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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Edward Harold Schad,

Petitioner,

-vs-

Charles Ryan, et al.,

Respondents.

CV 97-2577-PHX-ROS

CAPITAL CASE

RESPONSE TO MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b)

Citing Rule 60(b)(6), Federal Rules of Civil Procedure, Petitioner Edward Harold Schad seeks relief from this Court's judgment entered on September 28, 2006 (Doc. No. 121), based on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). However, Schad is simply asking this Court to "revisit an argument" that the Ninth Circuit has "already explicitly rejected." *Schad v. Ryan*, 133 S. Ct. 2548 (2013). Because that determination is the law of the case, Schad's Rule 60 motion must fail.

DATED this 6th day of September, 2013.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL HISTORY.

The Supreme Court's recent unanimous *per curiam* opinion, which summarily reversed the Ninth Circuit's granting Schad relief pursuant to *Martinez*, summarized the procedural history of this case:

> In 1985, an Arizona jury found respondent guilty of first-degree murder for the 1978 strangling of 74-year-old Lorimer Grove. [footnote omitted]. The court sentenced respondent to death. After respondent's conviction and sentence were affirmed on direct review, *see State v. Schad*, 163 Ariz. 411, 788 P.2d 1162 (1989), and *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), respondent again sought state habeas relief, alleging that his trial counsel rendered ineffective assistance at sentencing by failing to discover and present sufficient mitigating evidence. The state courts denied relief.
>
> In August 1998, respondent sought federal habeas relief. He again raised a claim of ineffective assistance at sentencing for failure to present sufficient mitigating evidence. The District Court denied respondent's request for an evidentiary hearing to present new mitigating evidence, concluding that respondent was not diligent in developing the evidence during his state habeas proceedings. *Schad v. Schriro*, 454 F.Supp.2d 897 (D.Ariz.2006). The District Court alternatively held that the proffered new evidence did not demonstrate that trial counsel's performance was deficient. *Id.*, at 940–947. The Ninth Circuit affirmed in part, reversed in part, and remanded to the District Court for a hearing to determine whether respondent's state habeas counsel was diligent in developing the state evidentiary record. *Schad v. Ryan*, 606 F.3d 1022 (2010). Arizona petitioned for certiorari. This Court granted the petition, vacated the Ninth Circuit's opinion, and remanded for further proceedings in light of *Cullen v. Pinholster*, 563 U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). *See Ryan v. Schad*, 563 U.S. ——, 131 S.Ct. 2092, 179 L.Ed.2d 886 (2011). On remand, the Ninth Circuit affirmed the District Court's denial of habeas relief. *Schad v. Ryan*, 671 F.3d 708, 726 (2011). The Ninth Circuit subsequently denied a motion for rehearing and rehearing en banc on February 28, 2012.
>
> On July 10, 2012, respondent filed in the Ninth Circuit the first motion directly at issue in this case. This motion asked the court to

vacate its judgment and remand to the District Court for additional proceedings in light of this Court's decision in *Martinez v. Ryan* [citation and footnote omitted]. The Ninth Circuit denied respondent's motion on July 27, 2012. Respondent then filed a petition for certiorari. This Court denied the petition on October 9, 2012, 568 U.S. ——, 133 S.Ct. 432, 184 L.Ed.2d 264, and denied a petition for rehearing on January 7, 2013. 568 U.S. ——, 133 S.Ct. 922, 184 L.Ed.2d 713.

Respondent returned to the Ninth Circuit that day and filed a motion requesting a stay of the mandate in light of a pending Ninth Circuit en banc case addressing the interaction between Pinholster and *Martinez*. The Ninth Circuit denied the motion on February 1, 2013, "declin[ing] to issue an indefinite stay of the mandate that would unduly interfere with Arizona's execution process." Order in No. 07–99005, Doc. 102, p.1. But instead of issuing the mandate, the court decided sua sponte to construe respondent's motion "as a motion to reconsider our prior denial of his Motion to Vacate Judgment and Remand in light of *Martinez*," which the court had denied on July 27, 2012. *Id*., at 2. The court ordered briefing and, in a divided opinion, remanded the case to the District Court to determine whether respondent could establish that he received ineffective assistance of postconviction counsel under *Martinez*, whether he could demonstrate prejudice as a result, and whether his underlying claim of ineffective assistance of trial counsel had merit. No. 07–99005 (Feb. 26, 2013), App. to Pet. for Cert. A–13 to A–15, 2013 WL 791610, *6. Judge Graber dissented based on her conclusion that respondent could not show prejudice. *Id*., at A–16 to A–17, 2013 WL 791610, *7. Arizona set an execution date of March 6, 2013, which prompted respondent to file a motion for stay of execution on February 26, 2013. The Ninth Circuit panel granted the motion on March 1, 2013, with Judge Graber again noting her dissent.

On March 4, 2013, Arizona filed a petition for rehearing and rehearing en banc with the Ninth Circuit. The court denied the petition the same day, with eight judges dissenting in two separate opinions. 709 F.3d 855 (2013).

On March 4, Arizona filed an application to vacate the stay of execution in this Court, along with a petition for certiorari. This Court denied the application, with Justices SCALIA and ALITO noting that they would grant it. 568 U.S. ——, 133 S.Ct. 2548, 186 L.Ed.2d 644, 2013 WL 3155269 (2013).

Ryan v. Schad, 133 S. Ct. 2548, 2549-2550 (2013).

The Supreme Court granted Arizona's petition for certiorari seeking review of the Ninth Circuit's order of February 26, 2013. *Id.* at 2550. Its subsequent opinion noted that the Ninth Circuit had denied Schad's *Martinez* motion on July 27, 2012, and stated: "[t]here is no doubt that the arguments presented in the rejected July 10, 2012, motion were *identical to those accepted by the Ninth Circuit the following February*." *Id.* at 2551 (emphasis added). The Supreme Court found the Ninth Circuit abused its discretion by: not issuing the mandate after the Supreme Court denied certiorari review, reconsidering its previous denial of the *Martinez* motion, and remanding to the district court for *Martinez* proceedings. *Id.* at 2551-2552. It concluded, "there is no indication that there were *any extraordinary circumstances* here that called for the court to revisit an argument *sua sponte that it already explicitly rejected*." *Id.* at 2552 (emphasis added). Accordingly, the Court reversed the Ninth Circuit's judgment of February 26, 2013, and remanded with instructions for the Ninth Circuit to issue the mandate "immediately and without any further proceedings." *Id.*

Petitioner filed a petition for rehearing, which the Court denied on August 30, 2013. (Supreme Court Docket in 12-1084).

On September 3, 2013, the Arizona Supreme Court granted the State's Motion for Warrant of Execution, setting the execution date of October 9, 2013.

On September 4, 2013, the Ninth Circuit issued a mandate order stating: "pursuant to this Court's third amended opinion of November 10, 2011, the district court's September 29, 2006 judgment is affirmed in all respects."

II. THE LAW OF THE CASE PRECLUDES RULE 60(B) RELIEF.

In seeking Rule 60(b) relief, Schad primarily relies on the order from the Ninth Circuit dated February 26, 2013, which was reversed by the Supreme Court. However, as discussed above, the Ninth Circuit's mandate order specifies that it is

from the third amended opinion, upholding this Court's judgment. The third amended opinion and the order rejecting Schad's *Martinez* claim are the "law of the case." Accordingly, this Court must reject Schad's request to have this Court revisit the already-decided *Martinez* issue under the guise of a Rule 60(b) motion.

"The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Harrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993). *See also United States v. Cade*, 236 F.3d 463, 467 (9th Cir. 2000) (law of the case "requires courts to follow a decision of an appellate court on a legal issue in all later proceedings in the same case."); *Odom v. United States*, 455 F.2d 159, 160 (9th Cir. 1972) ("The law in this circuit is clear that when a matter has been decided adversely on appeal from a conviction, it cannot be litigated again on a 2255 motion").

A more specific aspect of the law of the case doctrine is the "rule of mandate doctrine," which provides that, "When a case has been once decided by this court on appeal, and remanded to the [district court], whatever was before this court, and disposed of by its decree, is considered as finally settled. The [district court] is bound by the decree as the law of the case, and must carry it into execution according to the mandate." *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) (quoting from *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895)). A district court cannot revisit its already final determinations unless the mandate allows it. *United States v. Cote*, 51 F.3d 178, 181 (9th Cir 1995).[1]

The Ninth Circuit's third amended opinion affirmed this Court's judgment,

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[1] Moreover, the denial of the *Martinez* claim is *res judiciata*. *See Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466 fn. 6 (1982). Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Id.*

which rejected Claim P. *Schad v. Ryan*, 671 F.3d 708, 722 (9th Cir. 2011). And the Supreme Court noted that the Ninth Circuit's Order of July 27, 2012, "explicitly rejected" Schad's *Martinez* argument. *Ryan v. Schad*, 133 S. Ct. at 2552. Thus, under the law of the case doctrine and the law of the mandate doctrine, this Court cannot reconsider the *Martinez* issue already rejected by the Ninth Circuit.

Schad proceeds as though the Ninth Circuit's reversed order of February 26, 2013, and the related mandate control this Court's decision on the current motion. However, that vacated order and mandate are not the law of the case. *See Doe v. Cheney*, 885 F.2d 898, 909 (D.C. Cir. 1989) ("because the Supreme Court heard this case on certiorari and reversed, the mandate in our original decision never took effect.") (citing 1B MOORE, LUCAS, CURRIER, MOORE'S FEDERAL PRACTICE, ¶ 0.404[5.–3].).

Again citing the recently-reversed order from the Ninth Circuit, Schad argues that *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), does not prevent this Court from reconsidering Claim P. (Motion, at 5-6.) However, the dispositive decision on Claim P is the Ninth Circuit's third amended opinion, which recognized that *Pinholster* controls this issue, found that the state courts did not unreasonably apply *Strickland* in rejecting the IAC sentencing claim presented in Claim P, and affirmed this Court's denial of Claim P. *Schad v. Ryan*, 671 F.3d at 722. The Ninth Circuit's holding that *Pinholster* controls the analysis of Claim P cannot be reconsidered by this Court. Moreover, the Ninth Circuit has recently reiterated that *Pinholster* applies when a claim had been adjudicated on the merits in state court. *Detrich v. Ryan*, 2013 WL 4712729, *7 (9th Cir. Sept. 3, 2013). Thus, this Court can neither reconsider its previous rejection of Claim P nor reconsider the re-proffered declaration from Dr. Charles Sanislow. (Motion, Attachment C.)

III. EVEN IF THIS COURT COULD RECONSIDER ITS JUDGMENT, *MARTINEZ* DOES NOT APPLY BECAUSE THERE WAS NO PROCEDURAL DEFAULT ON CLAIM P.

The law of the case aside, *Martinez* does not even apply to Claim P, because this Court did not find a procedural default that could be excused under *Martinez*. Rather, it analyzed Claim P on the merits, both in view of the state court record and additional material submitted to this Court in the federal habeas proceeding. *See Schad v. Schriro*, 454 F.Supp.2d 897, 936-944 (D. Ariz. 2006). As the Ninth Circuit recently made clear in *Detrich*, "*Martinez* does not apply to claims that were not procedurally defaulted, but were, rather, adjudicated on the merits in state court." 2013 WL 4712729, at *7 (plurality opinion). *See also id.* at *28 (J. Graber dissenting) (holding of *Martinez*—that procedural default of an IAC claim can be excused if it was due to PCR counsel's ineffectiveness—"has no application when the claim was *not defaulted*.") (emphasis in original).

The reversed Ninth Circuit order of February 26, 2013, *sua sponte* found 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. *Schad v. Ryan*, 2013 WL 791610, **5-6 (9th Cir. 2013). First, even assuming *arguendo* that the new evidence first introduced in federal habeas somehow transformed the IAC-sentencing claim rejected by the state courts into a new or additional IAC claim, this Court rejected that "new" IAC-sentencing claim *on the merits* because it found the new evidence neither showed deficient performance nor prejudice. *Schad v. Schriro*, 454 F.Supp.2d at 940-944. *See Stokley v. Ryan*, 659 F.3d 802, 808 (9th Cir. 2011) (prisoner not entitled to relief either under *Pinholster* review or "if we construe his federal claim as unexhausted such that we may consider the supplemental evidence he offered to the district court."). Second, the new evidence did not create a new claim, for, as stated by the

Supreme Court: "the only claim presented [in the July 10, 2012, motion] was that respondent's postconviction counsel *should have developed more evidence to support his ineffective-assistance-of-trial-counsel claim*." *Ryan v. Schad*, 133 S. Ct. at 2552 (emphasis added).

The applicability of *Pinholster*, rather than *Martinez*, to this case is made manifest by Chief Judge Kozinski's dissenting opinion from the Ninth Circuit's reversed opinion in *Pinholster*. Chief Judge Kozinski opined that the Ninth Circuit's habeas review should have been limited to the record presented in the state habeas petition. *Pinholster v. Ayers*, 590 F.3d 651, 688-690 (9th Cir. 2009) (C.J. Kozinski, dissenting). The dissent warned:

> This is the most dangerous part of the majority opinion as it blots out a key component of AEDPA. *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.

590 F.3d at 690 (emphasis added).

Thus, when the Supreme Court considered *Pinholster*, it was in a similar posture to Schad's case. California contended there "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*. The Supreme 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 *Lopez v. Ryan*, 678 F.3d 1131, 1137 (9th Cir. 2012), the Ninth Circuit noted the problem with the theory that new evidence makes a new claim:

> Lopez argues that it is but a small expansion of *Martinez* to hold that the "narrow exception" in *Martinez* necessarily applies not only to PCR counsel's ineffective failure to raise a claim (the subject of procedural default) but also to PCR counsel's ineffective failure to develop the factual basis of a claim (the subject of § 2254(e)(2)). We need not decide whether Lopez is correct, though we do note tension between his theory and the Supreme Court's jurisprudence in this area, *see, e.g., Cullen v. Pinholster*, —— U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

Schad discusses at some length an unpublished opinion from the Fourth Circuit, *Moses v. Branker*, 2007 WL 3083548 (4th Cir. Oct. 23, 2007). (Motion, at 21-23.) First an unpublished decision is not even binding precedent in the Fourth Circuit. *See Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334, 338 (4th Cir. 2009). Second, *Moses* is both pre-*Pinholster* and pre-*Martinez*. Third, to the extent *Moses* relies on *Vasquez v. Hillery*, 474 U.S. 254 (1986), for the proposition that a habeas petitioner who presents facts that "fundamentally alter" a claim has not properly exhausted the altered claim and is subject to procedural default, that reliance is no longer valid under *Pinholster*, for the reasons discussed above. Fourth, unlike the present case, the district court in *Moses* actually *found a procedural default*, and that finding was upheld by the Fourth Circuit. *Moses*, at **2-3. Fifth, the Fourth Circuit ultimately found Moses had not set forth a sufficient basis to excuse his procedural default on his claim that trial

counsel failed to adequately investigate mitigating circumstances at sentencing. *Id.* at *3.

Schad also cites *Dickens v. Ryan*, 688 F.3d 1054 (9th Cir. 2012). But the Ninth Circuit granted rehearing *en banc*, and ordered: "The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit." *Dickens v. Ryan*, 704 F.3d 816, 817 (9th Cir. 2013).

Schad argues that, when this case was previously before this Court, Respondents argued that the proffered new evidence placed the claim in a significantly different posture, and thus made it not fairly exhausted and procedurally defaulted. (Motion, at 21.) But Respondents made that argument when they thought, like California in *Pinholster*, that *Hillery* set forth the proper analysis, but the Supreme Court clarified in *Pinholster* that a federal court must decide the IAC claim on the state court record. *See Pinholster*, 131 S. Ct. at 1402 n.11. Also, this Court *rejected* Respondents' procedural default theory and proceeded to analyze Claim P on the merits, and alternatively considered the newly-proffered habeas evidence. Finally, even if *Hillery* were still good law, it would not aid Schad because the essence of his federal claim—that counsel provided ineffective assistance at sentencing by failing to adequately investigate and present mitigating evidence—was the same claim he presented to the state PCR court. *See Stokley*, 659 F.3d at 809.

Through his new evidence/new claim theory, Schad attempts to manufacture a procedural default to be used as a sword against Respondents' interest in finality. That is a perverse use of the affirmative defense of procedural default. *See generally Trest v. Cain*, 522 U.S. 87, 89 (1997). *Cf. Wood v. Milyard*, 132 S. Ct. 1826, 1834-35 (2012) (abuse of discretion for appellate court to find procedural default not found by district court).

Finally, Schad attempts to manufacture a different procedural default on this

claim by erroneously claiming that, when he reasserted this issue in his most recent state PCR, the state court found it precluded under Rule *32.2(a)(3)*. He argues that the preclusion finding was made because the claim had *not* been previously raised, thereby showing that the state court found the new evidence constituted a new claim. (Motion, at 24.) To the contrary, the state PCR court found the claim barred precisely because it *had been raised* in Schad's first Rule 32 petition. (Motion, Attachment A, at page four.) Moreover, the state court specifically agreed with the Ninth Circuit's analysis of the same claim in the third amended opinion. *Id.*, citing *Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011). Thus, the most recent state PCR ruling confirms that Schad has made only one IAC-sentencing claim, which was rejected on the merits by the state courts.

IV. EVEN IF THIS COURT WERE FREE TO CONDUCT A *MARTINEZ* ANALYSIS, SCHAD WOULD NOT PREVAIL.

Furthermore, even if this Court could reconsider the issue and even if *Martinez* could apply, he cannot satisfy its requirements. *See Miles v. Ryan*, 713 F.3d 477, 494-495 (9th Cir. 2013). *Martinez* requires a prisoner to make a substantial showing on four separate points: (1) trial counsel's performance was constitutionally deficient, (2) trial counsel's deficient performance was prejudicial, (3) PCR counsel's performance was constitutionally deficient, and (4) PCR counsel's deficient performance prejudiced the prisoner's case. *See, e.g., Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012).

Schad's IAC-sentencing claim is not substantial. *See, e.g., Leavitt v. Arave*, 682 F.3d 1138, 1140-41 (9th Cir. 2012) (*per curiam*). This Court previously found that Schad had not "demonstrated that trial counsel's performance at sentencing was either deficient performance or prejudicial." *Schad v. Schriro*, 454 F. Supp.2d at 941. Because this Court has already found the underlying IAC-sentencing claim to be meritless, there is no reason to re-analyze whether the claim is "substantial" under *Martinez.*

Schad does not show why this Court should reconsider its decision, even if it were inclined to do so. "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). "[T]he standard for judging counsel's representation is a most deferential one." *Id*. The Ninth Circuit's third amended panel opinion noted that sentencing counsel filed a 39-page sentencing memorandum proffering 12 mitigating circumstances and presented testimony at sentencing from 15 witnesses, "including correctional officers, friends, relatives and a psychiatrist." *Schad v. Ryan*, 671 F.3d at 718-719. It further noted that the pre-sentence report prepared by a probation officer "included discussions of Schad's troubled childhood, favorable character reports from several of Schad's friends and Arizona prison officials, and Schad's good behavior and achievements in prison." *Id.* at 719. This Court's decision noted that counsel also proffered as in mitigation expert psychiatric testimony that Schad was not a violent individual. *Schad v. Schriro*, 454 F.Supp.2d at 941, fn.28. In rejecting Claim P, this Court concluded that counsel reasonably chose the strategy of showing that Schad was basically a good man, who would benefit from rehabilitation; arguing that he was of "good or stable character." *Schad v. Schriro*, 454 F.Supp.2d at 941. *See Miles*, 713 F.3d at 491 (failure to investigate social history further was reasonable when strategy was to show prisoner was a relatively normal person, and additional social history was irrelevant to chosen strategy).

Strickland itself supports this Court's denial of relief on Claim P:

> In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. [citation omitted] Nor did he request a psychiatric examination, since his conversations with his

> client gave no indication that respondent had psychological problems. [citation omitted].

Strickland, 466 U.S. 672-73. The Supreme Court held that, under these circumstances, the attorney's performance was neither deficient under the prevailing norms nor prejudicial: "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure." *Id*. at 700. The Court found no prejudice even though his attorney failed to offer any mitigating evidence, although fourteen friends and relatives of the capital murder defendant were willing to testify that he was "generally a good person," and unoffered medical reports described defendant as "chronically frustrated and depressed because of his economic dilemma." *Id.*

Even considering the new evidence first presented in federal habeas proceedings, Schad has not shown a substantial claim of deficient performance under *Strickland*. *See Miles*, 713 F.3d at 494-95 (*Martinez* did not help prisoner because new evidence uncovered during federal habeas proceedings was insufficient to demonstrate that his lawyer's investigation during the state-court proceedings was unreasonable); *Cook v. Ryan*, 688 F.3d 598, 612 (9th Cir. 2012) (finding support for denial of Rule 60(b) relief where petition failed to set forth a substantial claim of either deficient performance or prejudice by pretrial counsel); *Stokley*, 659 F.3d at 809 ("Even considering the new evidence, we conclude that Stokley has not presented a colorable claim of ineffective assistance of counsel.").

Even if Schad had offered all of the evidence he later submitted in federal court, it would not have mattered because this Court found it was cumulative to what was already presented: "The affidavits submitted by family members and psychologists repeat, rather than corroborate or elaborate on, the specific details of abuse included in the presentence report." *Schad v. Schriro*, 454 F.Supp.2d at 943. This Court specifically addressed Dr. Sanislow's declaration, "when documenting

the abuse Petitioner suffered," frequently relied "on the details contained in the presentence report." *Id.* at 943. This Court found the new material "is either cumulative or, . . . , contradictory to the portrait of Petitioner that trial counsel presented at sentencing." *Id.* at 944. *See Miles*, 713 F.3d at 492-94 (finding that the addition, during post-conviction proceedings of cumulative mitigating evidence relating to social history was insufficient to demonstrative prejudice even under *de novo* review). *See also Wong v. Belmontes*, 558 U.S. 15, 23 (2009) ("Additional evidence on these points would have offered an insignificant benefit, if any at all."); *Schriro v. Landrigan*, 550 U.S. 465, 481 (2007) ("the mitigating evidence he [Landrigan] seeks to introduce would not have changed the result."); *Bible v. Ryan*, 571 F.3d 860, 871-72 (9th Cir. 2009).

Because there is no underlying substantive IAC issue, Schad cannot prevail under a *Martinez* analysis. But, additionally, Schad has failed to show PCR counsel rendered deficient performance or that any deficient performance by PCR counsel prejudiced Schad.

Schad argues that Respondents have conceded that PCR counsel was deficient (Motion, at 25-26), but that is not true. Rather, Respondents argued that Schad was not diligent in presenting additional facts to the state PCR court, which is a different analysis based on 28 U.S.C. Section 2254(e)(2), not *Strickland*. Diligence concerns *how* a claim was presented, not whether counsel was deficient under *Martinez* for not raising a claim. Moreover, the Ninth Circuit, in its second amended opinion, *Schad v. Ryan*, 606 F.3d 1022, 1043 (9th Cir. 2010), did not find PCR counsel deficient, but rather found that "Schad's legal team attempted in state court to develop a factual basis for his ineffective assistance claim, but faced several obstacles." This Court then listed the difficulties faced by PCR counsel. *Id.* Accordingly, it simply cannot be said that "Petitioner's postconviction counsel performed his duties so incompetently as to be outside the 'wide range of

professionally competent assistance.'" *Miles*, 713 F.3d at 494, *quoting Strickland*, 466 U.S. at 690.

Moreover, Schad cannot make a substantial showing of prejudice from any deficiency by PCR counsel. This Court has already considered the new evidence Schad first presented in federal habeas review, that Schad argues sentencing or PCR counsel should have presented in state court proceedings. It found that "even if Petitioner had been diligent [in state PCR proceedings] and the new materials were properly before this Court, Claim P is without merit. *Schad v. Schriro*, 454 F.Supp.2d at 940. It concluded: "Despite Petitioner's failure to develop these facts in state court, the Court has considered these materials and concludes that the trial court's denial of Petitioner's sentencing-stage IAC claim was not an unreasonable application of clearly established federal law as set forth in *Strickland*. Petitioner is not entitled to relief on Claim P." *Id.*

There is no reason for this Court to reconsider evidence it has already considered regarding Claim P, but found did not establish a *Strickland* claim.

V. RULE 60(B)(6) AND THIS CLAIM.

Finally, Schad argues that the issuance of *Martinez* constitutes extraordinary circumstances sufficient for this Court to reopen its final judgment pursuant to Rule 60(b)(6). In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Supreme Court held that a motion pursuant to Rule 60(b) filed in federal habeas proceedings is subject to AEDPA's requirements for successive petitions under 28 U.S.C. § 2244(b). *Id*. at 531. When seeking relief under Rule 60(b)(6), a prisoner must show "extraordinary circumstances" justifying the reopening of a final judgment. *Id.* at 535. *See also Ackermann v. United States*, 340 U.S. 193, 199 (1950) (requiring a showing of "extraordinary circumstances" before a final judgment may be reopened). *Gonzalez* concluded that the prisoner had not asserted "extraordinary circumstances" justifying relief. *Gonzalez*, 545 U.S. at 538.

Rule 60(b) does not allow a party to reassert a claim that has been explicitly rejected by the federal appellate court. Because the Ninth Circuit has previously rejected the *Martinez* argument, Schad cannot show extraordinary circumstances that would allow this Court to reconsider its judgment.

Schad argues that, to determine whether there are extraordinary circumstances, this Court should employ the Ninth Circuit's test from *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). When a *Martinez* issue is intertwined with a Rule 60(b) motion, the federal court normally has some "leeway as to how to approach" the federal habeas case. *See Lopez*, 678 F.3d at 1135. However, the "extraordinary circumstances" analysis cannot aid Schad here.

First, the United States Supreme Court, assuming *arguendo* that the Ninth Circuit had the power not to issue the mandate following certiorari denial, found that the proposed reconsideration of the previously-rejected *Martinez* claim was not an "extraordinary circumstance" and therefore the Ninth Circuit abused its discretion in staying the mandate and reconsidering the argument it had "already explicitly rejected." *Ryan v. Schad* , 133 S. Ct. at 2549 & 2552. Thus, the issuance of *Martinez* cannot now be an "extraordinary circumstance" that would allow this Court to reconsider its prior judgment. Moreover, the "law of the case" bars Schad from litigating the *Martinez* issue under the guise of a Rule 60 motion.

Second, unlike *Lopez*, where the *Martinez* claim was being presented to the federal courts for the first time in a Rule 60 motion, Schad presented the issue to the Ninth Circuit after the third amended opinion, and that court summarily rejected it, after which the Supreme Court denied his petition for certiorari review based on *Martinez*. *See Lopez*, 678 F.3d at 1136 ("Until the Supreme Court decided *Martinez* after Lopez's federal proceedings had become final, Lopez had never pursued the theory that he now advances.).

Third, *Lopez* found there was no substantial underlying IAC issue that would

permit relief from a final judgment. 678 F.3d at 1137-1139. As discussed above, this Court already considered the new evidence Schad first proffered in federal habeas, but still found no prejudice because the new evidence would not have changed the sentence. 454 F. Supp.2d at 944. *Cf. Lopez*, 678 F.3d at 1139 ("Even accepting and reviewing de novo Lopez's late-offered evidence at the first habeas proceeding, Lopez fails to meet the *Martinez* test of substantiality as to prejudice.").

Fourth, in *Phelps*, the Ninth Circuit agreed that the law had changed *after* the Ninth Circuit affirmed the dismissal of his habeas petition. 569 F.3d at 1129. In this case, by contrast, the Ninth Circuit had the opportunity to consider the *Martinez* argument, but summarily denied it. Moreover, *Lopez* distinguished *Phelps*, on the basis that the "connection between the intervening change of law and Lopez's case is not as straightforward." 678 F.3d at 1137. Also, because Lopez did not present a substantial underlying claim of ineffective assistance, the Ninth Circuit declined to reopen his habeas case under Rule 60. *Id. See also Styers v. Ryan*, 2013 WL 149919, at *11 (D. Ariz. Mar. 20, 2013) (prisoner's *Martinez* motion failed to demonstrate requisite extraordinary circumstances necessary to warrant relief under Rule 60(b)(6)).

VI. CONCLUSION.

For the above reasons, Respondents respectfully request this Court to deny Schad's Rule 60(b)(6) motion.

Respectfully submitted,

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I hereby certify that on September 6, 2013, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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