No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ADOC,
PETITIONER,
-vs-
EDWARD HAROLD SCHAD,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

The majority of the assigned Ninth Circuit panel (Judges Stephen Reinhardt and Mary Schroeder, Judge Susan Graber dissenting) reconsidered its pre-certiorari decision to deny Respondent Edward Schad's motion to vacate judgment and remand pursuant to *Martinez v. Ryan*, 139 S. Ct. 1309 (2012). It then reconsidered its prior denial and remanded to the district court to reconsider the evidence Schad produced in district court, even though the district court had already alternatively considered the evidence and found it did not establish a viable claim of ineffective assistance of counsel at sentencing. *See Schad v. Schriro*, 454 F. Supp. 2d 897, 940 (D. Ariz. 2006).

The Ninth Circuit denied the State's request for en banc review, although eight judges joined in a dissenting opinion, including the statement: The majority's stay of execution and remand order in Schad openly defies the Supreme Court's directive in this very case and takes our habeas jurisprudence down a road that has already been rejected." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 2.)

1. Does the majority panel opinion order conflict with *Bell v. Thompson*, 545 U.S. 794 (2005), by staying the issuance of the Ninth Circuit's mandate based on its reconsidering a motion it had already denied prior to certiorari review?

2. Does the order err by applying *Martinez* rather than *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), when the district court did not find a procedural default, but rather considered Schad's claim of ineffective assistance of counsel on the merits (that the state post-conviction court had denied on the merits), and alternatively considered the merits of the claim in the light of new evidence first presented in the federal habeas proceedings?

3. Does the order err by remanding to the district court to reconsider the new evidence that it had already considered?

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DECISIONS BELOW

The Ninth Circuit majority panel order (Judge Graber dissenting) granting reconsideration of the *Martinez* motion, granting relief, and remanding to the district court was filed on February 26, 2013. On March 1, 2013, the panel majority issued an order granting Schad's motion for a stay of execution. On March 4, the Ninth Circuit panel majority (Judge Graber dissenting) issued an order denying rehearing by the panel. That same day, the Ninth Circuit issued a separate order denying rehearing en banc. There were two dissenting opinions from that order: the first, authored by Judge Tallman, and joined by Chief Circuit Judge Kozinski, Judges O'Scannlain, Bybee, Callahan, Bea, M. Smith, and Ikuta; the second authored by Judge Callahan and joined by Chief Circuit Judge Kozinski, Judges O'Scannlain, Tallman, Bybee, and M. Smith.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Article III, Section 2 of the United States Constitution; 28 U.S.C. § 1254(1); and United States Supreme Court Rule 10.

PROVISIONS INVOLVED, IF ANY

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

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

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

> Petitioner has failed to show that the PCR court's denial of his claim of IAC at sentencing was an unreasonable application of federal law. The Court further finds, with respect to Petitioner's attempt to introduce factual information that was not presented to the state court, Petitioner was not diligent in developing these facts. See infra, pp. 82-84. Moreover, the Court finds that even if Petitioner had been diligent and the new materials were properly before the Court, Claim P is without merit.

Schad v. Schriro, 454 F.Supp.2d at 940. The district court found, regarding the reasonable application of *Strickland*:

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

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

On appeal, the panel's second amended majority opinion affirmed the district court's rulings on all claims regarding the conviction, but remanded to the district court for an evidentiary hearing on whether Schad's PCR counsel had been diligent in presenting evidence to support the IAC claim. *Schad v. Ryan*, 606 F.3d 1022, 1032 & 1048 (9th Cir. 2010).

The State filed a petition for writ of certiorari in this Court. This Court granted certiorari, vacated the Ninth Circuit's judgment, and remanded for further consideration in light of *Pinholster*. *Ryan v. Schad*, 131 S. Ct. 2092 (2011).

After further briefing and consideration regarding the application of *Pinholster*, the Ninth Circuit unanimously affirmed the district court's denial of the IAC claim in a third amended opinion. *See Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011) (*per curiam*). Schad filed a Motion to Vacate Judgment and Remand in light of *Martinez v. Ryan*, 139 S. Ct. 1309 (2012), which the Ninth Circuit summarily denied on July 27, 2012. (Ninth Circuit Docket Numbers 88, 91.)

After this Court denied Schad's petition for certiorari and motion for rehearing of his petition for certiorari, Schad filed with the Ninth Circuit an Emergency Motion to Continue Stay of the Mandate Pending En Banc Proceedings in *Dickens v. Ryan*, No. 08-99017. On February 1, 2013, the Ninth Circuit panel denied the motion, as such, but instead construed it as a motion to reconsider its prior denial of Schad's Motion to Vacate Judgment and Remand in light of *Martinez.*

On February 26, 2013, the panel issued an order granting the motion and remanding the matter to the district court. (Order, attached hereto.) Judge Graber dissented, stating she would have denied Schad's motion to stay the mandate because there was no reasonable likelihood that the Arizona courts would have come to a different conclusion if presented with the new mitigating evidence first presented in federal court. (Order, J. Graber dissenting, at 17-19.)

On February 28, 2013, Schad filed a motion to stay the execution itself. The panel majority granted the motion to stay, with Judge Graber dissenting. The State has filed a separate application to vacate that stay. *Ryan v. Schad*, No. 12A857.

The State filed a petition for rehearing and petition for rehearing en banc with the Ninth Circuit, which denied both motions, with the dissents indicated above. 4, 2013.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit panel majority erred by reconsidering its denial of a motion it denied before this Court denied certiorari review. As succinctly stated by Judge Tallman's dissent from the denial of rehearing: "Bereft of any legally significant change of circumstances in the interim, the majority has now completely reversed its prior ruling and has again remanded the case to the Arizona district court for a second time, directing it to consider the "new" *Martinez* claim (which the majority now characterizes as procedurally defaulted), while back-handedly dispatching *Pinholster* in a mere footnote." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 2-3.) The Ninth Circuit also abused its discretion by: (1) finding for the first time in the habeas proceedings that the new

evidence of mental health mitigation constituted a "new claim" of ineffective assistance of sentencing that was procedurally defaulted and falls within the ambit of *Martinez* rather than *Pinholster*; (2) and by remanding to the district court to consider the new evidence, even though the district court had already analyzed the new evidence and reasonably found it did not present a claim of ineffective assistance at sentencing.

I. THE NINTH CIRCUIT HAS ABUSED ITS DISCRETION IN NOT ISSUING ITS MANDATE AND THEN GRANTING RELIEF ON THE BASIS OF A CLAIM IT PREVIOUSLY DENIED.

The Ninth Circuit has abused its discretion, under *Bell v. Thompson*, 545 U.S. 794 (2005), by not issuing its mandate after this Court denied Schad's petition for a writ of certiorari and subsequent motion for rehearing. As stated by Judge Tallaman's dissent: "Our mandate should have issued automatically following the Supreme Court's denial of Schad's petition for certiorari which rejected his *Martinez* argument. See Fed. R. App. P. 41; *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004)." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 8.)

In *Bell v. Thompson*, 545 U.S. 794 (2005), the State of Tennessee argued that Rule 41 of the Federal Rules of Appellate Procedure does not allow for a stay of the mandate following a denial of certiorari. 545 U.S. at 802. Although ruling for the State of Tennessee, this Court declined to rule on that argument and assumed *arguendo* that such a stay might be permitted under Rule 41. *Id.* at 803-804. This Court noted, however, that the denial of certiorari "*usually signals the end of litigation*." 545 U.S. at 806. It found that the Sixth Circuit had abused any

discretion it had by withholding the mandate for months based on evidence that supported only an arguable constitutional claim, thereby failing to "accord an appropriate level of respect" to the State's judgment." *Id.*

In his response to the State's petition for rehearing and rehearing en banc, Schad attempted to distinguish *Bell* on its procedural facts, pointing out that Schad had sought a stay of the mandate. (Response to Petition for Rehearing at 11 fn. 4.) However, Thompson had also asked that circuit court to extend a stay of the mandate while this Court considered his petition for rehearing. *Thompson*, 545 U.S. at 800. This Court denied the petition for rehearing, but the court of appeals did not issue the mandate. *Id.* Tennessee sought an execution date, and the Tennessee Supreme Court set an execution date. *Id.* Unlike here, there were further proceedings in both state and federal courts related to whether Thompson was competent to be executed. *Id.* at 800-801. While Thompson's competency-to-be executed claim was still pending in federal district court, the Sixth Circuit issued an amended opinion remanding a claim for ineffective assistance at sentencing claim for consideration of mental health evidence that apparently had not been previously considered. *Id.* at 801.

Thus, although this case is less complicated procedurally than *Thompson*, it involves the same reconsideration by the circuit court of evidence supporting an IAC claim and remand to the district court for consideration of that evidence. As in *Thompson*, the State reasonably assumed federal habeas review was final when this Court denied certiorari review.

The Ninth Circuit's reasoning for delaying issuing its mandate was its

reconsideration of the *Martinez* motion that it had previously *denied* before this Court denied certiorari review and rehearing. This Court said in *Thompson*: "Indeed, in this case Thompson's petition for rehearing and suggestion for rehearing en banc pressed the same arguments that eventually were adopted by the Court of Appeals in its amended opinion." 545 U.S. at 806. As in *Thompson*, "the State could have assumed with good reason that the Court of Appeals was not impressed" with Schad's previous *Martinez* motion, especially when the Ninth Circuit panel summarily denied the previous motion. *See id.* at 806-807. Mere review of a previously denied claim is "not of such a character as to warrant the Court of Appeals' extraordinary departure from standard appellate procedures." *Id.* at 808-809. This Court concluded in *Thompson*: "Here a dedicated judge discovered what he believed to have been an error, and we are respectful of the Court of Appeals' willingness to correct a decision that it perceived to have been mistaken. A court's discretion under Rule 41 must be exercised, however, in a way that is consistent with the "'State's interest in the finality of convictions that have survived direct review within the state court system.' " *Id.* at 812-813 (quoting *Calderon v. Thompson*, 523 U.S. at 555).

In sum, the Ninth Circuit panel majority's reconsideration of an issue it previously rejected improperly treats this Court's certiorari review of the very same issue as an academic exercise. This Court should not countenance the circuit courts' "reconsideration" of issues this Court has already ruled on. As Judge Tallman wrote: "The majority's stay of execution and remand order in Schad openly defies the Supreme Court's directive in this very case and takes our habeas jurisprudence

down a road that has already been rejected." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 2.)

II. THE NINTH CIRCUIT ABUSED ITS DISCRETION BY FINDING, FOR THE FIRST TIME, A PROCEDURAL DEFAULT ON THE IAC-SENTENCING CLAIM AND BY CONCLUDING THAT *MARTINEZ* CONTROLS RATHER THAN *PINHOLSTER*.

The Ninth Circuit panel majority abused its discretion by finding *sua sponte* a procedural default on the IAC-sentencing claim, on the theory that Schad had presented the district court with a "new" claim of IAC at sentencing for not presenting mental health evidence, a claim distinct from the claim adjudicated in the state courts, ineffective assistance of counsel at sentencing for not developing and presenting mitigation. The Ninth Circuit's order turns procedural default into a sword to be used against the State's interest, instead of being an affirmative defense to protect the State's interest in finality.

A. *Procedural default is an affirmative defense.*

The procedural default doctrine is an affirmative defense that the state is allowed to assert to protect its interests in the finality of state convictions. *See Trest v. Cain*, 522 U.S. 87, 89 (1997) ("[P]rocedural default is normally a defense that the state is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter.").

AEDPA does not prevent the state from waiving the procedural default defense. *See Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002). The procedural default doctrine is not a sword to be used against the State to further delay habeas proceedings. This Court has held that a federal court abuses its discretion by considering, *sua sponte*, an affirmative defense that has been

deliberately waived by the state. *See Wood v. Milyard*, 132 S. Ct. 1826, 1830 (2012). Here the Ninth Circuit abused its discretion by "overrid[ing] a State's deliberate waiver" of an affirmative defense. *See id.* at 1834-35.

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

Moreover, the State has not asserted a procedural default defense on appeal. (State's Supplemental Ninth Circuit Answering Brief, at 37-72.) Whether or not the State asserted procedural default as a claim to the IAC-sentencing claim in earlier habeas proceedings is irrelevant because the district court rejected the claim on the merits, including the merits of the claim *with* the new evidence first presented in federal court.

B. *It is not equitable to find a procedural default at this point.*

The Ninth Circuit's third amended opinion rejected the IAC-sentencing claim. After that motion was denied, this Court denied Schad's petition for certiorari and

petition for rehearing. It is inequitable to send this case back to district court to allow Schad to attempt to establish cause for a procedural default that was not found to exist until the Ninth Circuit's recent panel majority order. *Cf. Rhoades v. Blades*, 661 F.3d 1202, 1203 (9th Cir. 2012) (*per curiam*) (noting the inequity caused by delaying a *Martinez* claim when it could have been brought at any time after this Court granted certiorari review in *Martinez*).

C. *Pinholster still applies.*

Despite the clear applicability of *Pinholster*, the panel majority order relegates that opinion to a footnote and asserts it does not apply here because Schad presented a "new" claim of ineffective assistance of counsel at sentencing regarding developing and presenting mitigating evidence. (Order at 13, fn.3.) As Judge Tallman stated: "By failing to take this case en banc our court has unfortunately allowed the majority to stretch *Martinez* beyond its limited scope, and permitted Schad to bolster a previously exhausted Strickland claim with new federal habeas evidence in clear violation of *Pinholster*." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 1-2.) In other words, because the Ninth Circuit panel order *sua sponte* found a procedural default, *Pinholster* no longer applies. If this logic were followed, any habeas petitioner could avoid *Pinholster* and the deferential standard required under that case by presenting the federal habeas courts with different evidence in support of the same claim that was presented to the state courts.

"Pinholster and Schad's claims are, for all relevant purposes, factually indistinguishable." (Order Denying Petition for Rehearing En Banc, Judge

Tallman dissenting, at 3.) In *Pinholster*, the state contended "that some of the evidence adduced in the federal evidentiary hearing *fundamentally changed* Pinholster's claim so as to render it effectively unadjudicated." 131 S. Ct. at 1402 n.11 (emphasis added). Pinholster argued that the additional evidence that had not been part of the claim in state court "simply support[ed]" his alleged claim. *Id.* This Court rejected Pinholster's argument:

> We need not resolve this dispute because, even accepting Pinholster's position, he is not entitled to federal habeas relief. Pinholster has failed to show that the California Supreme Court unreasonably applied clearly established federal law on the record before that court, [citing the opinion], which *brings our analysis to an end*. Even if the evidence adduced in the District Court additionally supports his claim, as Pinholster contends, *we are precluded from considering it.*"

Id. (Emphasis added.)

In accordance with *Pinholster,* the additional factual allegations Schad presented to the district court are a nullity for purposes of federal review. The IAC-sentencing claim, without the additional factual allegations first presented in the federal district court, was decided on the merits in state court. The district court did not find that a "claim" was procedurally defaulted; therefore there is no reason for a "cause and prejudice" determination.

Schad has manufactured a procedural default by trying to split the ineffective assistance at sentencing claim into two claims involving different sorts of evidence. As Judge Tallman states: The majority attempts to circumvent the Supreme Court's holding in *Pinholster* by conjuring up a "new" *Strickland* claim, based on additional evidence identified for the first time in federal habeas proceedings." (Order Denying

Petition for Rehearing En Banc, Judge Tallman dissenting, at 4.) He then stated: "The problem with the majority's 'new claim' theory is that there is nothing new about Schad's current claim." (*Id.* at 4-5.) Schad simply describes the *Strickland* claim raised in post-conviction relief proceedings as "not properly developed" and the *Strickland* claim he currently advances as "completely developed." Reply Brief for Petitioner- Appellant at 7, *Schad v. Ryan*, No. 07-99005 (9th Cir. Jan. 11, 2013), ECF No. 100-1. In other words: "The ephemeral default declared is only in the mind of the panel majority." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 6.)

A broad reading of the narrow holding in *Martinez* to justify a remand to district court would conflict with the holding in *Pinholster.* (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 1, 6-7.) In *Martinez*, the problem that concerned this Court was the fact was no merits ruling on *trial counsel's effectiveness* in state court; that issue had been procedurally defaulted. Hence, there was no merits ruling for a federal court to review under § 2254(d). Here, because there was a state court ruling on the merits, followed by a district court review on the merits, *Martinez* simply is not relevant.

III. THE NINTH CIRCUIT ABUSED ITS DISCRETION BY ORDERING THE DISTRICT COURT TO DO WHAT IT HAD ALREADY DONE—CONSIDER WHETHER THE NEW EVIDENCE ESTABLISHED A CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Even assuming *Martinez* applies, nothing would be achieved by sending the matter back to the district court to make an analysis and decision it has already made. *Martinez* allows a new claim to be considered despite the failure to present it to the state courts. Here, any deficiency in the performance of PCR counsel by not

presenting mental health evidence in the PCR proceeding was cured by the district court considering the new evidence and still finding Schad had not established a claim of ineffective assistance of counsel at sentencing.

The majority panel order of February 26, 2013, attempts to explain why the panel majority thinks the district court analysis was unpersuasive. But it did not make that conclusion when Schad filed his previous *Martinez* motion, which the panel summarily and unanimously denied after briefing by the parties. There is nothing new since the prior rejection of the *Martinez* motion, except that this Court has denied certiorari review and rehearing. (Order Denying Petition for Rehearing En Banc, J. Tallman dissenting, at 2-3.)

The district court discussed at some length why sentencing counsel's performance was not deficient. *Schad v. Schriro*, 454 F. Supp.2d at 940-943. It found: "trial counsel presented a strategically sound case in mitigation." *Id.* at 941. It further noted: "At sentencing, counsel presented evidence intended to show Petitioner as a man whose character and capabilities would enable him to benefit society." *Id.* at 942. It concluded: "Trial counsel's performance cannot be considered deficient for failing to present these opposing versions of Petitioner—i.e., as both rehabilitated and exemplifying a number of personal strengths and virtues which could be used to benefit others, and as an unstable and disoriented individual incapable of completing a task."

The Ninth Circuit's third amended opinion detailed the significant evidence counsel presented at sentencing. *See Schad v. Ryan*, 671 F.3d 708, 718-720 (9th Cir.

2010). The Ninth Circuit has not explained why the mitigation case that sentencing counsel *actually presented* was unreasonable.

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

The new evidence that Schad had mental health issues would have undermined his theory at sentencing that he was a stable, model prisoner who could benefit from rehabilitation. Indeed, his continually being a model prisoner would have seemed improbable if he indeed had serious mental health issues. Thus, as the district court found, the new evidence would not have been particularly mitigating, in view of the aggravating circumstances. Moreover, sentencing counsel called a psychiatrist to testify at sentencing, who testified about Schad's mental condition. *See Schad v. Ryan*, 595 F.3d at 919. That Schad produced new mental health reports in federal habeas does not show ineffective assistance of counsel at sentencing. *See Earp v. Cullen*, 623 F.3d 1065, 1076 (9th Cir. 2010) ("The fact that Earp can now present a neuropsychologist who is willing to opine that he had organic brain

damage at the time of his trial does not impact the ultimate determination of whether Earp's counsel insufficiently investigated that possibility.").

Judge Graber's dissent echoes this reasoning. Judge Graber found no reasonable likelihood that the Arizona courts would have come to a different result if they had been presented with the new evidence. (Order, J. Graber dissenting, at 17-18). Judge Graber noted that the Arizona courts had found two aggravating circumstances: pecuniary gain and a prior murder. (*Id.* at 18, n.5). This Court has recognized that a defendant having committed another murder is "the most powerful imaginable aggravating evidence." *Wong v. Belmontes*, 558 U.S. 15, 130 S. Ct. 383, 391 (2009). Thus, "even if *Martinez* applied, Schad does not advance a substantial ineffective assistance of trial counsel claim." (Order Denying Petition for Rehearing En Banc, J. Tallman dissenting, at 2-3.)

Ultimately, Schad fails to explain how a mitigation case alleging that Schad had serious mental issues would have been more mitigating than the evidence presented at sentencing that he was a man worth saving because he could be rehabilitated in view of his good conduct in prison. As this Court said in *Pinholster*: "The new evidence relating to Pinholster's family—their more serious substance abuse, mental illness, and criminal problems, . . .—is also by no means clearly mitigating, *as the jury might have concluded that Pinholster was simply beyond rehabilitation."* 131 S. Ct. at 1410. Accordingly, there was no prejudice from any ineffective assistance by sentencing counsel. *See id.* at 1409-1410 ("There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury's verdict."); *Belmontes,* 130 S. Ct.

at 386-90; *Schriro v. Landrigan*, 550 U.S. 465, 481 (2007) (holding that "the mitigating evidence he seeks to introduce would not have changed the result").

And, because the district court already considered the new evidence, there is no purpose in remanding to that court. There is no reason the district court should evaluate the new evidence any differently under *Martinez* than it did before many years ago.

Finally, as Judge Callahan states in her dissenting opinion from the Ninth Circuit order denying en banc review: "The panel majority's decision here cavalierly disregards [the victims'] rights in favor of a twice-convicted murderer who had already had the benefit of 33 years of legal process." See Order Denying Petition for Rehearing En Banc, J. Callahan dissenting, at 2. This Court should not countenance further delay.

CONCLUSION

Based on the foregoing authorities and arguments, the State respectfully requests this Court to grant its petition for writ of certiorari and vacate the Ninth Circuit's majority panel opinion of February 26, 2013.

Respectfully submitted,

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