No. 12A857

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,
Director, Arizona Department of Corrections, et al.,
Movant,

v.

EDWARD HAROLD SCHAD,
Respondent.

SCHAD'S RESPONSE IN OPPOSITION TO
APPLICATION TO LIFT STAY

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In light of the intervening decision of *Martinez v. Ryan*, 566 U.S. ___ (2012) which was decided during the pendency of Ed Schad's initial habeas proceedings, the court of appeals (like many other courts of appeals) has ordered a remand for the application of *Martinez*. In doing so, the court of appeals has noted that Ed Schad's mental-health mitigation claim under *Strickland* is quite substantial, with sentencing counsel having seriously prejudiced Schad at the sentencing hearing. To allow Schad his one full-and-fair opportunity to have his claim reviewed, the court of appeals has granted a stay of execution. Movant now seeks the extraordinary remedy of vacating that stay, which founders under the heavy burdens imposed by 28 U.S.C. §1651.

Indeed, the movant has failed to comply with Rule 20.1 of this Court. Under §1651, having leapfrogged the *en banc* court of appeals, he cannot now secure the relief he requests, nor has he shown that extraordinary intervention by this Court is necessary or appropriate to aid this Court's jurisdiction – especially where he seeks extraordinary relief regarding a stay order based upon a interlocutory court of appeals order.

Nor can the movant establish any abuse of discretion. The court of appeals properly applied *Barefoot v. Estelle*, 463 U.S. 880 (1983), to grant a stay during these initial habeas proceedings. *Martinez* was designed specifically for claims like Schad's and there was no abuse of discretion in allowing *Martinez* to be applied here when it was decided *during the pendency of Schad's initial habeas proceedings*. In fact, this Court has granted stays of execution in similar circumstances. *See e.g.*, *Haynes v. Thaler*, 568 U.S. ___ (2012); *Balentine v. Thaler*, 567 U.S. ___ (2012). Likewise, the courts of appeals have issued similar remand orders in any number of identical circumstances where *Martinez* has yet to be applied.

Moreover, the court of appeals here is aligned with other courts of appeals which have found identical sentencing ineffectiveness claims (based upon new expert evidence like Schad's), to be new

claims for which a petitioner can show "cause," as is permitted by *Martinez*. *Bell v. Thompson*, 545 U.S. 794 (2005) does not prohibit the court of appeals' action, and it is distinguishable on its facts. Where the court of appeals carefully balanced the equities and concluded that Schad should not be executed before his substantial ineffectiveness is resolved in light of *Martinez*, there is no abuse of discretion.

Given the movant's failures to comply with this Court's rules, to satisfy the stringent standards of 28 U.S.C. §1651, and to show any abuse of discretion under established law, the movant's extraordinary motion to vacate must be denied.

I.

The Motion Should Be Denied Because
Movant Has Not Complied With U.S.Sup.Ct. R. 20.1

Having asked this Court to vacate the court of appeals' stay order, movant is requesting extraordinary relief. Though the State utterly fails to set forth any jurisdictional basis for its application, the only possible jurisdictional basis for this Court's intervention is 28 U.S.C. §1651. *See Wainwright v. Spenkelink*, 442 U.S. 901 (1979)(denying motion to vacate stay of execution); *Id*. at 902-903 (Rehnquist, J., dissenting)(§1651 provides jurisdictional basis for motion to vacate stay). Movant fails to cite §1651, perhaps because its requirements are so stringent.

Nevertheless, in requesting extraordinary relief, movant must comply with this Court's Rule 20.1. That rule requires the movant to show that relief "will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." U.S.Sup.Ct. R. 20.1. None of those statements (or showings) have been properly made. Movant has not stated

(or shown) how any action by this Court will be in aid this Court's appellate jurisdiction (*See* Section IIB, *infra*), has not articulated extraordinary circumstances justifying its requested relief, nor has movant shown stated (let alone demonstrated) that the requested relief is not available in any other form or elsewhere. *See* Section IIA, *infra*.

On this basis alone, the motion must be denied. *See e.g.*, *Bagley v. Byrd,* 534 U.S. 1301, 1302 (2001)(Stevens, J., in chambers)(denying motion for stay based, in part, on movant's failure to alleged irreparable harm).

II.
Movant Is Not Entitled To Extraordinary Relief: He Has Not Shown Action By This Court Is Necessary Or Appropriate In Aid Of This Court's Jurisdiction Under 28 U.S.C. §1651

Issuance of an order for extraordinary relief sought here "is not a matter of right, but of discretion sparingly exercised." U.S.Sup.Ct. R. 20.1, *quoted in Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. ___, ___ (2013)(Sotomayor, J., in chambers)(slip op. at 2). To secure the extraordinary relief it seeks, movant must show that the requested relief is "necessary or appropriate in aid of" this Court's jurisdiction. 28 U.S.C. §1651(a). Movant fails to meet this demanding standard.

A.
Because Movant Refused To Seek The Requested Relief In The *En Banc* Court Of Appeals, Intervention By This Court Is Not Necessary Or Appropriate Under 28 U.S.C. §1651

First, movant has wholly failed to seek the requested relief in the *en banc* court of appeals. Having done so, the movant has forfeited his request for extraordinary relief in this Court. Indeed, it quite remarkable that the movant has sought *en banc* rehearing on the merits in the court of appeals, yet took the unique step of filing in this Court an extraordinary motion to vacate on a

Sunday – before the court of appeals has even ruled on the *en banc* petition, and *without* asking the *en banc* court for the remedy now requested in this Court. This is simply not a situation for extraordinary intervention by this Court under 28 U.S.C. §1651. Issuance of an extraordinary order is not necessary, nor is it appropriate under these unique circumstances.

B.
Action By This Court Is Not Necessary Or Appropriate In Aid Of This Court's Jurisdiction, Where This Court's Jurisdiction Is Not At Risk

Second, movant also does not satisfy the highly demanding standard of §1651, which requires him to demonstrate that the requested extraordinary relief "is necessary or appropriate to aid our jurisdiction." *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. ___, ___ (2013)(Sotomayor, J., in chambers)(slip op. at 3-4). As Justice Sotomayor recently emphasized in *Hobby Lobby Stores, Inc.*, when a party can pursue litigation in the lower courts and then petition this Court for review once a final judgment has been rendered, that party cannot show that extraordinary intervention by this Court is necessary or appropriate to aid its jurisdiction. *Id*. This Court's ability to review a final judgment of the court of appeals, is not at risk. Once the lower courts comply with the court of appeals' order, this Court will be in a position to review that decision.

In fact, in *Bagley v. Byrd*, 534 U.S. 1301 (2001), Justice Stevens was presented with a similar situation, where the court of appeals in a capital case ordered a remand to the district court for further proceedings, and the warden moved for a stay. Justice Stevens denied the motion for a stay of the lower court proceedings, especially noting that there was "no need to enter an extraordinary writ to preserve this Court's jurisdiction." *Id*. at 1302 (Stevens, J., in chambers). So it is here. The motion should be denied.

C.
It Would Be Doubly Extraordinary For This Court To Issue An Extraordinary Order Under §1651 In A Case Involving An Underlying Interlocutory Order

There is no question that the lower court's order remanding the case to the district court is an interlocutory order, as it contemplates further proceedings in the district court. Even using a normal procedural vehicle, this Court would rarely intervene under such circumstances and invoke jurisdiction. *See e.g., Wrotten v. New York*, 560 U.S. ___ (2010) (Sotomayor, J.)(slip op. at 1-2)(interlocutory posture posed procedural difficulties for resolving case); *DTD Enterprises, Inc. v. Wells*, 558 U.S. 964 (2009)(Kennedy, J.,)(review inappropriate where petition was interlocutory). Having invoked the extraordinary remedy of §1651 to seek an extraordinary remedy *vis-a-vis* an interlocutory order, it is impossible to see how this Court could undertake the extraordinary intervention requested, to aid jurisdiction which almost certainly it would never invoke anyway. Again, movant's request for extraordinary action must fail.

III.
The Court Of Appeals Did Not Abuse Its Discretion In Granting A Stay Of Execution To Allow Application Of *Martinez*, Which Was Decided During The Pendency Of Schad's Initial Federal Habeas Corpus Proceedings, Where Schad Sought Application Of *Martinez* Before He Ever Petitioned For Certiorari And Before Any Mandate Ever Issued

At the outset, it is important to emphasize the facts which support the court of appeals' eminently reasonable decision to remand this case for further proceedings in light of *Martinez*, which was decided during the pendency of Schad's initial federal habeas corpus proceedings, where Schad has never received a merits consideration of his claim under *Strickland* that sentencing counsel failed to present mental-health mitigating evidence in support of a life sentence.

First, Schad's claim is a new claim that was never adjudicated on the merits by the state

courts. As the court of appeals has concluded, Schad's mental-health mitigation claim under *Strickland* is a "new claim" that has never been adjudicated on the merits by the Arizona courts, because no such claim predicated upon Schad's compelling mental health experts was ever presented for resolution in state court. It is a new claim because the significant mitigating evidence supporting the claim was never presented to the state courts. In fact, the state itself agrees with this conclusion, having admitted below that the mental-health evidence made Schad's claim unexhausted 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). All the other courts of appeals to address the issue concur that such a claim is an unexhausted new claim and/or procedurally 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 legal landscape of sentencing ineffectiveness claim, claim was not adjudicated in state court, and new claim was presented in federal court). Where the state agreed that the mental-health claim containing all of Schad's expert mental health evidence was unexhausted because it had never been presented to the state courts, the court of appeals did not abuse its discretion in concluding that the claim was a new, unadjudicated claim – especially where the other courts of appeals to consider such claims have reached the identical conclusion.[1]

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[1] And indeed, in state post-conviction proceedings, Schad's counsel presented a bald, unsupported, claim that sentencing counsel was ineffective for failure to present evidence of his traumatic upbringing. Post-conviction counsel failed to support that claim with any evidence and it was dismissed for violating the State's procedural rule that the petition be supported with affidavits. Schad has never had a true merits decision on any ineffectiveness claim, let alone his new claim which was presented for the first time in federal habeas. And the district court did not adjudicate Schad's new claim. She excluded the evidence (and by extension the claim) as defaulted at the State's behest. Furthermore the district court's order denying relief is tethered to a mininterpretation
(continued...)

Second, *Martinez* was decided during the pendency of Schad's initial federal habeas corpus proceedings. The court of appeals denied relief in 2011 (*Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011)), denied rehearing in early 2012, and stayed the mandate. Shortly thereafter, this Court decided *Martinez v. Ryan*, 566 U.S. ___ (2012). Schad promptly asked the court of appeals to apply *Martinez*, requesting a remand for further proceedings in July 2012, before he ever petitioned for certiorari, though the court of appeals summarily denied the motion apparently misapprehending its import. The court of appeals noted that its summary denial "left unanswered several serious legal questions." *Schad*, slip op at 7. In the meantime, and with the court of appeals' mandate stayed based upon Schad's motion, the court of appeals granted rehearing *en banc* in *Dickens v. Ryan*, 9th Cir. No. 08-99017. The court of appeals granted rehearing in *Dickens* precisely because the movant here told the court of appeals that the decision Schad's case (*Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011)), and that in *Dickens'* case (688 F.3d 1054 (9th Cir. 2012)) were in conflict. Immediately upon the en banc grant in *Dickens,* and with the mandate still stayed, Schad again argued to the court of appeals that *Martinez* had to be applied to his claim, just as it was to *Dickens*. Two days later, the Court of Appeals ordered movant to respond to Schad's motion. On February 1, 2013, the Court of Appeals provided each party an opportunity to brief the applicability of *Martinez* to Schad's procedurally defaulted claim.

To ensure the fair application of *Martinez* – which was decided during the pendency of

[1](...continued)
of Arizona law that mitigating evidence must have a causal connection to the crime. ER 75. In any event, the panel disagreed with that ruling on initial submission. On reconsideration, the appellate court explained how the mental health evidence did in fact provide link to the crime and provided a detailed discussion on why Schad's new claim is constitutionally meritorious. The appellate court has superior jurisdiction to the district court.

Schad's initial habeas proceedings – the court of appeals, after careful examination of the record and the parties briefs, has now ordered that it be applied to Schad's case and ordered a stay of execution so that Schad will not be executed before the federal courts can properly apply to Schad's initial habeas petition the governing law of *Martinez* that was *promulgated during the course of Schad's initial habeas proceedings*.

The court of appeals has acted in an eminently reasonable manner. The order granting a stay of execution was far from an abuse of discretion, and thus, the movant's motion must be denied.

A.
The Court Of Appeals Did Not Abuse Its Discretion In Granting A Stay Of Execution Because A Stay Is Appropriate Under *Barefoot*

As the court of appeals concluded in granting the stay, these are Schad's initial habeas proceedings. As such, Schad is entitled to a stay of execution pending the final disposition of the proceedings, lest he be executed before he receives the one full-and-fair adjudication of his *Strickland* mental-health-mitigation claim – which he has yet to receive in federal court. Having merely applied *Barefoot v. Estelle*, 463 U.S. 880 (1983) by its terms, the court of appeals by definition did not abuse its discretion.

B.
The Court Of Appeals Could Not Have Abused Its Discretion When This Court Has Granted Stays Of Execution To Require Deliberate Consideration Of *Martinez*

It is likewise apparent that the court of appeals did not abuse its discretion when one compares the court of appeals' stay order to at least two of this Court's recent orders granting a stay of execution to ensure that a habeas petitioner is not denied the proper application of *Martinez* to which he is entitled. *Haynes v. Thaler*, 568 U.S. ___ (2012)(U.S. No. 12-6760); *Balentine v. Thaler*, 567 U.S. ___ (2012)(U.S. No. 12-5906). With this Court having granted stays of execution in both

Haynes and *Balentine* which are in a *less* favorable procedural posture than Schad's case, *a fortiori*, the court of appeals did not abuse its discretion here.

Thus, for example, in the case of Anthony Haynes, *Martinez* was decided during the pendency of his certiorari petition, as occurred here in Schad's case. Unlike Schad, however, Haynes did not request the court of appeals to apply *Martinez* to his still-pending initial habeas proceeding. Nevertheless, Haynes later filed a motion for relief from judgment, and this Court granted him a stay of execution to ensure proper application of *Martinez*, especially given this Court's contemporaneous review of *Trevino v. Thaler*, 568 U.S. ___ (2012)(U.S. No. 10-10189), concerning the applicability of *Martinez*. As Justices Sotomayor and Ginsburg have explained, "a stay of execution is warranted to allow Haynes to pursue his claim on remand" if *Trevino* is favorable to him. *Haynes v. Thaler*, 568 U.S. ___, ___ (2012)(Sotomayor, J., respecting grant of stay of execution)(slip op. at 2). The court of appeals has followed the same course as in *Haynes*, granting Schad "a stay of execution . . . to pursue his [*Martinez*] claim on remand." *Id*. Just as this Court's stay in *Haynes* was not abusive, neither was the court of appeals' stay here, where in both cases *Martinez* was decided during the pendency of the initial habeas proceedings.

An even stronger case showing the absence of an abuse of discretion here is *Balentine*. In *Balentine*, the habeas petitioner's initial habeas proceedings concluded in October 2009, nearly 2½ years before *Martinez* was decided. *Balentine v. Thaler*, 558 U.S. ___ (2009). Yet when Balentine sought application of *Martinez* via a motion for relief from judgment which was denied by the lower courts, this Court stepped in and granted a stay of execution so that Balentine would not be executed before *Martinez* could be properly applied to his case. *Balentine v. Thaler*, 567 U.S. ___ (2012). Thus, where Balentine has been granted a stay of execution to allow proper consideration and

application of *Martinez* which was not even decided until years after his habeas proceedings had concluded, the court of appeals here did not abuse its discretion in granting a stay of execution to allow application of *Martinez* to Schad's case. *Martinez* was decided during the pendency of Schad's initial habeas procedings and Schad promptly sought its application during the course of those proceedings.

Just as this Court has ordered that Haynes and Balentine remain alive to see the appropriate application of *Martinez* to their cases, the court of appeals here has done so as well. This was anything but an abuse of discretion in light of this Court's actions in *Haynes* and *Balentine*.

C.
The Court Of Appeals Did Have The Power And Authority To Apply *Martinez* To Schad's Case Where *Martinez* Was Decided During The Pendency Of Schad's Initial Habeas Proceedings And The Court Of Appeals' Careful Action Does Not Run Afoul Of *Thompson*

Asking this Court to issue an extraordinary order vacating an eminently reasonable stay of execution, the movant essentially complains that the court of appeals is powerless to do justice under the circumstances of this case. That is not true, given the court of appeals' inherent powers and equitable powers derived from Article III of the Constitution, as well as the discretion implicitly acknowledged by this Court in *Bell v. Thompson*, 545 U.S. 794, 804-814 (2005); *Id*. at 814-829(Breyer, J., dissenting)(finding no abuse of discretion). Movant claims that *Thompson* somehow means that the court of appeals lacked the authority to apply *Martinez* to Schad's case, but as is apparent from the face of *Thompson*, *Thompson* said no such thing.

Indeed, were that the case, this Court would have reversed on the basis of jurisdiction, rather than (as the movant would claim) issuing an advisory opinion on abuse of discretion (which itself would have been a violation of Article III). Movant's reading of *Thompson* is simply untenable.

Movant also doesn't take account of the fact that *Thompson* cited with approval cases in which a court of appeals had used its discretion to ensure justice in light of intervening events, even late in the course of a case's litigation. *Thompson*, 545 U.S. at 806. What this means is that *Thompson* does not, as movant claims, impose any jurisdictional barrier to the court of appeals' order granting a stay of execution.

Quite apart from the fact that *Thompson* does not withdraw from a court of appeals the power to do justice, even on the facts, *Thompson* is fully distinguishable and simply cannot bear the weight movant places upon it. Indeed, the movant strategically omits from its motion many critical facts which demonstrate that Schad's case is nothing like *Thompson*, with the court of appeals here having acted with great reasonableness.

Thus, for instance, movant doesn't tell this Court that the state (unlike the situation in *Thompson*) precipitously and prematurely sought a warrant for execution while the mandate remained stayed and while the state was simultaneously seeking *en banc* review of another court of appeals panel on the ground that the other decision (*Dickens*) conflicted with Schad's case. Movant does not inform the Court that while in *Thompson*, the stay of mandate entered by the court of appeals expired upon the denial of rehearing and Thompson never sought a continued stay of the mandate once rehearing was denied, but Schad **did** seek a continued stay. In addition, unlike Arizona here, the State of Tennessee in *Thompson* did **not seek** an execution date[2] until **after** this Court had denied rehearing. Thus the State of Tennessee gave full respect to the stay of mandate order from the court of appeals, the Tennessee Supreme Court waited a full month after the filing of the

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[2]Tennessee does not issue warrants of execution, rather it issues Orders setting execution dates.

execution date request before acting. But the Sixth Circuit in *Thompson* waited months before notifying any party that it had withheld its mandate, throwing everything into disarray.

Here, Arizona requested an execution date well before this Court considered Schad's Petition for Rehearing. Schad complained to the Arizona Supreme Court that the request was premature and in contravention of the court of appeals' stay, which the state had never contested. The State opposed and pressed for a warrant despite Schad's federal habeas case not being final. Immediately upon learning that the state had obtained rehearing *en banc* in another Arizona capital habeas case based upon the state's own argument that the panel decision there was in direct conflict with Schad's case, Schad immediately sought emergency relief and so notified the Arizona Supreme Court – all before an execution warrant was issued. The court of appeals took swift action in ordering the state to respond to the emergency motion, expeditiously seeking briefing, and then issuing an opinion in which it addressed the state's various arguments.[3]

Unlike the situation in *Thompson*, where the state and the prisoner took actions in apparent belief that the initial habeas proceedings had come to an end, here the parties were all aware that the case was not final. Thus, even while *Thompson* does not preclude a court of appeals from acting in the interests of justice in rare circumstances such as those presented here, it is clear that *Thompson* is

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[3] *Thompson* is further distinguishable because the basis for reconsideration there did not involve questions regarding an unsettled area of habeas procedural law, but rather a factual question. The question that the court of appeals addressed in Schad's case involves legal questions which have continued to evolve. As noted, at the state of Arizona's request the holding in Schad's case is being reconsidered by the en banc court. The state does not explain how the court of appeals abuses its discretion in these circumstances. *Dickens* and *Detrich* are new facts which call into question the holding in Schad's case. It is unexceptional for a court to reconsider its holding in light of new legal developments that call into question their opinions. The fact is that *Martinez* and *Pinholster* are in tension. The lower courts are grappling with such issues, all the more reason for deliberate consideration by courts such as the court of appeals here.

distinguishable on its facts. It was not an abuse of discretion for the court of appeals to order a *Martinez* remand, because it had the power to do so.

D.
The Court Of Appeals Properly Cited And Applied The Stay Equities And Did Not Abuse Its Discretion In Light Of All The Circumstances

As Ed Schad has thus far noted, movant has failed to comply with Rule 20.1, has failed to establish the applicability of the extraordinary remedy sought under §1651, has failed to come to grips with *Barefoot*, and has asked this Court to stretch *Thompson* beyond all recognition. For each of those reasons individually and cumulatively, this Court is constrained to deny the motion to vacate. Finally, when one looks at the court of appeals' treatment of both the stay motion and its underlying order remanding under *Martinez*, there has been absolutely no abuse of discretion by the court of appeals granting a stay of execution to allow the *Martinez* proceedings to appropriately proceed.

Indeed, the court of appeals granted a stay of execution for the reasons stated in its order granting the *Martinez* remand, and the *Martinez* remand order was carefully explained and followed the law. There, the court of appeals properly identified the stay equities as identified by this Court. *Nken v. Holder*, 556 U.S. 418 (2009) and balanced them, noting upon its review of the record that Schad's underlying unadjudicated *Strickland* claim is strong, and that in the balance of interests, he is entitled to be heard on it, especially where the failure to do so, will result in his execution without any consideration of his substantive claim. *Schad*, slip op. at 4-11.

Especially where the state sought to execute Schad knowing full well that its interest in finality had not yet attached because the court of appeals was considering the application of *Martinez* while its mandate remained stayed (*Calderon v. Thompson*, 523 U.S. 538, 556 (1998)), the court of

appeals did not abuse its discretion in its balancing of the equities, a balance which it fully incorporated into its order granting the stay of execution. In fact, where the state offered Schad a life sentence before trial, it rings hollow for the movant to now clamor that it must execute Schad at all costs, notwithstanding the court of appeals' careful balancing of the competing interests.

In the balance of interests, the court of appeals has also been careful to identify the seriousness of Schad's claim. Indeed, being intimately familiar with the facts in the first instance, the court of appeals has been careful to explain why Schad was prejudiced by trial counsel's ineffectiveness and how there is a probability he would have received life given the not terribly aggravated circumstances of the offense *vis-a-vis* Schad's serious mental illness. There is no obvious error in the court of appeals' assessment, and where this Court is not as familiar with the facts as the court of appeals, there is no basis for finding any abuse of discretion under the circumstances. [4]

In addition, just as Justice Sotomayor made clear in *Haynes* that a petitioner with a valid *Martinez* claim should be allowed to be heard on a remand, the court of appeals' remand here is anything but an abuse of discretion. Indeed, the court of appeals' underlying order is nothing extraordinary where all the other courts of appeals have granted remands under similar circumstances. *See e.g.*, *Hairston v. Blades*, No. 11-99012 (9th Cir., Feb. 25, 2013); *Rodriguez v. Padula*, No. 12-6392, 2012 U.S. App. Lexis 20405 (4th Cir, Sept. 28, 2012); *Henderson v. Colson*,

[4] Further, the state's superficial treatment of Schad's mental health claim is not well-taken. Mental illness and good character evidence are not incompatible. The characterization of Schad's mental illness as a "damaged goods" theory is pejorative not only to Schad but to the millions of Americans who suffer from mental illness. It trivializes what is in fact a serious disease and trades on outdated ideas that mental illness is a character flaw or that people with mental illness are less than human and not deserving of compassion. Contemporary mores are just the opposite. Having mental illness is not inconsistent with the positive qualities about Ed that trial counsel sought to introduce. People with mental illness can be kind. They can be a model prisoner. In fact many thrive under the structure, as Ed Schad has. They can also be funny and warm. They can love and be loved.

No. 06-02050 (6th Cir. July 2, 2012); *Creech v. Hardison*, No. 10-99015 (9th Cir., June 20, 2012); *Cantu v. Thaler*, 682 F.3d 1053 (5th Cir. June 1, 2012); *Middlebrooks v. Colson*, No. 05-5904 (6th Cir., May 17, 2012); *Lindsey v. Cain*, No. 11-30997, 2012 U.S. App. Lexis 7953 (5th Cir., Apr. 19, 2012). Having done what the other courts of appeals have done, the court here simply did not abuse its discretion in ordering a remand as well, while enabling the courts to rule without mooting the case through Schad's execution.

This leaves but a few loose ends to tie up in the movant's motion, none of which compel the extraordinary relief movant requests. Movant continues to insist on misrepresenting the record with respect to their alleged waiver of procedural default. Movant continued to press procedural default on appeal. As movant well knows, any waiver of exhaustion must be express. In any event, if movant were to waive exhaustion, then Schad is entitled to full consideration of all his evidence, which he has never received, but a claim which the court of appeals indicates is meritorious.

In any event, Schad ought not be executed pending decision of his *Martinez* issue and/or pending the granting of habeas corpus relief. Movant makes the nonsensical assertion that by "waiving" exhaustion, it can prevent a full merits review of Schad's mental-health mitigation claim. Were that true, *Martinez* means nothing, for Schad would never receive an adjudication of his mental-health mitigation claim. In any event, the court of appeals did not abuse its discretion in refusing to adopt such a nonsensical position.

Finally, contrary to movant's contentions, the court of appeals carefully harmonizes *Pinholster* and *Martinez*. *Pinholster* is distinguishable from the new claim presented by Schad. *Pinholster* had an evidentiary hearing and a state court process that he conceded was full and fair. The evidence presented was the same type of evidence as presented in state court - expert mental

health testimony. Here post-conviction counsel presented **no mitigating evidence** in state court and the petition was dismissed without a hearing for failure of counsel to abide by state procedural rules requiring the petition to be supported by affidavit. And, the claim presented was limited to evidence regarding Schad's traumatic childhood. It did not raise a claim regarding Schad's adult mental health and it failed to establish any link to the crime.

In fact, while claiming that *Pinholster* should apply here, the state overlooks the critical fact that in *Pinholster* itself, Justice Thomas alluded to the very situation presented here as a situation in which the rule of *Pinholster* **would not apply**. As Justice Thomas explained in footnote 10 of the majority opinion, there is a distinction "between new claims and claims adjudicated on the merits," and a claim "involving new evidence" "may well present a new claim," i.e. a claim that was not adjudicated on the merits in state court. *Pinholster*, 563 U.S. ___, ____ n.10(2011)(slip op. At 14 n.10). Any "new claim" not presented to the state courts is not subject to *Pinholster*, because such a claim has not been adjudicated on the merits within the meaning of 28 U.S.C. §2254(d) – just like Schad's claim, and the claims presented in *Dickens* and *Moses* and *Fairchild*. *See* p. 6, *supra*.

In fact, as Justice Sotomayor explained, footnote 10 means that when presenting a new claim (as Schad does), a habeas petitioner like Schad can be heard in federal habeas if he has "cause" for having failed to present that new claim in state court. As she explained, footnote 10 "presumably means to suggest that the petitioner might be able to obtain federal-court review of his new evidence *if he can show 'cause and prejudice' for his failure to present the 'new' claim to state court*." *Pinholster*, 563 U.S. at ___ (Sotomayor, J., dissenting)(slip op at 11)(emphasis supplied). That is the very situation here. It is precisely the situation to which *Martinez* applies and for which *Martinez* was

crafted. It was not an abuse of discretion for the court of appeals to so conclude.[5]

E.
Schad Presents a Substantial Claim for Relief

The court of appeals 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.

As the court of appeals explained on initial submission, Schad's ineffective claim is a claim on which he may be entitled to relief. The Court wrote, in "the district court, Schad presented evidence that, we conclude, if it had been presented to the sentencing court, would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating factors present in the case." *Schad v. Ryan*, 606 F.3d 1022, 1044 (9th Cir. 2010). The Court discussed how Schad could have received a life sentence had counsel presented the significant mitigating evidence now presented in federal habeas:

> The evidence showed how Schad's childhood abuse affected his mental condition as an adult. Had the sentencing court seen this evidence, which was so much more powerful than the cursory discussion of Schad's childhood contained in [Dr.] Bendhein's testimony and the presentence report, it might well have been

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[5] In fact, by agreeing long ago that Schad's current claim is a claim in a "significantly different evidentiary posture than it was in before the state court, thereby *violating the fair presentation requirement*." (R. 116, p. 9), the state has admitted that Schad's claim is a "new claim" under *Pinholster* that was *not* adjudicated on the merits. It couldn't have been, when the facts were not before the state courts. The court of appeals opinion faithfully applies the law of exhaustion and procedural default and clearly explains how Schad's new claim was procedurally defaulted. *Schad*, slip op at 11-14. The Court wrote, "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." *Id.* at 14, internal quotations and citations ommitted. Movant does not even address the court's analysis.

> influenced to impose a more lenient sentence. There was ample evidence presented at sentencing to illustrate Schad's intelligence, good character, many stable friendships, and church involvement, at least while he was in prison. Although Schad had a prior Utah conviction for second-degree murder, that charge arose out of an accidental death. The missing link was what in his 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. The extensive evidence of repressed childhood violent experiences could have supplied that link and mitigated his culpability for the crime.

Id. Given the court of appeals prior opinion, Schad's claim easily meets *Martinez*'s requirement "that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at ___ (slip op. at 11).

On reconsideration, the court of appeals was even more definitive in its analysis of the claim. As the court 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.

Indeed, Schad's *Strickland* claim is supported by significant mitigating expert testimony, corroborated by lay testimony and documentation. Taken together, that evidence presents a compelling mitigating narrative that, had it been presented at sentencing, would have made a significant difference. Such evidence includes the following:

Schad's father (Ed, Sr.) was sent off to combat in World War II days after Ed's birth in 1942, only to suffer horrific conditions as a prisoner of war in Stalag-17. Upon his return, Ed Sr. was a "changed man." An abusive alcoholic who suffered disabling anxiety and post-traumatic stress disorder, he was seriously mentally disturbed, and extremely abusive toward Ed, particularly so because Ed Sr. believed Ed was not actually his child. Even so, Ed Sr. suffered hallucinations, delusions, and paranoia throughout Ed's childhood and adolescence, and was later diagnosed with psychosis. This profoundly disturbed man, however, profoundly distorted Ed's development. And while Ed's alcoholic father was debilitated by serious mental illness, Ed's mother lacked the ability to properly care for him. She neglected Ed, and through neglect and/or denial, watched helplessly as Ed's infant sister died from illness, dehydration, and malnutrition. Ed's mother, too, was dependent upon substances, including narcotics. And the family lived in poverty.

Importantly, the sentencing judge never heard significant mitigating expert testimony such as that from Charles Sanislow, Ph.D., of the Yale University School of Medicine, which compellingly weaves together the tragedy and trauma of Ed Schad's life which so terribly damaged him, resulting in lifelong, ongoing mental disturbance. As Dr. Sanislow explains, from a very early age, Ed Schad suffered "severe stresses"that damaged him psychologically, placing him at high risk for mental illness and disturbance, and making him unable to cope with life:

> The environment in which Ed Jr. was raised included many factors that placed him at high risk. Among these are: a physically disabled and psychologically damaged father by horrific war experiences; an uneducated, unskilled, fairly young mother burdened with full responsibility for several children, some of them quite ill, facing an uncertain future with a husband in a POW camp; isolation in a semi-rural area, with mother and children totally dependent on a mentally ill father for transportation; both parents with substance abuse problems which worsened over time; no medical care for the first five to nine years of the children's lives; economic poverty in a depressed area with obligations of assistance to extremely large extended families.

Declaration Of Charles A. Sanislow, Ph.D., ¶58, p. 28. Ed Sr.'s unpredictable violence and chaotic behavior and abuse stunted Ed's "ability to regulate his affect and his ability to respond to stressful situations which increased his developing mental illness." *Id.*, ¶85, p. 41. Ed's parents socially isolated Ed, and he became withdrawn, viewing himself with the same sense of contempt and uselessness showered upon him by his own parents. *Id.*, ¶¶104-105, pp. 49-50. Ongoing instability in the home led to continued chaos in Ed's life during adolescence, leading him into juvenile criminal activity. *Id.*, ¶¶109-112, pp. 51-52.

Having endured this horribly toxic home environment, Ed simply could not overcome the chaos and trauma that damaged him and formed him in those early years. Thus, for example, at age twenty, when it looked as if Ed might succeed in the Army, he impulsively committed petty offenses which led to his discharge from the service. Ed's life continued to be marked by mental instability – "impulsivity, agitation, restlessness, anxiety, manic behavior, disorganized thought processes." *Id*, ¶134, p. 62; *Id*. ¶¶131-150, pp. 59-72. This was not surprising, given the horrible dysfunction in which he was molded. This ultimately culminated with Schad being imprisoned in Utah in 1970, his being released in 1977, followed by mental deterioration, manic behavior, and his arrest for this murder. *Id.*, ¶¶172-193, pp. 80-90. All the while, mental health professionals

noted that he suffered mental problems, including paranoia, depression, and obsessive-compulsive tendencies. *Id*., ¶¶178-179, pp. 82-83.

As Dr. Sanislow emphasized, throughout his life, Ed Schad "exhibited many symptoms of a severe and chronic mental illness" traceable to the sheer chaos and insanity of his upbringing. *Id*., ¶194, p. 90. As the court of appeals has recognized, it is that link between the trauma and chaos of Ed's early life that very well could have resulted in a life sentence. *Schad*, 606 F.3d at 1044. That is precisely why Schad's claim is substantial: Had the mitigating narrative of Ed's life been presented at sentencing, as it could have been by a mental health professional like Dr. Sanislow, a life sentence was reasonably probable. The court of appeals held that Schad's claim was "more than substantial." *Schad*, slip op. at 15. It found that sentencing counsel's professional errors had a "subsantial and injurious effect" on the sentence. *Id*, citing *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

In fact, Schad's *Strickland* claim is similar to any number of *Strickland* claims from Arizona which the court of appeals has found to be substantial and/or meritorious, given the very types of mitigating explanation presented in Schad's case. *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). *See also Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009).

Ed Schad meets *Martinez*'s substantiality requirement. It cannot be said that the court of appeals abused its discretion in so concluding.

CONCLUSION

Movant has failed to make a case for this Court's extraordinary exercise of its jurisdiction. The Application should be denied.

Respectfully submitted this 4th day of March, 2013.

BY: *Kelley J. Henry*
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CERTIFICATE OF SERVICE

I certify that on this 4th day of March, 2013, I emailed a true and correct copy of the foregoing Opposition to Motion to Lift Stay of Execution to Mr. Danny Bickell, Staff Attorney, United States Supreme Court, and opposing counsel, Mr. Jon Andersen, Assistant Attorney General, 1275 W. Washington, Phoenix, AZ 85007-2997.

/s/ Kelley J. Henry
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