Blades*, 661 F.3d 1202, 1203 (9th Cir. 2012) (*per curiam*) (noting the inequity caused by delaying a *Martinez* claim when it could have been brought at any time after the Supreme Court granted certiorari review in *Martinez*).

The Arizona Supreme Court's order denying the petition for review from denial of post-conviction relief is not an extraordinary circumstance. As this Court notes, it does not affect the *Martinez* issue at all.

The fact of the upcoming execution is not an extraordinary circumstance. Rather it is the usual case that the State seeks a warrant of execution after the Supreme Court has denied review of this Court's denial of habeas relief.

The order also cites the upcoming en banc argument in *Dickens*. (Order at 2.) But that case is distinguishable, as discussed further below, because the district court found a procedural default in that case.

B. *This Court's new finding of a procedural default is not a changed circumstance.*

This Court abused its discretion by finding, *sua sponte*, a procedural default that was not found by the district court, was abandoned as an affirmative defense by Respondents on appeal, and that was not previously found by this Court in its third amended opinion. *See Rhoades*, 661 F.3d at 1203.

Respondents have waived any procedural default defense by not asserting it on appeal. (Respondents' Supplemental Answering Brief, at 37-72.) 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.").

AEDPA does not prevent the state from waiving the procedural default defense. *See Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002). The procedural default doctrine is not a sword to be used against the State to further delay habeas proceedings. 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.

This case appears to be the first time this Court has found a procedural default when the district court did not find it. For instance, in some cases where the district court found procedural default of one or more claims, the Ninth Circuit has remanded for further proceedings. *See Runningeagle v. Ryan*, No. 07-99026 (9th Cir. Order, July 18, 2012); *Creech v. Hardison*, No. 10-99015 (9th Cir. Order, June 20, 2012); and *George Lopez v. Ryan*, No. 09-99028 (9th Cir Order, April 26, 2012). Because there was a state-court merits ruling in this case on the IAC-sentencing claim, the Supreme Court's decision in *Martinez* simply is not relevant. *See Brown v. Thaler*, 684 F.3d 482, 489 n.4 (5th Cir. 2012) (reliance on *Martinez* was unavailing when the Texas court considered the claim on the merits).

The panel order cites the upcoming en banc oral argument in *Dickens*, but that case is distinguishable because the district court found a procedural default. The panel opinion in that case, *Dickens v. Ryan*, 688 F.3d 1054 (9th Cir. 2012), was withdrawn. In *Dickens,* the inmate argued 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. 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.[1] 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.

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

[1] 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.)

to establish cause for a procedural default that was not found to exist until this Court's recent order.

C. *Pinholster still applies.*

Despite the clear applicability of *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), the majority panel order relegates it a footnote and asserts it does not apply here because Schad presented a "new" claim of ineffective assistance of counsel at sentencing in developing and presenting mitigating evidence. (Order at 13, fn.3.) In other words, because this Court has *sua sponte* found a procedural default, *Pinholster* no longer applies.

The applicability of *Pinholster* to this case is apparent from the Supreme Court opinion itself. *Pinholster* was in a similar posture to this 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." 131 S. Ct. 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 Supreme Court rejected Pinholster's argument:

> 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.) The holding validated Chief Judge Kozinski's dissent in *Pinholster v. Ayers*, 590 F.3d 651, 690 (9th Cir. 2009) (C.J. Kozinski dissenting):

> *The statute was designed to force habeas petitioners to develop their factual claims in state court.* [citation omitted]. The majority now provides a handy-dandy road map for circumventing this requirement: *A petitioner can present a weak case to the state court, confident that his showing won't justify an evidentiary hearing. Later, in federal court, he can substitute much stronger evidence and get a district judge to consider it in the first instance, free of any adverse findings the state court might have made.* I don't believe that AEDPA sanctions this bait-and-switch tactic, nor will it long endure.

(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.

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 was a ruling on the merits for review under the AEDPA standards.

III

EVEN ASSUMING A PROCEDURAL DEFAULT, SCHAD DOES NOT PRESENT A SUBSTANTIAL CLAIM UNDER *MARTINEZ*.

Schad does not present a colorable claim of ineffective assistance of

sentencing counsel or PCR counsel, as required by *Martinez*. *Martinez* requires a prisoner to make a substantial showing on four separate points: (1) his trial counsel's performance was constitutionally deficient, (2) that trial counsel's deficient performance was prejudicial, (3) that PCR counsel's performance was constitutionally deficient, and (4) that PCR counsel's deficient performance was prejudicial. *See, e.g., Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012). Schad's IAC claims are not substantial. *See Cook*, 688 F.3d at 610; *Leavitt v. Arave*, 682 F.3d 1138, 1140-41 (9th Cir. 2012) (*per curiam*).

1. Sentencing counsel's performance was not deficient.

Under *Martinez*, a petitioner must demonstrate that the underlying IAC claim is a substantial one. *Martinez*, 132 S. Ct. at 1318. *See also Cook*, 688 F.3d at 610; *Lopez v. Ryan*, 678 F.3d 1131, 1137-1139 (9th Cir. 2012). Surmounting *Strickland*'s high bar is not easy. *Harrington v. Richter*, 131 S. Ct. 770, 778 (2011). This is because an IAC claim can be used to escape doctrines of waiver and forfeiture and raise issues not presented at trial, "and so the *Strickland* standard must be applied *with scrupulous care*, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Id*. (emphasis added) (quoting *Strickland*, 466 U.S., at 689-90).

The facts of *Strickland* do not themselves support the underlying IAC

claim. The Court found no prejudice even though his attorney failed to offer any mitigating evidence, although fourteen friends and relatives of capital murder defendant were willing to testify that he was "generally a good person," and unoffered medical reports described defendant as "chronically frustrated and depressed because of his economic dilemma." *Id.*

The district court pointed out at some length why sentencing counsel was not deficient. *Schad v. Schriro*, 454 F.Supp.2d 897, 940-943 (D. Ariz. Sept. 28, 2006). It found: "trial counsel presented a strategically sound case in mitigation." *Id.* at 941. It noted: "At sentencing, counsel presented evidence intended to show Petitioner as a man whose character and capabilities would enable him to benefit society." *Id.* at 942. It concluded: "Trial counsel's performance cannot be considered deficient for failing to present these opposing versions of Petitioner—i.e., as both rehabilitated and exemplifying a number of personal strengths and virtues which could be used to benefit others, and as an unstable and disoriented individual incapable of completing a task." *See Bonin v. Calderon*, 59 F.3d 815, 834-35 (9th Cir.1995) (reasonable for counsel not to further investigate client's psychiatric condition when counsel made tactical decision to rely on "institutional adjustment" as primary mitigation theory. And this Court's second amended opinion detailed the extensive evidence counsel presented at sentencing. *Schad v. Ryan*, 595 F.3d 907, 917-919 (9th Cir. 2010).

2. Schad was not prejudiced by trial counsel's performance

To establish prejudice from deficient performance of counsel, Schad must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Richter*, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 694.) "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" (*Id.*) (quoting *Strickland*, 466 U.S. at 693).

The district court found "that the information Petitioner now contends should have been presented is not of sufficient weight to create a reasonable probability that, if it had been presented, the trial court would have reached a different sentencing determination." *Schad v. Schiro*, 454 F.Supp.2d at 941. It concluded: " Finally, while the Court notes that the new materials, particularly the affidavit of Dr. Stanislaw, offer a more elaborate explanation of the psychological effect of Petitioner's childhood experiences, this information is either cumulative or, as discussed above, contradictory to the portrait of Petitioner that trial counsel presented at sentencing." *Id.* at 944.

Judge Graber's dissent echoes this reasoning, citing this Court's order in *Stokley v. Ryan*, 2012 WL 5883592, at *1 (Order) (9th Cir. Nov. 21, 2012). Judge Graber's dissent noted that the Arizona courts found two aggravating

circumstances, pecuniary gain and a prior murder. (Order, J. Graber dissenting, at 18, n.5)

Accordingly, there was no prejudice from any ineffective assistance by sentencing counsel. *See Wong v. Belmontes,* 130 S. Ct. 383, 386-90 (2009); *Leavitt*, 646 F.3d at 615; *Mickey v. Ayers*, 606 F.3d 1223, 1248 (9th Cir. 2010); *Bible v. Ryan*, 571 F.3d 860, 871-72 (9th Cir. 2009).

3. Schad's PCR attorney was not constitutionally deficient.

It cannot be said that "Petitioner's postconviction counsel performed his duties so incompetently as to be outside the 'wide range of professionally competent assistance.'" *Miles v. Ryan*, 691 F.3d 1127, 1144 (9th Cir. 2012). This Court's second amended opinion stated: "The record before us reflects that Schad's legal team attempted in state court to develop a factual basis for his ineffective assistance claim, but faced several difficult obstacles." 595 F.3d at 922. This Court criticized the district court for focusing "not on the reasonableness of Schad's efforts in state court to develop mitigating evidence regarding his childhood, but on the fact that he did not succeed in doing so." *Id.*

4. Schad has not shown that PCR counsel's performance prejudiced him.

Finally, Schad has not shown any prejudice from PCR counsel's performance. Any deficiency was cured by the district court analyzing the new evidence, which PCR could have presented, and found no ineffective assistance.

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 the new evidence presented in federal court was either cumulative to what had been presented at sentencing, or "contradictory" to what had been presented at sentencing. (PA A173.) *See, e.g., Bobby v. Van Hook*, 558 U.S. 4, 130 S. Ct. 13, 19 (2009) (additional evidence would not have made a difference); *Wong v. Belmontes,* 558 U.S. 15, 130 S. Ct. 383, 391 (2009) (*per curiam*) ("Shick's mitigation strategy failed, but the notion that the result could have been different if only Shick had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful."). *See also Pinholster*, 131 S. Ct. at 1409-1410 ("There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury's verdict."); *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's opinion focuses on the new mental health evidence presented to the district court. (Order at 13-15.) However, sentencing counsel called a psychiatrist to testify at sentencing, who testified about Schad's mental condition. *See Schad v. Ryan*, 595 F.3d at 919. *See also Earp v. Cullen*, 623 F.3d 1065, 1076 (9th Cir 2010) ("The fact that Earp can now present a neuropsychologist who is willing to opine that he had organic brain damage at the time of his trial does not impact the ultimate determination of whether Earp's trial counsel insufficiently investigated that possibility.").

Furthermore, any additional mitigation would have to be weighed against the aggravating circumstances. Schad committed another murder, for which he was convicted in Utah. The Supreme Court has recognized that a defendant having committed another murder is "the most powerful imaginable aggravating evidence." *Wong v. Belmontes*, 558 U.S. 15, 130 S. Ct. 383, 391 (2009).

Finally, because the district court already considered the new evidence, and this Court can do the same, there is 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."). *See alsoWilliams v. Woodford*, 306 F.3d 665, 688–89 (9th Cir. 2002); *Cardwell v. Greene*, 152 F.3d 331, 338 (4th Cir. 1998), *overruled on other grounds, Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000) (*en banc*).

CONCLUSION

For the above reasons, the panel should vacate its order of February 26, 2013, vacating its judgment and remanding to the district court, and issue the mandate. Alternatively, the panel order should be reviewed and reversed after *en banc* consideration.

Respectfully submitted,

Thomas C. Horne
Attorney General

Kent E. Cattani
Solicitor General

s/_____
JON G. ANDERSON
Assistant Attorney General

Attorneys for Respondents-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2013, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DENISE YOUNG
2930 North Santa Rosa Place
Tucson, Arizona 85712

KELLEY J. HENRY
Assistant Federal Public Defender
Office of the Federal Public Defender
810 Broadway, Suite 200
NASHVILLE, TENNESSEE

Attorneys for PETITIONER-APPELLANT

s/_____
Barbara Lindsay
Legal Secretary
Capital Litigation Section
1275 West Washington
Phoenix, Arizona 85007–2997

3110148

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 40-1, 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 4,177 words.

s/_____
JON G. ANDERSON

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. CIV-97-02577-PHX-ROS STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any of any related cases.

DATED this 27th day of February, 2013.

Thomas Horne
Attorney General

s/_____
JON G. ANDERSON
Assistant Attorney General
Attorneys for RESPONDENTS-APPELLEES

FILED

FEB 26 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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.

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