No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,
PETITIONER,
-vs-

EDWARD HAROLD SCHAD,
RESPONDENT.

APPLICATION TO LIFT STAY OF EXECUTION

FOR PRESENTATION TO JUSTICE ANTHONY M. KENNEDY

THOMAS C. HORNE
ATTORNEY GENERAL

KENT E. CATTANI
SOLICITOR GENERAL

JON G. ANDERSON
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)

1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONER

CAPITAL CASE-APPLICATION TO LIFT STAY OF EXECUTION

To the honorable Anthony M. Kennedy, Associate Justice of the United States Supreme Court and Circuit Judge for the Ninth Circuit. Petitioner Charles Ryan (hereinafter "the State") respectfully moves for an order vacating the stay of execution entered by the Ninth Circuit Court of Appeals on March 1, 2013, for the reasons that follow.

SUMMARY OF ARGUMENT

In its recent stay order, the majority of the assigned Ninth Circuit panel (Judges Stephen Reinhardt and Mary Schroeder, Judge Susan Graber dissenting) has stayed the execution scheduled for March 6, 2013, because it has 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). The State requests this Court to lift the stay of execution because: (1) the Ninth Circuit has abused its discretion by declining to issue its mandate after this Court denied review and by instead granting relief and a stay of execution based on a motion it denied before Schad sought certiorari review by this Court; (2) the Ninth Circuit abused its discretion by, for the first time, declaring that Schad had procedurally defaulted his "new" claim of ineffective assistance at sentencing for not presenting mental health mitigation, and therefore the issue was governed by *Martinez* rather than *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), as it had determined in its third amended opinion; and (3) the Ninth Circuit has illogically remanded the case to the district court, and directed that court to reconsider the "new" evidence under *Martinez*, even though the district court had already alternatively considered the

new 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). Accordingly, the Ninth Circuit abused its discretion by staying the execution.

SUMMARY OF THE CASE

In the state post-conviction-relief (PCR) proceedings, Schad claimed that counsel at sentencing failed to present evidence "regarding physical and emotional abuse to which Schad was subjected as a child and teenager." (ER 345.) However, the state 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 panel 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 petition for rehearing and petition for rehearing en banc with the Ninth Circuit, which has indicated it will rule on the petition on March 4, 2013.

THIS COURT'S LAW REGARDING A STAY OF EXECUTION

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1760 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 1761 (citing cases). While a stay involves the exercise of judicial discretion, it is not unbridled discretion; legal principles govern the exercise of discretion. *Id.*

Moreover, "a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments[.]" *Hill v. McDonough*, 547 U.S. 573, 584 (2006);

Nelson v. Campbell, 541 U.S. 637, 649 (2004). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584 (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). Even if the prisoner states a cognizable claim under § 2254 in his request for a stay, he is not entitled to a stay as a matter of right. *Nelson*, 541 U.S. at 649; *see also Gomez v. United States Dist. Court for Northern Dist. of California.*, 503 U.S. 653, 654 (1992) (*per curiam*) (noting that "last-minute or manipulative uses of the stay power constitute equitable grounds which can justify the denial of an application for stay of a state-court order of execution.").

Equity does not tolerate last-minute abusive delays "in an attempt to manipulate the judicial process." *Nelson*, 541 U.S. at 649 (quoting *Gomez*). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *See also Hill*, 547 U.S. at 584; 18 U.S.C. § 3771(a)(7); (b)(2)(A) (state victims are entitled to federal habeas review "free from unreasonable delay"); Ariz. Const. art 2 § 2.1(A)(10) (expressly providing that surviving victims are entitled to a "prompt and final conclusion of the case after the conviction and sentence"). "[E]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584 (citing cases). Hence, there is "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* (quoting *Nelson*, 541 U.S. at 650).

SCHAD IS NOT ENTITLED TO A STAY OF EXECUTION

The Ninth Circuit abused its discretion by granting the stay of execution because the stay is based on the February 26, 2013, Ninth Circuit panel majority order which reconsidered its denial of a motion it denied before this Court denied certiorari review. There is no law or evidence since this Court denied certiorari review. The Ninth Circuit also abused its discretion by: 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 falls within the ambit of *Martinez* rather than *Pinholster*; and by remanding to the district court to consider the new evidence, even though the district court had already extensively analyzed the new evidence and 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. Even if the Ninth Circuit could have held the mandate after this Court denied rehearing, it clearly abused its discretion by holding the mandate to reconsider a motion it had denied before Schad sought certiorari review, and granting relief on the basis of that reconsidered motion.

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, 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 to this Court. *Thompson*, 545 U.S. at 800. In *Thompson*, as here, 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.

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. The Supreme Court has held that a federal court abuses its discretion by considering, *sua sponte*, an affirmative defense that has been

deliberately waived by the state. *See Wood v. Milyard*, 132 S. Ct. 1826, 1830 (2012). It is an abuse of discretion for an appellate court to "override a State's deliberate waiver" of an affirmative defense. 132 S. Ct. at 1834-35.

This case appears to be the first time 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, 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 waived any procedural default defense by not asserting it 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 relegated 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 in developing and presenting mitigating evidence. (Order at 13, fn.3.) 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.

The applicability of *Pinholster* to this case is apparent from this Court's opinion; *Pinholster* was in a similar posture to this case. California contended "that some of the evidence adduced in the federal evidentiary hearing *fundamentally changed* Pinholster's claim so as to render it effectively unadjudicated." 131 S. Ct. at 1402 n.11 (emphasis added). Pinholster argued that the additional evidence that had not been part of the claim in state court "simply support[ed]" his alleged claim. *Id.* 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.) The holding validated Chief Judge Kozinski's dissent in *Pinholster v. Ayers*, 590 F.3d 651, 690 (9th Cir. 2009) (C.J. Kozinski dissenting):

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

(Emphasis added).

In accordance with *Pinholster,* the additional factual allegations Schad presented to the district court are a nullity for purposes of federal review. The IAC-sentencing claim, without the additional factual allegations first presented in the federal district court, was decided on the merits in state court. The district court did not find that a "claim" was procedurally defaulted; therefore there is no reason for a "cause and prejudice" determination. Claims are defaulted, not facts. The district court addressed the claim on the merits. And it further determined that the new evidence showed neither deficient performance nor prejudice.

A broad reading of the narrow holding in *Martinez* to justify a remand to district court would conflict with the holding in *Pinholster. See Lopez v. Ryan*, 678

F.3d 1131, 1137 (9th Cir. 2012) (identifying the clear tension between *Pinholster* and *Martinez*, if *Martinez* could be read to include PCR counsel's ineffective failure to develop *the factual basis* of a claim). *See also Detrich v. Ryan*, 677 F.3d 958, 992-1000 (9th Cir. 2012) (McKeown, J., dissenting from the majority's avoidance of *Pinholster*), *rehearing en banc granted by Detrich v. Ryan*, 696 F.3d 1265 (9th Cir. 2012); *Gonzalez v. Wong*, 667 F.3d 965, 972, 1017-21 (9th Cir. 2011) (O'Scannlain, J., dissenting in part from a remand of a portion of a claim the state court had previously decided on the merits to allow the state court to consider newly-discovered evidence).

In *Martinez*, the problem that concerned this Court was the fact that there had been no merits ruling on *trial counsel's effectiveness* in state court; that issue had been procedurally defaulted. Hence, there was no merits ruling for a federal court to review under § 2254(d). Here, there was a ruling on the merits for review by the district court considering the new evidence. Because there was a state-court merits ruling on the IAC-sentencing claim, and no procedural fault found by the district court, *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.

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, to show that sentencing counsel was deficient for

not presenting that evidence at sentencing, 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 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." *See Bonin v. Calderon*, 59 F.3d 815, 834-35 (9th Cir. 1995) (reasonable for counsel not to further investigate client's psychiatric condition when counsel made tactical decision to rely on "institutional adjustment" as primary mitigation theory. *See also Schad v. Ryan*, 595 F.3d 907, 917-919 (9th Cir. 2010) (detailing the evidence counsel presented at sentencing).

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.

Judge Graber's dissent from the recent majority panel order 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. (Order, J. Graber dissenting, 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).

Schad has also suggested that the evidence here was merely circumstantial. (Response to Petition for Rehearing, at 15 fn. 6.) However, the Ninth Circuit in its unanimous third amended opinion noted: "This is a case with strong circumstantial evidence pointing to the defendant's guilt and to no one else's." *Schad v. Ryan*, 606 F.3d at 1032.

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 seems improbable if he indeed has serious mental health issues. Thus, as the district court found, the new evidence is not 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.").

Accordingly, there was no prejudice from any ineffective assistance by sentencing counsel. *See, e.g. Pinholster*, 131 S. Ct. at 1409-1410 ("There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury's verdict."); *Wong v. 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 the district court. There is no reason the district court should evaluate the new evidence any differently under *Martinez* than it did before many years ago.

CONCLUSION

The Ninth Circuit panel majority order improperly granted a stay of execution because the order is based on a reconsideration of a motion that the panel unanimously and summarily denied before Schad sought certiorari review by this Court. The stay order and the underlying order fly in the face of the principles of federalism and finality underlying this Court's jurisprudence. Accordingly, the State respectfully asks this Court to vacate the Ninth Circuit's order granting a stay of the execution.

Respectfully submitted,

THOMAS C. HORNE
Attorney General

KENT E. CATTANI
Solicitor General

/s_____
JON G. ANDERSON
Assistant Attorney General
(Counsel of Record)

Attorneys for Petitioner Ryan

3103541