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 RESPONSE TO PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

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In its petition, the state does not identify any irreconcilable conflict in this Court's decisions, nor any exceptional question of importance, instead requesting that this Court expend its scarce resources to parse the record and re-review the panel's application of law to the facts. The panel's well-reasoned decision conforms with circuit and Supreme Court law. Respondent's petition brazenly misstates the holding in *Bell v. Thompson*, 545 U.S. 794 (2005); utterly fails to address the reasoning of the opinion; takes positions opposite to those it has taken in other capital cases pending in this court; misleads the Court by claiming they have waived procedural default on appeal where the opposite is true; is self-contradictory in trying to simultaneously waive exhaustion and limit the review to the state court record; and disingenuously asserts that Schad's claim is insubstantial.

As the panel carefully explains, the sentencing judge imposed a death sentence without knowing significant mitigating mental health evidence that Ed 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." *Schad*, slip op. at 10. Rather, the judge imposed death based on aggravation that was not "particularly egregious." *Id.* at 9. Schad, however, *never* received a state court "adjudication on the merits" of the ineffectiveness-at-sentencing claim predicated upon his mental health evidence, because the state courts never "heard and evaluated the evidence." *Johnson v.*

Williams, 568 U.S. ___, ___ (2013)(slip op. at 12)(setting forth requirements for adjudication on the merits under 28 U.S.C. §2254(d)). Then the state successfully precluded federal court consideration of Schad's ineffectiveness claim predicated on this evidence, arguing that principles of exhaustion prohibited its consideration.

Martinez v. Ryan, 566 U.S. ___ (2012), however, makes clear that when (as here) an ineffectiveness claim is not exhausted because of the ineffectiveness of post-conviction counsel, the ineffectiveness of post-conviction counsel provides "cause," such that the petitioner's claim can instead be heard *on the merits* in federal habeas. The panel has simply ensured that *Martinez* – decided before Schad sought certiorari, and whose application Schad sought before he ever sought certiorari – means what it says: Because Schad did not receive an adjudication on the merits in state court because of ineffective counsel, he is entitled to that one full review in federal court.

The petition should be denied.

STATEMENT OF FACTS

In state post-conviction proceedings, Ed Schad's post-conviction attorney never presented a claim that Schad's trial counsel was ineffective at sentencing for failing to present mitigating mental health evidence showing that Schad's father was mentally ill, that Schad's mother was mentally disturbed and addicted, and that as a result "at the time of the crime Schad was suffering from "several major mental

disorders" specifically extremely serious mental conditions such as bipolar disorder, schizoaffective disorder, and dissociative disorders, among others. ER 540." *Schad v. Ryan*, No 07-99005, Slip op, at 10 (9th Cir. Feb. 26, 2013). As the state itself has repeatedly asserted in this litigation, it was the fault of post-conviction counsel that an ineffectiveness claim predicated upon such evidence was never properly presented to the state courts. According to the state, there is an "extensive state court record demonstrating [post-conviction counsel's] lack of diligence." *Ryan v. Schad*, U.S. No. 10-305, Petition For Writ Of Certiorari, p. 25.

When Ed Schad finally received effective counsel in federal habeas corpus proceedings, he first presented an ineffectiveness-at-sentencing claim predicated upon sentencing counsel's failure to present this extensive mitigating mental health evidence. The state told the District Court that Schad's presentation of new evidence in federal habeas created 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). The state reiterated that Schad's federal habeas claim was "in a significantly different evidentiary posture than it was in before the state court, thereby *violating the fair presentation requirement*." *Id*., p. 9. The district court thus refused to consider such evidence, and on appeal, the state *again* successfully maintained that

Schad's claim could not be adjudicated based upon the unexhausted mental health evidence first presented in federal court.[1] This Court then only considered the ineffectiveness-at-sentencing claim that had been adjudicated by the state court, and denied relief on that claim – not the new claim first presented in federal habeas based on the unexhausted mental health evidence.

That Schad's new ineffectiveness claim is procedurally defaulted should come as no surprise to the State, which told the district court that there could be no federal review of the claim because of the exhaustion requirement. The panel here has so held. The vacated panel decision in *Dickens v. Ryan*, 688 F.3d 1054, 1070 (9th Cir. 2012) came to a similar conclusion under identical circumstances. And the Fourth, Fifth, and Tenth Circuits have likewise concluded that when, as here, a federal habeas petitioner presents an ineffectiveness-at-sentencing claim predicated on substantial new evidence never considered by the state court, the petitioner's claim is unexhausted and/or defaulted. *Moses v. Branker*, 2007 U.S.App.Lexis 24750 (4th Cir. 2007); *Kunkle v. Dretke*, 352 F.3d 980, 987-988 (5th Cir. 2003); *Fairchild v. Workman*, 579 F.3d 1134, 1148-1151 (10th Cir. 2009)(when new evidence changed

[1]On appeal, the State complained that Schad had improperly included the evidence not presented to the State Court in his record excerpts. See Motion to Strike Opening Brief and Excerpts. Attachment A. As a result, Schad was required to file two sets of excerpts with the second (and more voluminous set) being the evidence not presented to the State Court. Attachment B.

legal landscape of sentencing ineffectiveness claim, claim was not adjudicated in state court, and new claim was presented in federal court).

After this Court ruled - *but before Ed Schad ever petitioned for certiorari and while this Court's mandate remained stayed pending a petition for writ of certiorari*- the Supreme Court decided *Martinez v. Ryan*, 566 U.S. ___ (2012). Schad promptly moved for a remand in light of *Martinez*, maintaining that he could receive full consideration of his mental-health-based mitigation claim under *Martinez*, because the ineffectiveness of post-conviction counsel provided "cause" for his failure to exhaust and his default. The panel, apparently misapprehending the significance of *Martinez*, summarily denied Schad's motion to remand, but this Court's mandate remained stayed.

The law in this circuit regarding *Martinez* then began to evolve. A panel of this Court concluded that when a federal habeas claim of sentencing ineffectiveness is predicated upon substantial new evidence not presented to the state courts (exactly as in Schad's case), it is procedurally defaulted, but subject to the *Martinez* exception. *Dickens v. Ryan*, 688 F.3d 1054, 1070 (9th Cir. 2012). This Court then granted *en banc* review in *Dickens*, while the mandate in Schad's case remained stayed. Schad promptly sought a continued stay of mandate pending the *en banc* decision in

Dickens,[2] after which Schad filed (at the panel's request) a request for reconsideration of his motion for a *Martinez* remand – a motion that was filed many months earlier, before Schad even filed his certiorari petition.

Though fully aware that this Court had not issued any mandate and that Schad's initial federal habeas proceedings were thus not final, the state of Arizona pressed forward to have Schad executed.

The Arizona Supreme Court – also knowing that this Court has not issued a mandate marking the conclusion of federal habeas proceedings – ordered Schad executed on March 6, 2013. Indeed, when it ordered Schad's execution, the Arizona Supreme Court was well aware that any interest in finality of its judgment had not yet attached. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)(state's interest in finality becomes compelling once court of appeals issues its mandate).

With *Martinez* having been decided during the pendency of Schad's initial habeas proceedings, the panel has now reconsidered its denial of the pre-certiorari *Martinez* motion and its prior panel opinion. The panel has carefully considered the various contentions now made by the state in its petition for rehearing *en banc* and

[2]Schad immediately notified the Arizona Supreme Court that he had requested a continuation of the mandate stay in light of the en banc grant in *Dickens*. See Attachment C, email correspondence between Kelley Henry (counsel for Schad) and Donna Hallam (Staff Attorney for the Arizona Supreme Court)(Hallam will inform the Justices of the motion).

rejected them.

The panel has noted that the application of *Martinez* under similar circumstances is being considered by the *en banc* court in *Dickens v. Ryan*, No. 08-99017 and by a panel in *Detrich v. Ryan*, No. 08-99001 and that "Schad's case raises the same issues our court is considering *en banc*." *Schad*, slip op. at 2.

The panel has carefully balanced the stay equities to determine whether a *Martinez* remand on Schad's initial habeas proceedings is warranted, concluding that the circumstances here are exceptional, even **assuming** a *Martinez* remand based on a *Martinez* motion made before certiorari was filed requires such a showing. *Id*., slip op. at 3-11.

The panel has carefully looked at the facts of Schad's case, noting that the change in the legal landscape wrought by *Martinez* and this Court's *en banc* review of an identical issue are exceptional.

The panel has noted that the aggravation in Schad's case is weak, and that Schad's unpresented evidence of mental illness is very significant, showing that because of mental illness, Schad "did not bear the same level of responsibility for the crime as would someone with normal mental functioning." *Id*., slip op. at 9-10.

The panel has noted – in complete accord with the decisions of the Fourth, Fifth, and Tenth Circuit (*See* p. 4, *supra*) – that Schad's ineffectiveness claim is a new

claim that is procedurally defaulted because it is based upon new evidence that was never considered by the state courts, and that it is therefore subject to *Martinez*. *Schad*, slip op. at 11-14.

The panel has thus concluded that *Martinez* applies with full force to Schad's claim because it is a new claim, and the panel has rejected the state's argument that *Cullen v. Pinholster*, 563 U.S. ___ (2011) applies. *Schad*, slip op. at 13 n. 3.

THE PETITION FOR REHEARING *EN BANC* SHOULD BE DENIED

As an initial matter, it should be noted that, in violation of Fed.R.App.P. 35(b)(1)(A), the state has not identified in its required statement any specific case posing a conflict with the panel decision. Given that shortcoming in the state's petition, this Court need only evaluate the state's petition in light of Fed.R.App.P. 35(b)(1)(B)'s requirement of an issue of exceptional importance, and this Circuit Rule 35-1, requiring a "direct conflict" with another court of appeals concerning a rule of national application. In light of these requirements, as well as the factbound nature of the state's requests, the petition for rehearing is not well-taken.

I.
The Panel Has Appropriately Exercised Jurisdiction Over A Still-Pending Case To Apply An Intervening Decision Rendered During The Pendency Of Initial Federal Proceedings

There is no basis for granting rehearing on the question of jurisdiction. The law

of this circuit is clear that the Court has the power to reconsider its prior judgment during the pendency of a stay of mandate. *Beardslee v. Brown*, 393 F.3d 899 (9th Cir. 2004). The panel has properly cited *Beardslee* and applied it, and *en banc* review for re-application of *Beardslee* is unwarranted. *Compare Kyles v. Whitley*, 514 U.S. 419, 456 (1995)(Scalia, J., dissenting)(further review not warranted based upon alleged misapplication of properly-stated rule of law to specific facts).

Moreover, Schad's case presents a unique situation, because: (1) the intervening decision which he wants applied to his case was issued during the pendency of his appeal and before certiorari was even filed; and (2) he clearly requested application of *Martinez* ***before*** he ever filed for certiorari. Where this Court reconsidered its judgment in *Beardslee* where Beardslee first asked for reconsideration post-certiorari, *a fortiori*, this Court has properly applied *Martinez* where Schad expeditiously asked for application of *Martinez* before he ever sought certiorari. The panel's decision engenders no intracircuit conflict requiring *en banc* review.

There is also no conflict with *Bell v. Thompson*, 545 U.S. 794 (2005). In stark contrast to the State's representation, the Supreme Court never held that a mandate must issue upon denial of certiorari. Rather, in *Thompson,* the Court not only noted that Fed.R. App. 41 "may authorize a court to stay the mandate after certiorari is

denied," but it also identified circumstances in which such action has been deemed appropriate. *Thompson*, 545 U.S. at 806, *citing First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895 (5th Cir. 1995) and *Alphin v. Henson*, 552 F.2d 1033 (4th Cir. 1977). The Court thus emphasized that "the Federal Rules of Appellate Procedure ensure that litigation following the denial of certiorari will be infrequent*"* (Thompson, 545 U.S. at 806) – not non-existent, as the state contends.[3]

Moreover, the facts of *Thompson* are quite different from those here, and thus there is no conflict. There, the state was lulled into thinking that it could move forward with seeking execution of its judgment, only to have that reliance undermined by issuance of a new judgment that was completely unexpected by all the parties, months after certiorari was denied. Here, the state has always been on notice that Schad has wanted application of *Martinez*, he requested it before certiorari was ever filed, and it has finally been granted before the mandate ever issued – facts known to all the parties. *Thompson* does not prohibit the equitable application of the equitable principles of *Martinez*, which was decided in the time window before

[3] It is also worth noting that had the Supreme Court taken the extreme position advocated by Appellees here, *viz*., that an Article III appellate court has no inherent control over its mandate given a court *rule* (Fed.R.App.P. 41), the Supreme Court would have had to confront the constitutionality of Rule 41.

certiorari was ever requested.[4]

II.
En Banc Review Is Not Warranted For Reapplication Of *Pinholster* To The Facts, Especially Where All The Circuits Agree That An Ineffectiveness Claim based Upon Significant New Facts Not Presented To State Court Is A New, Procedurally Defaulted Claim

The state persists in claiming that Ed Schad somehow received an adjudication on the merits of his fully-developed mental-health based ineffective assistance of counsel claim presented as Claim P in his federal habeas petition. The state is incorrect. The panel has rightly concluded that the claim as presented in federal habeas was not exhausted and procedurally defaulted by initial post-conviction counsel, who (as the state agrees) was not diligent in securing the evidence in support

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[4] In *Thompson*, after rehearing was denied on certiorari, Thompson never "sought an additional stay of the mandate," as Schad has. *Id*. at 804. Unbeknownst to anyone, however, the court of appeals in *Thompson* then reconsidered its original judgment, reversed that judgment, and issued a mandate (with a completely new outcome) five months after rehearing had been denied by the Supreme Court. Because the court of appeals notified no one post-certiorari that it was actually "reviewing its original panel decision," the state secured an execution date, after which the parties engaged in state competency proceedings. *Id*. at 805.

Under these circumstances, the Supreme Court concluded that any discretion available to the court of appeals had been abused, given: the court of appeals' secrecy; the state's justifiable belief that denial of certiorari (and rehearing) signaled the conclusion of initial federal habeas proceedings; the fact that the state secured an execution date relying on the denial of certiorari (and rehearing); and the fact that the mandate based upon the newly-revised judgment came out of the blue months after rehearing was denied. *Id*. at 804-806. By implication, the Supreme Court indicated that had Thompson moved for an additional stay and shown exceptional circumstances (as Schad has done), had the court of appeals promptly informed the parties that habeas proceedings were not in fact over, had the state not relied upon the court of appeals' silence, and had the court of appeals not unreasonably delayed issuance of the mandate without explanation, the outcome might have been different. Ed Schad and this Court have made *none* of the gaffes made by the court of appeals in *Thompson*. Just the opposite. Schad has repeatedly implored the Arizona Supreme Court to not set an execution date because the mandate had not issued. *See, eg.*, Attachment C.

of the claim.

This is a non-startling conclusion and engenders no conflict within this circuit or outside it. As Schad has already explained, the panel's conclusion is in complete harmony with the decisions of the Fourth, Fifth, and Tenth Circuits who have all reached the identical conclusion under identical circumstances. *Moses v. Branker*, 2007 U.S.App.Lexis 24750 (4th Cir. 2007); *Kunkle v. Dretke*, 352 F.3d 980, 987-988 (5th Cir. 2003); *Fairchild v. Workman*, 579 F.3d 1134, 1148-1151 (10th Cir. 2009). There is thus no basis for *en banc* reconsideration.

Moreover, given this lack of conflict, all the state is really requesting is that the *en banc* court reapply *Pinholster* to the unique facts of Schad's particular claim. That is not a proper ground for *en banc* review. Indeed, the panel has already cited and applied *Pinholster*, concluding that, under the facts of this case, it does not apply. *Schad*, slip op. at 13 n.3. The panel has already reviewed the facts of Schad's ineffectiveness claim, acknowledged the law of *Pinholster* which provides that it does not apply to "new claims," and applied that law to the circumstances of Schad's case, which (as all the other circuits would agree) is a new, unexhausted claim.

Where the panel agrees with all the other circuits and has already considered the application of *Pinholster* and applied it by its terms, there is no basis for the *en banc* court to step in either to *create a conflict* among the circuits on the question of

exhaustion/default, or to reapply *Pinholster*, as the panel has already done.

III.
It Is Disingenuous For The State To Contend That The Panel Has Somehow Erred In Finding Schad's Claim To Be Substantial Under *Martinez*[5]

Having been intimately familiar with Schad's case for years now, the panel has now explicitly stated what was apparent to the court years ago: Schad's ineffectiveness claim is substantial under *Martinez*. *Schad*, slip op. at 6-11, 15. Where the panel has carefully delved into the facts in its recent order and has been cognizant of those facts for so many years, members of this Court properly defer to the panel's understanding and characterization of Schad's ineffectiveness claim. Indeed, the panel has a familiarity and facility with the facts of this factbound claim that cannot be replicated in a few short hours of consideration, especially where all the details of the record are not before this Court on this *en banc* petition. As an institutional matter, therefore, the state's request that the *en banc* court second-guess the panel's determination of substantiality is not well-founded.

Moreover, the state's assertions of insubstantiality is disingenuous. Under

[5]For the first time, the State alleges that post-conviction counsel was effective. This argument is directly contrary to every pleading it has filed in this matter where they repeatedly describe post-conviction counsel as not diligent. The State is judicially estopped from taking a contrary position at this late date. *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990). In any event, such a factual dispute is yet another reason why the panel's remand order is eminently reasonable. The factual determination of the issue should be made on a fuller record - something that Schad has been deprived of.

Martinez, a claim is substantial merely if it is debatable. *See Martinez*, 566 U.S. at ___ (slip op. at 11)(citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The panel has cited that standard (*Schad*, slip op. at 14) and properly applied it. There is no reason for the *en banc* court to redo that task. And on its face, Schad's claim is substantial, for all the reasons carefully recounted by the panel. *Schad*, slip op. at 7-11. Schad's claim is like many other claims of sentencing ineffectiveness which this Court has found to be meritorious or worthy of further proceedings. *See e.g.*, *Stanley v. Schriro*, 598 F.3d 612 (9th Cir. 2010)(finding a *prima facie* case for relief under *Strickland* and remanding for further proceedings where counsel failed to present expert mitigating mental health evidence at sentencing); *Robinson v. Schriro*, 595 F.3d 1086 (9th Cir. 2010)(counsel ineffective at sentencing for failing to present mitigating evidence of, *inter alia*, poverty, unstable and abusive upbringing including sexual abuse, and personality disorder); *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009)(counsel ineffective at sentencing for failing to present mitigating evidence of serious childhood abuse and mental disturbance); *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008); *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007)(sentencing counsel ineffectively failed to investigate and present mitigating evidence of abusive childhood, mental condition, and drug dependency).

In claiming that Schad's claim is insubstantial, the state resorts to citing cases

that present crimes and offenses that are not even remotely like the facts here.[6] But in any event, an *en banc* court need not be in the business of parsing facts of various cases to make a substantiality inquiry, when the panel has already done so in this case, and done so properly.

IV.
En Banc Review Is Not Warranted On The Question Whether The State Waived Procedural Default, But If This Court's Finds Waiver, Then *En Banc* Review Should Be Denied And The Panel Should Grant Ed Schad Relief On The Merits Of His Now Non-Defaulted Claim

The state's final pitch for *en banc* review involves the assertion that it waived

[6] The facts of each case are far more egregious than those here. In *Cook v. Ryan*, 688 F. 3d (9th Cir.), Cook represented himself at trial. "In short, Cook's trial counsel was, at his own request, Cook." *Id.* at 609. Thus, Cook didn't even present a *Martinez* claim. Moreover, the facts of his crime were extreme. "Cook and Matzke tied Cruz-Ramos to a chair and tortured him for six hours. Among other things, Cook and Matzke beat Cruz-Ramos with a metal pipe; burned his chest, stomach, and genitals with cigarettes; and cut his chest with a knife. Cook also raped Cruz-Ramos and stapled Cruz-Ramos's foreskin to a chair. Matzke finally strangled Cruz-Ramos to death with a metal pipe, and the two men put his body in a closet." *Id*. 601-602. In *Leavitt v. Arave*, Leavitt repeatedly stabbed his victim and removed her sexual organs. 383 F.3d 809 (2009). Sam Lopez's case involved the beating, raping, and repeated stabbing of an elderly woman. The panel described the case has brutal and depraved. *Lopez v. Ryan*, 678 F. 31 1131, 1138 (9th Cir. 2012). Richard Bible's case involved the kidnapping, sexual assault, and bludgeoning of a 9 year old girl. *Bible v. Ryan*, 571 F.3d 860 (9th Cir. 2009). In *Mickey v. Ayers*, 606 F.3d 1223 (9th Cir. 2010), "Mickey murdered Hanson and Blount. He first bludgeoned Hanson with a baseball bat and slit his throat from ear to ear down to the spinal cord. He then stabbed Blount seven times in the chest. Three of the blows pierced her heart. Mickey left the house, taking substantial property with him, and drove away in Hanson's Volkswagen. He left no fingerprints." These cases are not even on the same graph as the factual scenario in Schad's case which the panel described as a "single homicide of an adult male" where the aggravation was not "particularly egregious" and where "Schad never confessed to the crime and all of the evidence was circumstantial." *Schad*, slip op at 9.

procedural default by simply not arguing procedural default on appeal.[7] There are numerous factual and legal problems with this argument, all of which demonstrate the state is engaging in kafkaesque machinations solely in the effort to carry out an execution without regard for the seriousness of the claim before this Court.

First, the statement that the State has waived exhaustion is not true. Second, the statement that this Court is without authority to find a procedural default for non-exhaustion is not true. Third, the State cannot have its cake and eat it too. The State wants to waive exhaustion but at the same time cabin the merits review of Schad's claim to the four corners of the state court record. To do so will create a conflict with *Martinez* and will eviscerate the vitality of that opinion. Such a holding from this Court will signal to prosecutors everywhere that they can take an end-run around *Martinez* by declaring that they waive exhaustion. But that isn't how exhaustion waiver works. If the state wants to waive exhaustion now, then Schad is entitled to a full review of his claim, a review which should result in sentencing relief for Schad.

As a factual matter, the State pressed non-exhaustion and procedural default on appeal in this Court. See Attachment A, Motion to Strike Opening Brief. And as Schad has already noted, the state emphasized that Schad's new claim based upon the

[7]The State characterizes the question for the Court as "whether this Court can use the affirmative defense of procedural default against the State[.]" Petition at 2. This formulation is improper and suggests that this Court is somehow not neutral, but instead the adversary of the State.

mental health evidence violated the exhaustion requirement. *See* p. 3, *supra*; R. 116, pp. 4, 9. But even more obvious is the fact that the State has always taken the position that the only merits adjudication that Schad is entitled to vis-a-vis his sentencing counsel's ineffectiveness is that which relates to the evidence of his tragic childhood. The State has vigorously blocked all merits review, in state and federal court, to his mental illness claim.

The State's attempt to re-write its history is particularly Machiavellian when one considers that they know full well that any waiver must be express (which it has not been) and that this Court is well within its jurisdiction to *sua sponte* hold a claim defaulted for non-exhaustion. Indeed the State made this very argument less than a year ago in this Court. In the *Lopez* case, the State argued to the Court:

> A federal court has discretion, on its own initiative, to address "nonjurisdictional"defenses. *Day*, 547 U.S. at 202. Such defenses include non-exhaustion of state court remedies and procedural default. Id., at 205. Where, inadvertently or otherwise, the State fails to raise a non-exhaustion defense, "the court is not obligated to regard the State's omission as an absolute waiver of the claim." *Granberry v. Greer*, 481 U.S. 129, 134 (1987). Thus, "federal appellate courts have discretion to consider the issue of exhaustion despite the State's failure to interpose the defense at the district-court level." *Day*, 547 U.S. at 206 (quoting Granberry, 481 U.S. at 133). Moreover, Congress has clearly provided that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C.A. § 2254(b)(3).

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It is impossible for the state to now claim that it implicitly waived exhaustion and default, and that it was somehow improper for the court to find Schad's claim procedurally defaulted absent not only an explicit waiver in prior proceedings, but given the state's **emphasis** that Schad's new claim based on new evidence was not exhausted. Indeed, had the state's waiver of exhaustion and default been clear in earlier proceedings, the panel undoubtedly would have considered all of the significant mental health evidence presented in federal court as part of Schad's new, unexhausted claim, and would have clearly granted Schad relief based upon all the evidence. For as the panel notes, 28 U.S.C. §2254(d) does not apply to Schad's new claim. *Schad*, slip op. at 13 n.3.

But if in attempting to forestall application of *Martinez* to Schad's new ineffectiveness claim the state is now saying that it is explicitly waiving procedural default, then Schad is unquestionably entitled to a full merits review of his new claim, something he has never had. Instead, this Court should deny *en banc* review, and the panel itself should, in light of the state's now explicit waiver, determine that Ed Schad's new mental-health mitigation claim is not defaulted and should properly review that claim *in its entirety*, free from 28 U.S.C. §2254(d) (because the claim is a "new claim") and grant Ed Schad relief on the merits of his ineffectiveness claim.

It is truly exceptional if the state is now claiming that it has always waived procedural default as to Schad's claim, and the court should thus grant habeas relief to Ed Schad if that is so.[8] This Court has, after all, concluded that trial counsel's errors had a substantial and injurious effect on the sentencing decision. Slip op at. 7-8.

CONCLUSION

Schad's case should either be remanded for the *Martinez* hearing as the panel has concluded, or if this Court concludes that Schad's new claim is not subject to procedural bar because of the State's newly announced exhaustion waiver, Schad should be granted relief outright on his new (now-undefaulted) *Strickland* claim,. Either outcome is acceptable to Schad. But in either scenario, *en banc* review should be denied.

Respectfully submitted this 28th day of February, 2013.

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[8]In reply, the State will no doubt repeat its argument that the District Court had already reviewed the merits of the new claim. But the State ignores that the panel opinion already addressed this issue. The Court found that the district court did not address the new claim here. Further, if the State is suggesting that the District Court will not discharge her duties to follow the higher court's direction on remand, Schad does not share in that cynicism. The Court wrote: "Schad's mitigating factors that were not before the sentencing court provided a far greater reasoning for not executing a capital defendant... We conclude that absent the ineffective assistance 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 illness as an adult, would have mitigated his culpability for the crime, we cannot say with fair assurance .. that the judgment was not swayed by the error." Slip op at 10-11 (internal quotations omitted). The lower court will have the benefit of this analysis on remand.

By: /s/ *Kelley J. Henry*
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CERTIFICATE OF SERVICE

I certify that on this 28th day of February, 2013, I electronically filed the foregoing Response To Petition For Rehearing 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

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MOTION TO STRIKE OPENING BRIEF

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD, Petitioner-Appellant, –vs– DORA B. SCHRIRO, ET. AL., Respondents-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-97-227-PHX-ROS

Pursuant to Rules 10(a), 10(b), 10(e)(3), and 27 of the Federal Rules of Appellate Procedure, and Circuit Rule 30–1 and 30–2, Respondents/Appellees [hereafter Respondents] move that this Court strike Petitioner/Appellant Edward Harold Schad's [hereafter Schad] opening brief [hereafter OB] and excerpts of record because: (1) the brief refers to and relies upon non-record items and the excerpts of record include non-record items; (2) the brief refers to and relies upon transcripts that are not included in the excerpts of record; and (3) the certification date on the excerpts of record is incorrect.

A. BACKGROUND PRINCIPLES.

The federal appellate "rules of practice and procedure were not

whimsically created by judges who derive some sort of pleasure from the policing functions that the existence of such local rules necessarily entails." *Dela Rosa v. Scottsdale Memorial Health Systems, Inc.*, 136 F.3d 1241, 1244 (9th Cir. 1998). Rather, these rules serve a critical function on appeal in that they maximize ever more scarce judicial resources. *In re O'Brien*, 312 F.3d 1135, 1137 (9th Cir. 2002), *citing N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1145 (9th Cir.1997) ("In order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words . . . ."). The FRAP and Ninth Circuit rules are "not optional suggestions . . . but *rules* that . . . are entitled to respect, and command compliance." *Dela Rosa*, 136 F.3d at 1243 (emphasis in original).

Either briefing inadequacies or the failure to present a sufficient record can serve as a basis for summary affirmance, *Perez v. Perez*, 30 F.3d 1209, 1217-18 (9th Cir.1994); *Lowery v. United States*, 258 F.2d 194, 196 (9th Cir.1958) ("Since appellant has seen fit to proceed with his appeal on the wholly inadequate record we have described, the judgment must be and is affirmed."), or for a dismissal of the appeal, *Dela Rosa*, 136 F.3d at 1243 n. 1. *See also In re O'Brien*, 312 F.3d at 1137 (dismissing appeal because appellate

brief and excepts of record were not in compliance with federal rules of appellate procedure and Ninth Circuit rules); 16A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3956.1 ("Failure to provide a sufficient record to support informed review of district-court determinations may lead either to dismissal of the appeal or to affirmance for inability to show error."). Alternatively, if this Court determines that the excerpts of record omit materials that are required under the rule to be included, or include irrelevant materials, it may take one of several actions, including striking the excerpts and ordering that they be corrected and resubmitted. Circuit Rule 30-2.

B. SCHAD'S BRIEF CITES NON-RECORD ITEMS.

Schad has improperly included in his excerpts of record numerous exhibits, comprising about 1218 pages of material, that were not part of the state or district court record. *See* ER Vol. II, pp. 515, 528-531; Vol. III, pp. 737-831; Vol. IV, pp. 832-1131; Vol. V, pp. 1132-1341; Vol. VI, pp. 1148-1544; 1560-1652, 1667-1729; Vol. VII, pp. 1730-92. In the district court, Schad, with the one exception discussed below, did not even file a motion to expand the record to include the above items. (See ER 1911-1921, Civil Docket for Case # CIV 97-227-PHX-ROS.)

The only motion to expand the record concerned the declaration of Dr. Charles Sanislow. Schad originally attached the declaration to a document entitled "notice of supplemental authority." (ER, at 1547-1652.) Respondents moved to strike the notice as an improper attempt to expand the record (ER, at 1653-56), and the district court granted the motion. (ER, at 1661-62.) Schad then filed a motion to expand the record to include Sanislow's declaration. (ER, at 1663-1759.) Respondents opposed that motion, and the court issued an order saying that it would rule on the motion, and the applicability of other filed exhibits, when it decided the merits of Schad's claims. (ER, at 1788-89.)

The district court's decision noted that Schad had filed with the district court evidence that was not presented to or considered by the state courts, and found that Schad had not exercised due diligence in presenting said evidence to state courts, and therefore was not entitled to any expansion of the record. (ER, at 1867-68, 1871, 1872-75.) The district court did not grant Schad's motion to expand the record to include Sanislow's declaration, although it alternatively found the newly-submitted evidence would not have changed the sentence. (ER, at 1855.)

Schad's motion to alter or amend the judgment did not challenge the district court's denial of an expansion of the record. (ER, at 1880-1901.) Nor

does Schad's brief raise as an uncertified issue the denial of his motion to expand the record or the district court's finding regarding lack of due diligence in presenting the evidence to the state courts. And Schad's discussion of the two certified claims does not challenge the district court's denial of an expansion of the record. Thus, there is no "issue on appeal . . . based upon a challenge to the admission or exclusion" that allows for inclusion of the excluded exhibits in the excerpts. *See* Circuit Rule 30-1.3(a)(vii).

Schad nonetheless has included the above cited items in several volumes of his excerpts of record. Schad's use of the non-record exhibits is not merely incidental. A significant portion of his discussion of the first certified issues is based on facts asserted in non-record exhibits. See OB, at pp. 19, 22, 23, 25, 27. His discussion of the second certified issue is based almost entirely on facts asserted in non-record exhibits. See OB, at pp. 28, 29-33, 36. Schad's discussion of one uncertified issue also cites non-record exhibits. See OB, at 52-53, 54.

Thus, Schad improperly makes *substantive* use of the exhibits as the basis for his two certified claims, as if the district court had granted his motion to expand the record, drawing no distinction between record and non-record evidence. If a habeas petitioner could make substantive use of excluded

exhibits on his habeas appeal, that would nullify the exhaustion and presentment requirements embodied in 28 U.S.C. § 2254(e)(2) and Habeas Rule 7.[1] This Court cannot consider his appeal based on evidence never considered by the state courts *or* the district court. *See Boyko v. Parke*, 259 F.3d 781, 790 (7th Cir. 2001) ("Regardless of the procedural device through which Mr. Boyko seeks to accomplish this goal, he is asking that a federal court evaluate the merits of factual matters never presented to the state courts. Because § 2254(e)(2) restricts a petitioner's attempts to supplement the factual record, Mr. Boyko must satisfy that provision's requirements *before* he may place new factual information before the federal court.") (Emphasis supplied.)

Under Rule 10(a) of the Federal Rules of Appellate Procedure, the record consists of ". . . exhibits filed in the district court." Here, the district court expressly denied Schad's motion to expand the record to include Sanislow's declaration and found that he had not shown due diligence in submitting other evidence to the state courts; yet, he has included these very

[1] Rule 7(a) of the Habeas Rules states, in relevant part, "If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by inclusion of additional materials relevant to the determination of the merits of the petition."

items in his opening brief and in his excerpts of record. These items are not part of the district court record, and cannot be considered in adjudicating this appeal. "Ordinarily, a court of appeals should only consider evidence made part of the district court record." *Thompson v. Bell,* 373 F.3d 688, 690 (10th Cir. 2003), *reversed on other grounds*, *Bell v. Thompson*, 545 U.S. 794 (2005). *See also Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993) ("Generally, an appellate court cannot consider evidence that was not contained in the record below."); *Panaview Door & Window Co. v. Reynolds Metals Co.*, 255 F.2d 920, 922 (9th Cir.1958) (striking from record an exhibit that had been attached to appellant's trial court memorandum of points and authorities and a document that had been marked for identification, neither of which had been received in evidence).

The exhibits in question are not properly included under Rule 10(a) merely because that rule defines the record to include "the original papers and exhibits filed in the district court." If the exhibits became part of the record merely because they were "filed" with the court, Rule 7 of the Habeas Rules would be superfluous. The only reasonable application of Rule 10(a) is to treat an exhibit proffered under a motion to expand the record—but *excluded* by the *denial* of the motion—as an exhibit that was never "filed" in the first instance.

Cf. Barcamerica International USA Trust v. Tyfield Importers, Inc., 289 F.3d 589, 595 (9th Cir. 2002) (excluding exhibits lodged with the district court from definition of the "record" under Rule 10(a), F.R.A.P.). The purpose of Rule 10 of the Federal Rules of Appellate Procedure is to provide this Court with an accurate reflection of the evidence before and considered by the district court. *See United States v. Elizalde-Adame*, 262 F.3d 637, 640 (7th Cir. 2001).

Respondents filed a similar motion to strike the opening brief in *Laird v. Schriro*, No. 05-16509; this Court issued an order striking the opening brief and excerpts of record, ordering the filing of a proper substituted opening brief and excerpts of record, and setting a new briefing schedule. Respondents have attached a copy of the *Laird* order hereto for this Court's convenience.

C. SCHAD FAILS TO INCLUDE TRANSCRIPTS IN THE EXCERPTS OF RECORD THAT ARE CITED IN HIS BRIEF.

Additionally, Schad has extensively cited several state trial and sentencing transcripts in his opening brief, without including the transcripts, or even the cited portions thereof, in his excerpts of record. *See* Federal Rule of Appellate Procedure 10(b)(2) (providing that "[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion"). *See also* Circuit Rule

30-1.4(xi) (requiring excerpts of record to include "any other specific portions of any documents in the record that are cited in appellant's brief and necessary to the resolution of an issue on appeal").

Schad attacks the district court's findings and conclusions in his discussion of the first certified issue, a *Brady* issue. (OB at 19-28.) The discussion contains citations to two transcripts from the state trial: R.Ts. 6/21/85 (OB at 19, 27); 10/2/79 (OB at 20, 21). Neither these transcripts nor the cited portions thereof, are included in the excerpts of record.

Schad attacks the district court's findings and conclusions in his discussion of the second certified issue, a *Strickland* issue concerning alleged ineffective assistance of counsel at sentencing. (OB at 28-39.) The discussion contains citations to a transcript from the state trial: R.T. 8/29/85 (OB at 28.) Neither this transcript nor the cited portion thereof is included in the excerpts of record.

Schad's statements of the case and facts contains extensive citations to various trial transcripts. (OB at 4, 5, 10-18.) Neither these transcripts, nor the cited portions thereof, are included in the excerpts of record. Schad's first uncertified issue attacks the sufficiency of the evidence to support his conviction and sentence. (OB at 41-51.) The discussion of these issues

contains extensive citations to state trial transcripts. Neither these transcripts, nor the cited portions thereof, are included in the excerpts of record.

Moreover, Schad's last uncertified issue argues that the Arizona courts failed to consider and give effect to evidence presented at the Arizona sentencing hearing. (OB at 76-100.) The discussion of this issue contains extensive citations to state trial transcripts. Neither these transcripts nor the cited portions thereof, are included in the excerpts of record.

D. SCHAD'S CERTIFICATION IS INCORRECT.

Finally, although the recently-filed excerpts of record contain a certificate of service indicating that they were mailed on August 21, 2007, they were in fact mailed on the same day as Schad's replacement opening brief, on September 28, 2007. Indeed, this Court's docket sheet notes that the excerpts of record were not filed and served until September 28, 2007.

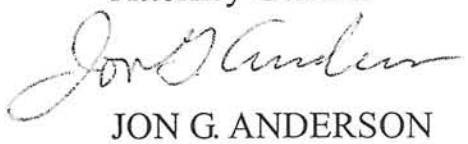
E. CONCLUSION.

For the above reasons, Respondents respectfully request that this Court: (1) strike the opening brief and order Schad to file a proper substitute opening brief; (2) strike the excerpts of record and order Schad to file an excerpts of record that does not include the non-record items, and does include all cited

state trial and sentencing transcripts; and (3) reset the briefing schedule accordingly.

Respectfully submitted this 9th day of October, 2007.

Terry Goddard
Attorney General



JON G. ANDERSON
Assistant Attorney General
Capital Litigation Section

Attorneys for Respondents-Appelleess

CERTIFICATE OF SERVICE

TWO COPIES of this Motion were deposited for mailing this 9th day of October, 2007, to:

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ATTACHMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 09 2005
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

KENNETH JEREMY LAIRD,

Petitioner - Appellant,

v.

DORA B. SCHRIRO, Director; et al.,

Respondents - Appellees.

No. 05-16509

D.C. No. CV-00-02410-JAT
District of Arizona,
Phoenix

ORDER

Appellees' motion to strike the opening brief and excerpts of record is granted. On or before December 29, 2005, appellant shall file a substitute brief that omits any reference to materials that were not before the district court. Materials not before the district court include exhibits that were filed but excluded by the district court in its denial of appellant's motion to expand the record. Appellant shall likewise exclude any materials in the excerpts of record that were not before the district court. 9th Cir. R. 10-2.

If appellant timely complies with this order, the answering brief is due January 30, 2006, and the optional reply brief is due 14 days after service of the answering brief.

For the Court:
CATHY A. CATTERSON
Clerk of the Court:

Cathie A. Gottlieb
Deputy Clerk
Ninth Cir. R. 27-7/Advisory Note to Rule 27
and Ninth Circuit 27-10

pro 12.5

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,

Petitioner-Appellant,

v.

DORA B. SCHRIRO, Director, Arizona Department of Corrections,

Respondent-Appellee.

No. 07-99005

D.C. No. CV-97-2577-ROS
D. Ariz.

ORDER

Before: Appellate Commissioner Peter Shaw

Appellee has filed a motion to strike appellant's opening brief (AOB) and excerpts of record (ERs) based on reference to and inclusion of materials that appellee contends are not properly part of the record. Appellant opposes the motion, contending that the materials are properly part of the record.

A review of the motions papers reveals that the parties have identified a significant issue that merits careful development in the briefs. Both parties have, to some extent, mentioned that appellant might file a superseding opening brief that would address the issue in detail. It appears that the court would benefit from having the issue addressed in the first instance in a superseding opening brief.

Accordingly, Appellee's motion to strike the AOB and ERs is granted as follows. The Clerk shall strike the October 1, 2007 AOB and the October 1, 2007 ERs. Appellant's motion to correct appellant's excerpt mailing certification date is denied as moot.

By January 31, 2008, Appellant shall file a superseding AOB and superseding ERs. As to any issue for which appellant argues that the district court erred in refusing to expand the record, appellant shall clearly so state. If Appellant deems it appropriate, appellant may raise additional uncertified issues in the superseding AOB. *See* 9th Cir. R. 22-1(e). Appellant's superseding AOB shall clearly identify any material upon which he relies that was not part of the state court record and not admitted as part of an expanded record by the district court.

To the extent appellant deems it appropriate, appellant may advance the arguments in his opposition to themotion to strike the October 1, 2007 AOB and ERs to explain why materials never admitted by the state courts and previously denied admission by the district court were nonetheless part of the record before the district court. In sum, Appellant in his superseding AOB shall address directly the issue of materials never admitted in state or district court.

No. 07-99005

Appellant's superseding ERs shall be comprised of two separately bound and separately labeled sets of ERs. Set II shall include only documents submitted to but not admitted by the district court. Set I shall include all other documents required by Ninth Circuit Rule 30-1. The superseding ERs shall include state trial court transcripts cited in the opening brief necessary to the resolution of an issue on appeal. *See* 9th Cir. R. 30-1.4(a)(xi).

Appellee's answering brief is due March 31, 2008. The reply brief is due within 21 days after service of the answering brief. The parties shall employ the same format of separately bound and labeled ERs for any supplemental and additional ERs.

Peter L. Shaw
General Order 6.3(e)

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eu
07-99005

RE: Schad v. Ryan - Emergency Motion to Continue Stay of Mandate

Hallam, Donna to: 'Kelley Henry', 'Margaret Epler' , 'Kristine Fox' 01/07/2013 02:44 PM

Cc: "Anderson, Jon", "Cattani, Kent" , "'dyoung3@mindspring.com'"

Thank you. The Court wants to be kept informed of proceedings in other courts, so I will forward a copy to the Justices.
D. Hallam

-----Original Message-----
From: Kelley Henry [mailto:Kelley_Henry@fd.org]
Sent: Monday, January 07, 2013 1:27 PM
To: Margaret Epler; Kristine Fox; Hallam, Donna
Cc: Anderson, Jon; Cattani, Kent; dyoung3@mindspring.com
Subject: Schad v. Ryan - Emergency Motion to Continue Stay of Mandate

Attached please find the Emergency Motion just filed on behalf of Mr. Schad with the Ninth Circuit asking that the Mandate Stay be continued in light of the Rehearing En Banc grant in Dickens v. Ryan. Ms. Hallam, we would very much appreciate it if the Justices be made aware of the filing prior to their conference tomorrow.

Thank you.

Kelley

(See attached file: Continue Mandate Stay.pdf)

Kelley J. Henry
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