

No. 07-99005

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EDWARD HAROLD SCHAD,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN,

Respondent-Appellee.

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

RESPONDENT-APPELLEE'S REPLY TO RESPONSE TO PETITION FOR
REHEARING AND REHEARING EN BANC

Terry Goddard
Attorney General
(Firm State Bar No. 14000)

Kent E. Cattani
Solicitor General

JON G. ANDERSON
Assistant Attorney General
Criminal Appeals/Capital Litigation
Section
1275 West Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686
State Bar Number 005852

Attorneys for RESPONDENT-
APPELLEE

MEMORANDUM

1. *Martinez v. Ryan*, 139 S. Ct. 1309 (2012), does not apply because the district court did not find a procedural default. In *Martinez*, the Supreme Court recognized, for the first time, a “narrow exception” to *Coleman v. Thompson*, 501 U.S. 722 (1991): When the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, “Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s *procedural default* of a claim of ineffective assistance at trial.” 132 S. Ct. at 1315, 1317. A prisoner may show cause for a *default* of an ineffective-assistance claim if he shows that initial-review-collateral-proceeding counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), and also demonstrates that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. 132 S. Ct. at 1318.

As discussed in the petition for rehearing, there was no procedural default finding in this case until this Court’s recent order.

2. Schad also asserts that Respondent did not waive the procedural default, citing earlier pleadings in this case. But Respondent chose not to raise procedural default in its briefs on appeal, thereby waiving the defense. See *Laboa v. Calderon*, 224 F.3d 972, 981 n. 6 (9th Cir. 2000) (holding that issues

“not specifically and distinctly argued in appellant's opening brief” are waived on appeal) (internal quotation marks omitted). *See also Gray v. Netherland*, 518 U.S. 152, 166, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996) (procedural default is an affirmative defense for the State.)

3. Finally, Respondent has discussed the district court’s rejection of the IAC-sentencing claim on the merits, even in light of the information newly presented in federal court. The district court’s consideration of the new evidence makes non-prejudicial any deficient performance by PCR counsel, which is one of the requirements for relief under *Martinez*. Accordingly, there is no reason for a remand to the district court pursuant to *Martinez*, which was the subject of this Court’s recent order.

Respectfully submitted,

Thomas C. Horne
Attorney General

Kent E. Cattani
Solicitor General

Jeffrey A. Zick
Section Chief Counsel

s/

JON G. ANDERSON
Assistant Attorney General

Attorneys for RESPONDENT-
APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 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

3116651

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 345 words.

S/ _____
JON G. ANDERSON