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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EDWARD HAROLD SCHAD, Petitioner, vs. CHARLES RYAN, et al., Respondents.	)	**CAPITAL CASE** CIV-97-2577-PHX-ROS MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b)

COMES NOW Petitioner, Edward Schad, and moves this Court pursuant to Article III of the United States Constitution, the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, 28 U.S.C. § 2241, *et. seq*., and Federal Rule of Civil Procedure 60(b)(6) to grant him relief from its judgment

(Doc. Nos. 121, 122 and 123)[1] denying his Petition for Habeas Corpus Relief because there has been a significant change in procedural law under which he is entitled to relief from judgment. *See Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Schad v. Ryan*, 2013 WL 791610 (9th Cir. Feb. 26 2013)(holding that the Supreme Court's decision in *Martinez* applies to Schad's substantial procedurally defaulted ineffective assistance of counsel at sentencing claim), vacated on other grounds, *Ryan v. Schad*, No. 12-1084 (June 2013)(petition for reh'g filed August 8, 2013 (Docket Sheet)); *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012)(*Martinez* announced a "remarkable" change in habeas procedural law); *Cook v. Ryan*, No. CV-97-00146-PHX-RCB, 2012 U.S. Dist. LEXIS 94363, 2012 WL 2798789, at *6 (D. Ariz. Jul. 9, 2012) (concluding that the nature of the change in law heralded by *Martinez* was a remarkable, albeit limited, development weighing slightly in favor of 60(b)(6) relief); *Dickens v. Ryan*, 688 F.3d 1054 (9th Cir. 2012); *Barnett v. Roper*, ___ F.Supp.2d ___, 2013 WL 1721205 (E.D. Mo. Apr. 22, 2013); *Landrum v. Anderson*, No. 96-cv-006441, slip op. at 11 (W.D. Ohio Aug. 22, 2012).

[1] On September 28, 2006, this Court entered its judgment denying Mr. Schad habeas corpus relief and dismissing his habeas corpus petition. (Doc. No. 121). On the same date, the Court entered its Order RE: Certificate of Appealability granting a Certificate on Claims A (*Brady* Claim) and P (IAC at Sentencing Claim) of Mr. Schad's Petition for a Writ of Habeas Corpus, but denying a Certificate and the opportunity for Mr. Schad to apply for one as to the remainder of his claims. (Doc. No.123). By issuing a COA this Court has already found that Schad's underlying claim of IAC is substantial because, under *Martinez*, the test for substantiality is equivalent to the COA standard. *See Barnett, supra*.

MEMORANDUM IN SUPPORT OF MOTION

I. THE REMARKABLE CHANGE IN HABEAS LAW BROUGHT BY *MARTINEZ* IS EXTRAORDINARY AND JUSTIFIES RELIEF UNDER RULE 60.

For more than two decades, federal courts steadfastly applied the holding of *Coleman v. Thompson*, 501 U.S. 722 (1991), as precluding the defense of ineffective assistance of post-conviction counsel as cause for a procedural default in habeas cases. The United States Supreme Court decision in *Martinez v. Ryan*, creating an equitable defense of ineffective assistance of initial-review-collateral-relief counsel for ineffective-assistance-of-counsel claims, worked "a sea change in habeas law." Br. Of Amici Curiae Utah and 24 Other States in Support of Respondent, *Trevino v. Thaler*, No. 11-10189, p.2 (Jan. 22, 2013)(Amici included Arizona). The Ninth Circuit found *Martinez* was a "remarkable" change in habeas procedural law in *Lopez*, *supra*. This Court echoed the holding in *Lopez*, in *Cook*, *supra*. Other courts have likewise found the change worked by *Martinez* to be extraordinary. *Barnett, supra; Landrum, supra.*

This Court, and Ed Schad, did not have the benefit of the Supreme Court's decision in *Martinez* on initial submission. As *Martinez* is an intervening decision which makes clear that Schad has valid cause for the procedural default of his ineffective-assistance-of-sentencing-counsel claim as presented for the first time in

federal court, this Court should grant Schad's motion for relief from judgment, reopen his case and order further proceedings in light of *Martinez*.[2]

A. CLAIM P IN SCHAD'S PETITION FOR WRIT OF HABEAS CORPUS IS A NEW, PROCEDURALLY DEFAULTED CLAIM, SUBJECT TO FEDERAL REVIEW UNDER THE EQUITABLE RULE OF *MARTINEZ*

In reviewing Schad's motion, this Court has the benefit of the decision of the appellate court in this case, itself an extraordinary circumstance, which found that Schad's ineffective assistance of counsel claim (Claim P in the petition) is a new, unexhausted, procedurally defaulted claim: "We conclude that Schad's new factual allegations set forth a new or different claim that was procedurally defaulted and

[2]While it is not clear that a habeas petitioner is required to exhaust his *Martinez* argument in state court, it should be noted that Schad has presented his *Martinez* argument and new claim of ineffective assistance of counsel at sentencing in the state court which refused to consider them. The January 18, 2013 decision of the Yavapai County Superior Court found that the state court does not provide an avenue for post-conviction relief for Schad's procedurally defaulted claim. Attachment A. The Yavapai County Superior Court's decision makes clear that Arizona does not, and will not, recognize the right to effective assistance of initial-review-collateral-proceeding counsel, equitable or otherwise. January 18, 2013 Minute Entry, pp.4-5. The Arizona Supreme Court denied Schad's petition for review. Attachment B. As such, the Arizona courts have found Schad's newly developed ineffective-assistance-of-sentencing-counsel claim (the same one presented in federal habeas and at issue here) precluded under Arizona law. *Id.*, p. 4. It is clear that there is no available remedy for Schad to exhaust the merit of his procedurally defaulted claim, nor his equitable defense thereto, in state court. The only avenue for vindication of Ed Schad's substantial and meritorious claim of the denial of his Sixth, Eighth, and Fourteenth Amendment rights, lies with the federal courts under *Martinez*.

that is 'substantial.'" (*Schad*, at *5). The Court also found that *Martinez* provided cause to excuse the procedural default. *Id*. The Court further found that Schad's IAC at sentencing claim was substantial. *Id*. The Court concluded that Schad was entitled to further proceedings in this Court to prove his allegations under *Martinez* and his right to habeas relief based in his defaulted, but meritorious, *Strickland* claim. *Id*. The extraordinary circumstances of the Ninth Circuit's opinion, coupled with the Supreme Court's decision in *Martinez* warrant relief under Rule 60(b)(6).

B. *CULLEN V. PINHOLSTER*, 131 S.CT. 1388 (2011), DOES NOT APPLY

Respondent will, no doubt, argue that this Court did not originally rule that Schad's claim was procedurally defaulted, but rather reached a decision on the merits of the narrow, different, and factually unsupported claim presented in state post-conviction. Respondent will also likely argue that *Cullen v. Pinholster*, controls this Court's review. But the Ninth Circuit has already rejected that argument **in this case**. It wrote:

> Although the district court did not find that Schad's claim was procedurally defaulted, it was. A claim is procedurally defaulted "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). Thus, if Schad's new claim was not exhausted, he has procedurally defaulted

that claim because Arizona prevents him from asserting a successive claim in state court. *See Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir.2002) (describing Arizona's procedural default rules). Our rules for exhaustion focus not only on the legal claim but also on the specific facts that support it. Thus, an ineffectiveness of counsel claim may be a "new claim," and therefore unexhausted, if the "specific facts" it asserts were not presented to the state court and they give rise to a 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." *Valerio v. Crawford*, 306 F.3d 742, 768 (9th Cir. 2002) (quoting *Humphrey v. Cady*, 405 U.S. 504, 517 n.18 (1972). *Martinez* permits a federal court to hear an unexhausted, and, thus, procedurally defaulted, claim that was not presented to the state court due to post-conviction counsel's ineffectiveness.

Schad raised an ineffective assistance of sentencing counsel claim before the state court based on counsel's failure to investigate and present additional evidence regarding his tragic history of child abuse—a claim designed to elicit a "reasoned moral response" to Schad as a "uniquely individual human being." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal citations and alterations omitted). ER 333–37, 343–49. The factual allegations he raised before the district court, however, amounted to a new and different claim: a claim that his counsel failed to investigate and present evidence of his mental illnesses as an adult—evidence that would have afforded an explanation of *why* he committed the crimes of which he was convicted. ER 459**.** The evidence Schad submitted in support of the new claim included a psychological report that addresses his "several major mental disorders" including, among others,: "Bipolar Disorder; Major Depression; ... Obsessive–Compulsive Disorder; Schizoaffective Disorder; ... Dissociative Disorders...." ER 540.

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." *Valerio*, 306 F.3d at 768 (quoting *Humphrey*, 405 U.S. at 517 n.18). Because Schad did not present this claim in his original petition for post-conviction relief to the state court**, it is procedurally**

> **defaulted.** If Schad meets the requirements of *Martinez*, however, he may well have established cause for that procedural default.

Schad, *supra*, at *5-6 (emphasis added). Thus, the panel correctly concluded that *Pinholster* does not apply to new claims. Although the Supreme Court has vacated the opinion of the Ninth Circuit, its decision did not criticize, or even mention, the *Martinez* arguments. Rather, the Supreme Court's opinion was confined to an interpretation of appellate procedural rules. Its decision does not undermine the persuasiveness of the panel's analysis on these key issues and this Court is not free to ignore the panel's analysis.

C. THE NINTH CIRCUIT'S OPINION THAT SCHAD IS ENTITLED TO HABEAS REVIEW OF HIS PROCEDURALLY DEFAULTED IAC CLAIM IN LIGHT OF THE INTERVENING DECISION IN *MARTINEZ* IS WELL SUPPORTED BY THE LAW AND RECORD HERE.

1. *MARTINEZ V. RYAN*, 566 U.S. ___ (2012), IS AN INTERVENING DECISION OF THE UNITED STATES SUPREME COURT THAT **FOR THE FIRST TIME** ESTABLISHES CAUSE FOR PROCEDURAL DEFAULT BASED ON EQUITABLE PRINCIPLES, *VIZ.* INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL

In *Martinez v. Ryan*, 566 U.S. ___ (2012), the Supreme Court acknowledged the right to counsel as "the foundation of our adversary system," with the "right to the effective assistance of counsel at trial" being "a bedrock principle in our justice system." *Id*. at ___ (slip op. at 9), 132 S.Ct. at 1317. An incarcerated inmate,

however, faces significant difficulties "vindicating a substantial ineffective-assistance-of-trial-counsel claim," because "while confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Id*. at ___ (slip op. at 8, 9), 132 S.Ct. at 1317.

To properly raise and exhaust an ineffectiveness claim, a state inmate requires the "help of an adequate attorney" who has both an "understanding of trial strategy" and the ability to undertake the "investigative work" necessary to raise the claim. *Id*. at ___ (slip op. at 8), 132 S.Ct. at 1317. In other words: "To present a claim of ineffective assistance at trial in accordance with the State's procedures . . . a prisoner likely needs an effective attorney." *Id*. at ___ (slip op. at 9), 132 S.Ct. at 1317.

If, however, state post-conviction counsel fails to properly raise a claim that trial counsel was ineffective, "it is likely that no state court at any level will hear the prisoner's [ineffectiveness] claim." *Id*. at ___ (slip op. at 7), 132 S.Ct. at 1316. Were federal habeas review of such an ineffectiveness claim also barred, an inmate would receive *no* review of his foundational constitutional claim in any court: "No court will review the prisoner's claims." *Id*. In *Martinez*, the Supreme Court recognized the inequity in such a situation.

Thus, to ensure that fundamental claims of ineffective-assistance-of-counsel may actually be reviewed by *some* court, *Martinez* provides that a federal habeas court may review an otherwise procedurally defaulted ineffectiveness claim when the default resulted from the ineffectiveness of *post-conviction counsel*:

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Cf. Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue).

Martinez, 566 U.S. at ___ (slip op. at 11), 132 S.Ct. at 1318-1319. Restated, *Martinez* provides that the ineffective assistance of post-conviction counsel *plus* a substantial ineffectiveness claim provide "cause" for an otherwise unexhausted, procedurally defaulted ineffectiveness claim:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-

> review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at ___ (slip op. at 15), 132 S.Ct. at 1320. The Ninth Circuit correctly found that Ed Schad's ineffective-assistance-of-trial-counsel claim fits precisely within the ambit of *Martinez.*

2. SCHAD CAN ESTABLISH "CAUSE" UNDER *MARTINEZ*: HE HAS A SUBSTANTIAL INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM THAT WAS PROCEDURALLY DEFAULTED IN INITIAL STATE POST-CONVICTION PROCEEDINGS BECAUSE OF THE INEFFECTIVENESS OF POST-CONVICTION COUNSEL

For purposes of applying *Martinez*, there are three operative questions: (1) Does Ed Schad have a substantial ineffectiveness claim? (2) Is that claim procedurally defaulted?, and (3) Was initial post-conviction counsel ineffective for failing to properly exhaust the claim? The answer to all three questions is a resounding "Yes," which ultimately means that a relief under 60(b) is in order, so that Schad may establish "cause" for his defaulted ineffectiveness claim, secure full habeas review of that claim, and ultimately obtain habeas corpus relief.

a. AS THE NINTH CIRCUIT RECOGNIZED ON INITIAL SUBMISSION AND REEMPHASIZED IN ITS FEBRUARY, 2013 OPINION, ED SCHAD'S UNDERLYING INEFFECTIVENESS CLAIM IS SUBSTANTIAL

The test for substantiality under Martinez is whether the underlying claim has "some merit." *Martinez*, 132 S. Ct. at 1318. The Court used the COA standard announced in *Miller-El v. Cockrell*, 537 U.S. 322 (2002)("debatable among jurists of reason") as an example of when a claim has demonstrated that it has "some merit." *Martinez*, 132 S.Ct. at 1318-1319. Schad's underlying claim easily meets this standard, particularly where this Court already found that ~~the~~ Schad's claim is debatable among jurists of reason. Doc. 123, *Barnett*, at *35-36. As the Ninth Circuit 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 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 Ninth Circuit's 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), 132 S.Ct. at 1318-1319. The Court reiterated this finding in its most recent opinion, specifically ruling that Schad's claim is substantial under *Martinez.* The factors, coupled with this Court's previous finding that Schad's claim was debatable among jurists of reason, Doc. 123, clearly establish that Schad's claim meets the substantiality prong of *Martinez*. *See Barnett*, *supra*.

Indeed, Schad's *Strickland* claim is supported by significant mitigating expert testimony, lay testimony, and documentation all of which was previously filed with this Court Docs 100, 115. Taken together, that evidence presents a compelling mitigating narrative that, had it been presented at sentencing, would have made a significant difference. 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, that compellingly weaves together the tragedy and trauma of Ed Schad's life that 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.

Attachment C, 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 and dangerous 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 and terrifying dysfunctional environment 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 this Court 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.

In fact, Schad's *Strickland* claim is similar to any number of *Strickland* claims from Arizona which have been 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).

It is not surprising then that the Ninth Circuit found that Ed Schad meets *Martinez*'s substantiality requirement.

> We conclude that Schad has shown that his claim is substantial because, as we previously held, "if [the new evidence] had been presented to the sentencing court, [it] would have demonstrated at least some likelihood of altering the sentencing court's evaluation of

> the aggravating and mitigation factors present in this case." *Schad v. Ryan*, 595 F.3d at 923 (subsequent history omitted). In fact, his claim is more than substantial. As we stated in Part II, *supra*, Schad's counsel's failure to investigate and present evidence of his serious mental illnesses "had substantial and injurious effect or influence in determining the [sentence]." *Brecht*. 507 U.S. at 623
>
> *Schad*, at *6.

b. SCHAD'S SUBSTANTIAL INEFFECTIVENESS CLAIM WAS PROCEDURALLY DEFAULTED BY INITIAL POST-CONVICTION COUNSEL

Schad's substantial ineffectiveness-at-sentencing claim, however, was never properly presented to the state courts by initial post-conviction counsel. It is thus considered procedurally defaulted and ultimately subject to *Martinez*, where post-conviction counsel provided the state courts *none* of the mitigating evidence underlying Schad's federal habeas claim.

i. EXHAUSTION REQUIRES PRESENTATION OF BOTH THE FACTS AND LEGAL THEORY IN SUPPORT OF A CLAIM

Before presenting a claim in federal habeas proceedings, a petitioner must exhaust state court remedies. 28 U.S.C. § 2254(b). Exhaustion requires a petitioner to present to the state court both the legal theory and the facts supporting a claim, so that the state court may have the first opportunity to apply the law to those facts. As the Supreme Court explained in *Gray v. Netherland*, 518 U.S. 152 (1996): "In *Picard v. Connor*, 404 U.S. 270 (1971), we held that, for purposes of

exhausting state remedies, a claim for relief in habeas corpus *must include* reference to a specific federal constitutional guarantee, as well as *a statement of the facts that entitle the petitioner to relief*." *Gray*, 518 U.S. at 162-163 (emphasis supplied). *See also McCaskle v. Vela*, 464 U.S. 1053, 1055 (1984)(O'Connor, J., dissenting) (exhaustion requires presentation of "all facts necessary to support a claim" and identification of legal claim arising from those facts).

As the Ninth Circuit has likewise explained, to "fairly present" a federal claim to state court and avoid a procedural default, a federal habeas petitioner must:

> describe both *the operative facts* and the federal legal theory on which his claim is based so that the state courts could have *a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim*.

Castillo v. McFadden, 399 F.3d 993, 998 (9th Cir. 2004)(emphasis supplied); *See also Schad, supra*. "For purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts the entitle the petitioner to relief." *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). *See also Carney v. Fabian*, 487 F.3d 1094 (8th Cir. 2007)(to exhaust state remedies, petitioner must fairly present the facts and substance of his claim to state court); *Longworth v. Ozmint*, 377 F.3d

437, 448 (4th Cir. 2004)(exhaustion requires that petitioner "fairly present to the state court both the operative facts and the controlling legal principles associated with each claim."); *Wilson v. Briley*, 243 F.3d 325, 327-328 (7th Cir. 2001)(to fairly present claim, petitioner must "present both the operative facts and the legal principles that control each claim.")

Respondent has previously acknowledged as much, having argued that unless facts in support of an ineffectiveness claim are actually presented to the state courts, the claim in federal court is not exhausted: "The problem with presenting to the federal court new evidence never presented to the state courts is that it places the claim in a significantly different evidentiary posture in federal court, violating the exhaustion requirement." R. 116, p. 4 (Respondent's Opposition To Motion To Expand Record).

ii. POST-CONVICTION COUNSEL FAILED TO PROPERLY EXHAUST SCHAD'S *STRICKLAND* CLAIM AS PRESENTED IN HABEAS

Under these standards, Schad's ineffectiveness claim, as presented in Amended Petition ¶28, Claim P, is not exhausted and procedurally defaulted for purposes of *Martinez*. To be sure, while Schad did raise ***a*** *Strickland* claim in his initial state post-conviction proceedings, he did not raise ***the*** *Strickland* claim presented to the federal courts in Amended Petition ¶28, Claim P, as supported by

the vast evidence presented in federal habeas. Post-Conviction counsel simply did not present to the state court the operative facts and evidence underlying ¶28, Claim P.

As the Ninth Circuit previously concluded in its pre-*Martinez* opinion in this case: "The record is clear that Schad did not succeed in bringing out relevant mitigating evidence during state habeas proceedings. *Schad*, 606 F.3d at 1044. Schad's federal habeas claim is thus *not* the claim raised in state court, because, as this Court noted, it is based upon "a number of exhibits that contain information never presented to the state courts." R. 121, p. 57 (Memorandum). In its most recent opinion, the Court clearly held that that the claim presented in federal court is a new, unexhausted claim. *Schad*, *supra*, at *5-6.

Indeed, in state court, post-conviction counsel presented no evidence (whether affidavits, declarations, or documents) to show that trial counsel was ineffective at sentencing. Even when asking for more time to represent Schad, post-conviction counsel did not present any documentary evidence or proposed testimony from any witness (lay or expert) to support a new sentencing hearing under *Strickland*. Counsel did provide an affidavit from investigator Holly Wake, but that affidavit merely identified corrections department records to be obtained,

while noting that family members also should be interviewed. To quote Respondent, post-conviction counsel simply:

> presented no names of potential witnesses, no description of their proposed testimony, no affidavit from anyone stating what that person would testify to at a hearing, and no argument why that information would probably have changed the sentencing hearing if it had been presented.

R. 116, p. 7.

Respondent has repeatedly asserted that Schad's current *Strickland* claim was not fairly presented to the Arizona courts, especially where ¶28, Claim P, is based upon the comprehensive affidavit of Charles Sanislow that was never considered by the Arizona courts:

> [A]llowing Petitioner to expand the record with the declaration at issue would place the claim in a significantly different evidentiary posture than it was in before the state court, thereby violating the fair presentation requirement. *See Nevius*, 852 F.2d at 470; *Aiken*, 841 F.2d at 883.

R. 116, p. 9. Schad's current claim in federal habeas, therefore, is quite clearly defaulted precisely because "Schad did not succeed in bringing out relevant mitigating evidence during state habeas proceedings." *Schad*, 606 F.3d at 1044.

Under virtually identical circumstances, the United States Court of Appeals for the Fourth Circuit found such a *Strickland* claim procedurally defaulted. *Moses*

v. Branker, 2007 U.S.App.Lexis 24750 (4th Cir. 2007). In *Moses*, the habeas petitioner claimed in state post-conviction proceedings that counsel was ineffective under *Strickland* based solely on allegations and proof that trial counsel should have called two additional witnesses at the capital sentencing proceeding, Dennis and Johnson. *Id*. *6. With Moses having presented that limited claim to the state court, the state court denied relief, concluding that trial counsel's performance with regard to those two witnesses was not deficient. *Id*.

In federal habeas proceedings, however, unburdened by ineffective state post-conviction counsel, Moses presented a very different claim – very much like Schad's habeas claim – in which he presented abundant, new mitigating evidence showing the prejudice flowing from trial counsel's failures:

> The claim in the federal petition is not limited, however, to counsel's failure to call Dennis and Johnson as mitigating witnesses. Instead, the federal petition asserts that counsel had 'conducted an inadequate investigation of Petitioner's childhood background and family circumstances' and 'consistently ignored important mitigation leads.' [citation omitted] The petition describes in detail the type of mitigating evidence that could have been presented if counsel had undertaken a full investigation of Moses's background. Attached to the petition are affidavits from seventeen persons who would have offered mitigating testimony, including a caseworker and two psychologists from the Massachusetts Department of Youth Services, two teachers from Moses's elementary school, and twelve family members, including Johnson. The petition asserted that testimony from these witnesses would have detailed the 'daily horror of Moses's childhood home' while also portraying Moses as someone with 'a life worth preserving.'

Id. *7. Having made such a different presentation of mitigating evidence that should have been presented at sentencing, Moses had thus "fundamentally alter[ed] the ineffective assistance of counsel claim he presented to the state . . . court," as his federal claim "required the presentation of a set of facts not introduced in the state . . . proceeding." *Id*. *8.

The Fourth Circuit thus concluded "that the ineffectiveness claim in Moses's [federal] petition was fundamentally different than the one presented to the state court," and accordingly, "Moses failed to exhaust in state court the ineffective assistance of counsel claim now presented in his federal habeas petition." *Id*. *8-9. His claim was therefore procedurally defaulted (and the court rejected his claim that the ineffectiveness of post-conviction counsel should be considered "cause" for his default). *Id*. *9.[1]

The Arizona Superior Court's recent order in *State v. Schad*, No. P1300CR8752, confirms this conclusion. During Schad's initial post-conviction proceedings, post-conviction counsel did not present any of the evidence underlying Schad's new *Strickland* claim as presented in federal habeas. In a

[1] The situation in both *Schad* and *Moses* is similar to that described in *Dickens v. Ryan*, 9th Cir. No. 08-99017, which is pending *en banc* review in the Ninth Court.

second Rule 32 motion filed in 2012, however, Schad did present all of that evidence, thus providing the state courts all the facts in support of his federal habeas claim as well as his legal theory.

Under Ariz.R.Crim.P. 32.2(a)(3), however, a claim is "precluded from relief . . . upon any ground . . . that has been waived . . . in any previous collateral proceeding." "[W]ithout examining the facts," the Yavapai County Superior Court thus found Schad's current *Strickland* claim precluded from review, waived under Rule 32.2(a)(3). *State v. Schad*, No. P1300CR8752, In The Superior Court of Yavapai County, Jan. 18, 2013, p. 4. In doing so, the Superior Court applied *Stewart v. Smith*, 202 Ariz. 446, 450 (2002), to conclude that given the mere fact that Schad raised a *Strickland* claim in his initial post-conviction proceedings, his new claim could not be heard. As the Arizona Supreme Court emphasized in *Smith*, the "ground of ineffective assistance of counsel cannot be raised repeatedly," but Schad's case "fits squarely within the parameters addressed in *Stewart*." *State v. Schad*, No. P1300CR8752, In The Superior Court of Yavapai County, Jan. 18, 2013, p. 4. Having been barred by the recent order of the Yavapai Superior Court, Schad's federal petition ¶28, Claim P, thus appears defaulted for this additional reason.

c. INITIAL POST-CONVICTION COUNSEL WAS INEFFECTIVE UNDER *MARTINEZ*

Under *Martinez*, therefore, the lone remaining question is whether initial post-conviction counsel was ineffective for failing to present the defaulted *Strickland* claim that Schad now presents in federal habeas. It certainly appears that way. In fact, Respondent has repeatedly emphasized that post-conviction counsel lacked diligence and unreasonably failed to present the mitigation claim now presented by Schad – because the mitigating evidence presented in federal court was readily available to post-conviction counsel. Respondent's own position proves that Schad has made more than the minimal *prima facie* showing necessary for further proceedings under *Martinez*.

Indeed, the state has emphasized that post-conviction counsel didn't present the state court any evidence in support of a *Strickland* claim "[d]espite extensive continuances and investigation." R. 116, p. 5. To reiterate, Respondent has maintained that post-conviction counsel:

> presented no names of potential witnesses, no description of their proposed testimony, no affidavit from anyone stating what that person would testify to at a hearing, and no argument why that information would probably have changed the sentencing hearing if it had been presented.

Id. at 7. Having laid the blame for this state of affairs at the feet of post-conviction counsel, Respondent had further acknowledged that post-conviction counsel's

failures were unreasonable under the circumstances, thus meeting *Strickland*'s definition of ineffectiveness. As Respondent has argued to the Ninth Circuit

> **[Schad's counsel] did not make 'a reasonable attempt, in light of the information available at the time, to investigate and pursue' his claim of ineffective assistance of counsel.**

Schad v. Ryan, 9th Cir. No. 07-99005, Respondents'-Appellees' Petition For Rehearing And Rehearing *En Banc*, R. 58-1, p. 3 (Sept. 23, 2009)(emphasis supplied). This is the very definition of ineffectiveness under *Strickland*. The Supreme Court explained in *Porter v. McCollum*, 558 U.S. 30, ___ (slip op. at 10), 130 S.Ct. 447, 453 (2009)(per curiam), counsel performs deficiently when she "ignore[s] pertinent avenues of investigation of which [s/]he should have been aware." *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (counsel ineffectively failed to conduct complete investigation of mitigating evidence).

This is precisely the error of state post-conviction counsel which a Missouri District Court found to constitute deficient performance under *Martinez* warranting relief under Rule 60(b). In *Barnett*, the state court found that the state post-conviction counsel violated Missouri rules of pleading and therefore denied the claim on procedural grounds. *Barnett*, 2013 U.S. Dist. LEXIS 57147, *38, note 17. Judge Weber of the United States District Court for the Eastern District of Missouri, accepted the findings of the state court that counsel's failure to brief was

the ground for procedural default and found such failure to be deficient performance. The errors and omissions of Schad's state post-conviction counsel here are even more egregious. Plainly, the record and the opinion of the Ninth Circuit in this matter establish post-conviction counsel's ineffectiveness.

3. SCHAD THUS STATES A *PRIMA FACIE* CASE FOR RELIEF UNDER *MARTINEZ*

All told, therefore, Ed Schad's case falls squarely within the scope of *Martinez*. As presented in federal court, Amended Petition ¶28, Claim P, is substantial, as this Court has already recognized. This claim was not presented to the Arizona courts and is thus unexhausted and procedurally defaulted under *Martinez*. Also, as Respondent has essentially conceded, counsel during initial post-conviction proceedings was ineffective for failing to present the claim, having failed to reasonably investigate and pursue the claim in light of evidence available at the time. *Martinez* applies with full force here.

D. APPLICATION OF THE *GONZALEZ/PHELPS* FACTORS WEIGH IN FAVOR OF SCHAD AND 60(b)(6) RELIEF

Rule 60(b) is a rule of equity. It is settled law that Rule 60(b)(6) provides a vehicle for a federal habeas petition to seek relief from a judgment where the continued enforcement of that judgment is contrary to law and public policy.

> Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence. Rule 60(b)(6), the particular provision under which petitioner brought his motion, permits reopening when the movant shows "any . . . reason justifying relief from the operation of the judgment" other than the more specific circumstances set out in Rules 60(b)(1)-(5). *See Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 863, n 11, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988); *Klapprott v. United States*, 335 U.S. 601, 613, 93 L. Ed. 266, 69 S. Ct. 384 (1949) (opinion of Black, J.).

Gonzalez v. Crosby, 545 U.S. 524, 528-529 (U.S. 2005) (internal footnotes omitted). The Court in *Gonzalez* held that when a habeas petitioner alleges a defect in the integrity of the federal habeas proceedings then such an attack is permitted under AEDPA. *Id.*, at 532. *Gonzalez* distinguished motions attacking the integrity of the federal court's resolution of procedural issues (there a statute of limitations issue) from motions alleging a defect in the substantive ruling on the merits of a claim or motions raising new claims for relief.

The Ninth Circuit has found that allegations similar to those raised here, are cognizable under Rule 60(b)(6). *See Lopez, supra; See Moormann v. Schriro*, 2012 WL 621885 at *2 (9th Cir. Feb. 28 2012)(finding petitioner's 60(b) motion properly and "diligent[ly]" brought, and claims fully exhausted). *See also*, *Barnett, supra; Landrum*, *supra*.

Applying *Gonzalez*, the Ninth Circuit has observed that,

> The United States Supreme Court has made clear that the equitable power embodied in Rule 60(b) is the power "to vacate judgments whenever such action is appropriate to accomplish justice." Given that directive, we agree that "the decision to grant Rule 60(b)(6) relief" must be measured by "the incessant command of the court's conscience that justice be done in light of all the facts."

Phelps v. Alameida, 569 F.3d 1120, 1141 (9th Cir. Cal. 2009)(footnotes omitted)(quoting *Gonzalez*). *Phelps* identified a number of factors for courts to consider in deciding whether to grant relief from judgment under Rule 60(b)(6). The Court emphasized that these factors were merely provided for guidance and were not a checklist. Each case, the court cautioned, must be reviewed on a case-by-case basis.

> [C]ourts applying Rule 60(b)(6) to petitions for habeas corpus have considered a number of factors in deciding whether a prior judgment should be set aside or altered. Most notably, the Supreme Court in *Gonzalez* and the Eleventh Circuit in *Ritter*, laid out specific factors that should guide courts in the exercise of their Rule 60(b)(6) discretion. In discussing these factors, **we do not suggest that they impose a rigid or exhaustive checklist**: "Rule 60(b)(6) is a grand reservoir of equitable power," *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992) (internal footnote and quotation marks omitted), and it affords courts the discretion and power "to vacate judgments whenever such action is appropriate to accomplish justice." *Gonzalez*, 545 U.S. at 542 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)). However, we have "cautioned against the use of provisions of Rule 60(b) to circumvent the strong public interest in [the] timeliness and finality" of judgments. *Flores v. Arizona*, 516 F.3d 1140, 1163 (9th Cir. 2008). Given these important and

> potentially countervailing considerations, the exercise of a court's ample equitable power under Rule 60(b)(6) to reconsider its judgment "requires a showing of 'extraordinary circumstances.'" *Gonzalez*, 545 U.S. at 536.

Phelps v. Alameida, 569 F.3d 1120, 1135 (9th Cir. Cal. 2009)(emphasis added).

Each of the *Gonzalez/Phelps* factors are discussed seriatim and each weighs in favor of 60(b) relief here.

1. THE NATURE OF THE CHANGE IN LAW FAVORS 60(B) RELIEF

Martinez, holds, "as an equitable matter": "A procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of trial counsel if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id*., Slip. Op. at 8, 15. The court explained that counsel in initial-review collateral proceedings who fail to perform consistent with prevailing professional norms and as a result of negligence, inadvertence, or ignorance fail to raise claims of ineffective assistance of trial counsel are themselves ineffective and the prisoner is excused from failing to raise such claims at an earlier time. This holding modified the Court's holding in *Coleman v. Thompson*, 501 U.S. 722 (1991).

Martinez completely changed the legal landscape with respect to procedurally defaulted federal habeas claims of constitutionally ineffective

assistance of counsel. Prior to *Martinez*, if the cause of the default was ineffective assistance of post-conviction counsel, then the claim was procedurally barred from federal review. No more. The Ninth circuit, as well as courts in Ohio and Missouri, have characterized this change in the law as remarkable and as meeting prong one of *Gonzalez*. *Lopez, supra; Barnett, supra; Landrum, supra.*

The equitable concerns expressed in *Martinez* are manifest in this case. The Court wrote, "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Id*, Slip Op. at 7. The Court observed further, "And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id*. Such a result, the Court concluded is inequitable.

That is exactly what happened here. As the Ninth Circuit observed, Petitioner deserves relief from this Court's now erroneous judgment.

2. SCHAD HAS BEEN DILIGENT IN PURSUING RELIEF

Schad had diligently sought relief on his claim since first presenting it to this Court in his amended petition for habeas relief. He obtained a COA from this Court after the denial of relief, Doc. 123. He briefed the claim on appeal and won a remand. He defended his right to a remand in the United States Supreme Court. After the remand order was reversed in light of *Pinholster*, Schad continued to

press his claim. After the Ninth Circuit, feeling constrained by *Pinholster* denied relief, Schad sought rehearing *en banc*. After rehearing was denied, the Supreme Court's decision in *Martinez* was announced. Although there was no recognized procedural vehicle for bringing the matter to the Court's attention, Schad moved to reopen the appeal based on *Martinez.* Schad pressed his *Martinez* arguments to the United States Supreme Court. And then, within days of discovering that on motion by the Respondent, the Ninth Circuit was reconsidering its opinion in *Schad* because it conflicts with the decision in *Dickens v. Ryan*, Schad moved for further consideration in the Ninth Circuit. ALL of these actions took place while the mandate of the Ninth Circuit was stayed WITHOUT OBJECTION. Schad won relief under Martinez in the Ninth Circuit. The Supreme Court reversed that grant of relief based on a procedural rule. Schad timely sought rehearing of that decision. Rehearing remains pending and the mandate of the Ninth Circuit has not issued. Schad has been diligent.

3. THE PARTIES RELIANCE IN FINALITY OF THE JUDGMENT IS NOT A WEIGHTY FACTOR

Finality has not attached to this case. As of this filing, the mandate from the United States Supreme Court has not issued and the Ninth Circuit's stay of execution remains in place. The Ninth Circuit has not returned the record to this Court. While the State of Arizona has moved for a warrant of execution, which

Schad has opposed, they did so with the full knowledge that 28 U.S.C. § 2251 renders any action by the state court void. The fact that Respondent flouts the law in an unseemly rush to execute a man whose capital sentence is patently unreliable is not a factor that can weigh in his favor.

Schad is in an even better posture than the prisoner in *Barnett* where the Court granted 60(b) relief in a motion to reconsider filed pursuant to Rule 59. There the Court gave weight to the capital nature of the crime and the fact that the claim at issue, as here, went to the reliability of sentence. The Court wrote, "the death penalty is different and requires a greater need for reliability, consistency, and fairness." *Barnett, supra,* at *55. Though calling it a "close call" the Court found that the State's interest in finality was ~~where~~ outweighed by Barnett's interest in review of his fundamental claim of constitutional error.

4. THERE HAS BEEN NO DELAY BETWEEN FINALITY OF JUDGMENT AND MOTION FOR RELIEF, THE JUDGMENT IS NOT YET FINAL.

As stated, Schad has not delayed. He timely sought rehearing from the United States Supreme Court *per curiam* opinion. His rehearing petition stayed the mandate of the Supreme Court and the Ninth Circuit. As such, there is no delay between finality and this motion as finality has not attached. Further, Schad has sought relief at every stage since the decision in *Martinez* was announced. It was

more appropriate to first bring the motion to the Court of Appeals who is vested with jurisdiction over the habeas petition.

Further, any interest in finality is diminished by the fact that this is a capital case and the error at issue goes to the heart of the reliability of Schad's sentence. As Judge Weber wrote in *Barnett*:

> [C]apital punishment jurisdiction cautions that the death penalty is different, and requires a greater need for reliability, consistency and fairness. See *Sheppard*, 2013 U.S. Dist. LEXIS 5565, 2013 WL 146342, at *12. Lessening any weight the capital nature of the action bestows, is the multiple layers of review that Barnett has received. See *id*. Nevertheless, although the reliability of Barnett's sentence is enhanced by many tiers of review, the claim at issue here, the ineffectiveness of trial counsel, due to failure to investigate and present mitigating evidence in the penalty phase, has never been heard on its merits, and directly implicates the reliability of Barnett's sentence.

Barnett, *supra*, at *55-56.

This factor is in Schad's favor.

5. THE OPINION OF THE NINTH CIRCUIT ESTABLISHES A CLOSE CONNECTION BETWEEN *MARTINEZ* AND SCHAD'S CLAIM. INDEED, THE OPINION DEMONSTRATES THAT SCHAD SHOULD NOW PREVAIL ON HIS IAC AT SENTENCING CLAIM.

This factor is the most obvious and the most weighty. The Ninth Circuit opinion sets a clear roadmap for the applicability of *Martinez* to Schad's claim and concludes that Schad is entitled to review and relief. There can be no more closer

connection that this. Further, this factor is all the more weighty because the IAC claim here goes directly to the reliability of Schad's capital sentence. *See Barnett*.

6. COMITY INTERESTS DO NOT OUTWEIGH SCHAD'S RIGHT TO REVIEW OF HIS MERITORIOUS CLAIM THAT GOES DIRECTLY TO THE RELIABILITY OF HIS CAPITAL SENTENCE.

The Court in *Phelps* explained the role of comity in considering a motion under Rule 60(b)(6).

> Finally, the court in *Ritter* also observed that, in applying Rule 60(b)(6) to cases involving petitions for habeas corpus, judges must bear in mind that "[a] federal court's grant of a writ of habeas corpus . . . is always a serious matter implicating considerations of comity." *Id.* at 1403. To be sure, the need for comity between the independently sovereign state and federal judiciaries is an important consideration, as is the duty of federal courts to ensure that federal rights are fully protected. However, **in the context of Rule 60(b)(6), we need not be concerned about upsetting the comity principle when a petitioner seeks reconsideration not of a judgment on the merits of his habeas petition, but rather of an erroneous judgment that prevented the court from ever reaching the merits of that petition**. **The delicate principles of comity governing the interaction between coordinate sovereign judicial systems do not require federal courts to abdicate their role as vigilant protectors of federal rights.** To the contrary, as the Supreme Court has made clear, "in enacting [the habeas statute], Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action.'" *Reed v. Ross*, 468 U.S. 1, 10, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972)). Even after the enactment of AEDPA, "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). For that reason, the Supreme Court has

> emphasized that "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996) (emphasis added). Accordingly, in applying Rule 60(b) to habeas corpus petitions, the Fifth Circuit has persuasively held that [t]he "main application" of Rule 60(b) "is to those cases in which the true merits of a case might never be considered." Thus, although we rarely reverse a district court's exercise of discretion to deny a Rule 60(b) motion, we have reversed "where denial of relief precludes examination of the full merits of the cause," explaining that in such instances "even a slight abuse may justify reversal." *Ruiz v. Quarterman*, 504 F.3d 523, 532 (5th Cir. 2007) (quoting *Fackelman v. Bell*, 564 F.2d 734, 735 (5th Cir. 1977); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)). We too believe that a central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard. In such instances, including the case presently before us, this factor will cut in favor of granting Rule 60(b)(6) relief.

Phelps, 569 F.3d at 1139-1140 (9th Cir. 2009)(emphasis added). Here, as the Ninth Circuit already found, Schad is faced with an "erroneous legal judgment" that prevents "the true merits of a petitioner's constitutional claims from ever being heard." Because this is a capital case, this factor is all the more weighty.

II. CONCLUSION

Ed Schad presents a substantial ineffective-assistance-of-counsel-at-sentencing claim that has not been reviewed in federal habeas because was it was not properly exhausted by counsel during initial post-conviction proceedings. Under *Martinez v. Ryan*, 566 U.S. ___ (2012), however, Schad

can establish "cause" for the default by showing that initial post-conviction counsel ineffectively failed to raise and exhaust his claim. *Id.* at ___ (slip op. at 11). The "incessant command of the court's conscience that justice be done" demands Rule 60(b) relief. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988); *Klapprott v. United States*, 335 U.S. 601 (1949). Because Schad can satisfy *Martinez*'s "cause and prejudice" standard, and meets the 9th Circuit standard for relief from Judgment under Rule 60(b) this Court should reopen the case and order further proceedings.

Respectfully submitted this 26th of August, 2013.

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