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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

*****DEATH PENALTY CASE*****
EXECUTION SCHEDULED OCTOBER 9, 2013 10:00 A.M.

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

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The Ninth Circuit has a test for determining when a district court may entertain a motion pursuant to Fed. R. Civ. P. 60(b) in a habeas context. *Phelps v. Alameida*, 569 F.3d 1120, 1141 (9th Cir. Cal. 2009). Petitioner filed his motion in accordance with that test and set out how each prong favored his motion. Docket Entry No. 145, Motion, pp.

28-38. But Respondent substantially ignores the *Phelps* factors, giving them mere lip-service. Docket Entry No. 147, Response, pp. 16-17. To the extent that Respondent failed to address a prong of *Phelps*, that prong should be viewed as conceded and weighed in favor of Schad.[1] Schad will address Respondent's arguments in the order he presented them. It should be noted at the outset that Respondent's position hinges on his argument that the United States Supreme Court decision that the Ninth Circuit did not have the authority to withhold the mandate in this case prevents this Court from considering Schad's motion under 60(b). If he is mistaken, and he is, then Schad's motion is well-taken. It is.

I. THE LAW OF THE CASE DOES NOT PRECLUDE RELIEF; RESPONDENT'S INTERPRETATION OF THE HOLDING IN *SCHAD V. RYAN*, 133 S.CT. 2548 (2013) IS MISTAKEN AT BEST, DISINGENUOUS AT WORST

Respondent spends the vast majority of his response repeating his argument that the Ninth Circuit has already decided the question of the applicability of *Martinez* to Schad's claim by its July, 2012, order denying Schad's Motion to Remand his Appeal to the District Court. The problem with Respondent's argument is that the Court's 2012 order did not address whether, if at all, *Martinez* applied to Schad's case. The order simply denied a procedural request. Schad asked for a remand in a post-rehearing motion. The panel denied the request to remand the case. They did so in an unexplained order. The Order reads: "The petitioner-appellant's Motion to Vacate Judgment and Remand to the District Court is DENIED." *Schad v. Ryan*, No. 07-99005, Docket Enty No. 90.

[1] Respondent ignored the following four of six factors: Diligence, Reliance, Delay, and Comity.

On its face, the order is one denying a procedural request rather than a ruling on the merits of the application of Martinez to Schad's claim.[2] The order is both reasonable and sensible in light of the procedural history in Schad's case. After issuing its opinion in 2011, The Court initially refused to entertain a petition for rehearing in Schad's case. "Petitioner-appellant's motion for leave to file petition for rehearing and rehearing en banc is DENIED." *Schad v. Ryan*, No. 07-99005, Docket Entry No. 80. Petitioner successfully obtained a reversal of that order and an en banc petition was filed. A response to the petition was ordered. The Petition was ultimately denied. In it February 28, 2012, order denying Petitioner's request for rehearing and rehearing en banc, the Court explicitly warned, "Further petitions for rehearing and rehearing en banc **shall not be entertained**." *Schad v. Ryan*, No. 07-99005, Docket Entry No. 86 (emphasis added).

The order denying Schad's request to vacate the court's opinion and remand the case cannot be fairly construed as law of the case, or *res judicata*.

Further, the Supreme Court's recent opinion in Schad's case cannot be fairly construed as commenting on the availability of equitable relief under Rule 60(b). The Supreme Court was asked to review the Ninth Circuit's deviation from normal mandate procedures. The Court began its analysis of this sole issue by noting that the default rule is "[t]he court of appeals *must issue the mandate immediately* when a copy of the Supreme Court order denying the petition for writ of certiorari is filed." *Ryan v. Schad*,

[2] Respondent opposed the motion on procedural grounds. *Schad v. Ryan*, No. 07-99005, Docket Entry No. 90, Response, pp. 2-3 (arguing that the motion to vacate is an unauthorized and untimely second petition for rehearing).

132S.Ct. 2548, 2550 (2013), *quoting* Fed. R. App. P. 41 (d)(2)(D)(emphasis added by the Court). The Court went on to emphasize that "[d]eviation from normal mandate procedures is a power of 'last resort, to be held in reserve against grave, unforeseen contingencies.'" *Id.* at 2551, *quoting Calderon v. Thompson*, 523 U.S. 538, 550 (1998). The Court went on to caution that assuming arguendo that the lower appellate courts have the authority to withhold the mandate, it will hold the courts to a standard of "extraordinary circumstances that could **constitute a miscarriage of justice**." *Id.* (emphasis added). A miscarriage of justice standard requires a habeas petitioner to establish actual innocence of the offense. *See House v. Bell*, 547 U.S. 518 (2006); *Schlup v. Delo*, 513 U.S. 298 (1995). Schad's claim did not present a case of actual innocence.

Nowhere in its opinion does the Court pass on the substance of Schad's *Martinez* argument. Nothing in the opinion can fairly be read to apply to the equitable motion under rule 60(b) presented here.

The subsequent history in the case of *Thompson v. Bell*, 545 U.S. 794 (2005) illustrates the point. Thompson's case also presented a situation where a court of appeals revisited its opinion after the Supreme Court denied certiorari but before issuing its mandate. There the Supreme Court held the Court of Appeals had abused its discretion in not issuing the mandate. In Thompson, the Supreme Court noted that the evidence which caused the Court of Appeals to revisit its opinion was "not of such a character to warrant the Court of Appeals' extraordinary departure from standard appellate practice." *Id.* at 808-809. The Court goes on at some length to discuss just how the evidence would not

have likely led to relief, going so far as to observe, "Thompson still would have faced an uphill battle to obtaining federal habeas relief." *Id*.

Importantly, for this Court's purposes, the Supreme Court went on to describe the fact that Thompson had ongoing proceedings in the federal district court and that "the District Court will have an opportunity to address these matters again and in light of the current evidence." *Id.* at 813. Thompson's ongoing proceedings were under a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). *Thompson v. Bell*, No. 4:98-cv-00006, Docket Entry No. 149 (E.D. Tenn. June 4, 2004). Thus, the Court clearly understood that its opinion was relevant only to the procedural question.

So it is here.

II. SCHAD'S CLAIM IS PROCEDURALLY DEFAULTED; MARTINEZ APPLIES

A. LAW OF EXHAUSTION

Exhaustion requires that a petitioner fairly present his claim to the state court. *Weaver v. Thompson*, 197 F.3d 359, 365 (9th Cir. 1999). Fair presentation requires the petitioner to present both the operative facts that support his claim as well as his federal legal theory that his claim is based on so that the state court has a fair opportunity to apply the controlling law to the facts which bear upon the constitutional claim. *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008). "[F]or 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 v. Netherland*, 518 U.S. 152, 162–63 (1996). It is hornbook law that new

facts which fundamentally alter a claim render that claim unexhausted and thus procedurally defaulted. *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994).

Contrary to Respondents assertion, Response at pp. 9-10, *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) did not overrule *Vasquez v. Hillery*, 474 U.S. 254 (1986). In *Pinholster* the Court observed, "No party disputes that Pinholster's federal petition alleges an ineffective-assistance-of-counsel claim that had been included in both of Pinholster's state habeas petitions." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1402 (2011). *Hillery* is not mentioned, let alone cited to or overruled, in *Pinholster*. Respondent does not cite a single case where any court has held that *Vasquez* has been overruled. Petitioner's research has found district court opinions which hold the opposite. *Wheeler v. Cox*, 3:12-cv-00469-MMD-WGC, dkt. no. 27 (D. Nev. May 29, 2013); *Lewis v. Nevada*, 2:10–cv–01225–PMP–CWH, dkt. no. 53, at 2–3 (D.Nev., Feb. 4, 2013); *Aytch v. Legrand*, 3:10–cv–00767–RCJWGC, dkt. no. 33, at 2 n. 2 (D.Nev. March 29, 2013); *Moor v. Palmer*, No. 3:10–cv–00401–RCJ–WGC, dkt. no. 27, at 9–10 (D .Nev., July 17, 2012).

B. CLAIM P OF THE PETITION IS A NEW, PROCEDURALLY DEFAULTED CLAIM

AEDPA did not disturb the well-established principles of exhaustion. In *Moorman v. Schriro*, 426 F.3d 1044 (9th Cir. 2005), the Ninth Circuit observed that a petitioner who raises a claim of ineffective assistance of counsel based on specific instances of alleged

ineffectiveness cannot add new instances of misconduct to the claim without rendering the previously exhausted claim unexhausted.

> Moormann contends that the facts of these claims were present in the state record and that they are fundamentally the same as the claims he did present in state court -- that his "counsel was ineffective for failing to investigate and present a viable defense." He does not contend that these more specific claims were presented in any state proceeding, and indeed they were not. …
>
> Moormann points out that we have held that, so long as the petitioner presented the factual and legal basis for his claims to the state courts, review in habeas proceedings is not barred. *E.g.*, *Chacon v. Wood*, 36 F.3d 1459, 1467-68 (9th Cir. 1994). **This does not mean, however, that a petitioner who presented any ineffective assistance of counsel claim below can later add unrelated alleged instances of counsel's ineffectiveness to his claim**. *See Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc).

Moormann v. Schriro, 426 F.3d 1044, 1056 (9th Cir. Ariz. 2005).

Respondent admits that his previous position in this litigation was that the evidence presented by Schad fundamentally altered the claim in such a way that it was an unexhausted, defaulted, new claim. Response, p. 10. Respondent now regrets that decision, but points to no change in the law that allows this Court to ignore the previous concession.[3]

This Court's previous merits holding on Petitioner's claim of ineffective assistance of sentencing counsel was limited to the claim that was presented and adjudicated on the

[3] Respondent told the Court that Schad's new evidence placed his claim in a different evidentiary posture, "violating the exhaustion requirement." R. 116, p. 4 (Respondent's Opposition To Motion To Expand Record).

merits in the state court. It is that holding, alone, that was upheld by the Ninth Circuit after remand from the Supreme Court given the holding in *Pinholster*. This court's alternative dicta regarding the Petitioner's new claim of ineffectiveness for failure to investigate, present and properly prepare competent expert testimony and mitigation was reversed by the panel majority. The panel majority deleted that analysis from its amended opinion. It did not change its mind. The only thing the panel majority passed on was the old claim that was fairly presented to the state court. The panel majority could not have reached the new claim at the time of the appeal because the new claim was procedurally defaulted and ineffective assistance of post-conviction counsel was not available as an argument for cause. Nearly one month after rehearing was denied in an order forbidding the filing of any further rehearing petitions the Supreme Court decided *Martinez v. Ryan*. Thus, Schad's new claim was not available for federal court merits review until *Martinez.*

C. SCHAD'S NEW CLAIM IS IN A SIMILAR POSTURE TO THE NEW CLAIM IN *DICKENS*

Respondent ignores the import of the pending Ninth Circuit proceedings in *Dickens v. Ryan*, No. 08-99017. Respondent correctly notes the panel opinion is no longer precedent, but the panel opinion is instructive. The pending en banc decision in *Dickens* is directly relevant to Schad's case.

First, it is Respondent who urged the *en banc* court to review the *Dickens* case precisely because the panel decision in *Dickens* conflicted with the panel decision in *Schad*. *Id.*, Docket Entry No. 69-1, p. 1 (Rule 35 Statement Of Reasons For Granting

Rehearing). It is entirely possible that the Ninth Circuit en banc is poised to overrule the panel opinion in *Schad* in light of *Martinez.* This fact, in and of itself, is an extraordinary circumstance warranting 60(b) relief, or at a minimum a stay of execution pending the outcome of *Dickens*.

Second, the panel's treatment of Dickens new claim is instructive for this Court. The panel in *Dickens* followed a well-established test and found that the claim Dickens presented in federal court was different from the claim he presented in state court. The same is true for Schad.

Respondent misleads the court by alleging that Schad's claim is on all fours with the claim at issue in *Pinholster*.[4] It is not. The claim at issue in *Pinholster* was presented to the state court and fully supported by evidence presented at a lengthy evidentiary hearing. No party in *Pinholster* complained about the fairness of the state court process. Pinholster simply sought to present additional expert testimony in federal court on the same point that expert testimony had been offered in state court. Schad's case is different.

Schad's state court claim was narrow and unsupported by evidence. Schad's claim was limited to an allegation that "the presentence report was inadequate resulting in

[4] Respondent advances a confusing and difficult to follow argument that *Pinholster* must apply here because a failure to apply *Pinholster* to a new, procedurally defaulted claim would encourage sandbagging. While respondent does not really explain how this argument is responsive to the claim that Petitioner's claim is new, it also fails to acknowledge that the Ninth Circuit, ***en banc***, has rejected any concerns regarding sandbagging and *Martinez* arguments. "The concern that gave rise to the strict "cause" and "prejudice" rule is not at issue in a *Martinez* motion. There is no concern about competent counsel who might 'sandbag' at trial. The premise of *Martinez* is incompetent counsel. Indeed, the premise is two incompetent counsel-trial counsel and state PCR counsel. This quite different circumstance is reflected in the Court's more lenient rule in *Martinez* for excusing procedural default." *Detrich v. Ryan,* 2013 WL 4712729 *5 (9th Cir. 2013).

the Court not having available significant mitigating evidence prior to imposing the death penalty." *Schad v. Arizona*, No. CR 8752, Supplemental Statement of Grounds for Relief, p. 7, see also *id.* pp. 9, 11. The post-conviction court described the claim as "defendant contends that counsel was ineffective for failing to uncover mitigating evidence that might exist." *Schad v. Arizona*, No. CR 8752, June 21, 1996 Minute Entry, p. 2. The post-conviction court's description was not surprising given PCR counsel's utter failure to conduct the thorough investigation of Schad's family background and history that she was obligated to conduct. The PCR counsel did not request appointment of a mental health expert or ever allege that Mr. Schad suffered from any sort of mental illness. PCR counsel did not offer social history records, data, or interviews. The PCR court did not conduct an evidentiary hearing.

Clearly, the claim presented in state court was a far different claim than that presented to this Court on initial habeas submission. Indeed the two separate and distinct claims bear little resemblance to one another. It is Petitioner's new claim, and all of the evidence which supports it, including the expert testimony of Drs. Sanislaw and Leibowitz, and the exhibits that corroborate their findings[5] that Petitioner claims is procedurally defaulted and thus subject to federal habeas review because he can establish cause under *Martinez.* [6] The en banc opinion in *Detrich* holds that *Martinez* allows:

[5] Docket Entries 100, 115. The new evidence is in multiple volumes, 700 pages in length.
[6] Because the law at the time was unclear as to whether Schad was required to exhaust his *Martinez* cause argument, he brought his argument as a claim for relief in successive Rule 32. The PCR court, who was not the sentencing court, denied the claim on grounds that *Martinez* is a equitable procedural defense in federal court and not a separate state court claim. There are a

> new claims of trial-counsel IAC, asserted for the first time on federal habeas, even if state PCR counsel properly raised other claims of trial-counsel IAC. The Court implicitly confirmed this reading in *Trevino*, where it held that Martinez applied to Trevino's procedurally defaulted trial-counsel IAC claims even though Trevino's state PCR counsel had presented other trial-counsel IAC claims during the initial-review collateral proceeding.

Detrich, at *9.

The argument advanced by Respondent that *Pinholster* should control this Motion under Rule 60(b) was rejected by the en banc court in Detrich:

> However, *Pinholster* does not prevent a district court from holding an evidentiary hearing in a *Martinez* case. *Pinholster* applies when a "claim" has been " 'adjudicated on the merits in State court proceedings.' " *Id.* at 1398 (quoting 28 U.S.C. § 2254(d)). But *Pinholster* 's predicates are absent in the context of a procedurally defaulted claim in a *Martinez* case in which a habeas petitioner seeks to excuse his default. First, "cause" to excuse a procedural default under *Martinez* is not a "claim." A finding of IAC by the PCR counsel under *Martinez* is only an "equitable" ruling that there is "cause" excusing the state-court procedural default. *Martinez*, 132 S.Ct. at 1319–20. Second, in a *Martinez* case, neither the underlying IAC claim nor the question of PCR-counsel ineffectiveness has been adjudicated on the merits in a state-court proceeding.
>
> *Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him. *See Strickland*, 466 U.S. at 694 (noting the unfairness of applying the restrictive "newly discovered evidence standard" where ineffective assistance of counsel was the reason the evidence was not discovered earlier). The same is true of the factual record of his trial-counsel's

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number of other problems, errors, and inaccuracies in the PCR court's order, but those need not be addressed since Respondent told the Ninth Circuit that the Rule 32 order had no impact on Schad's argument that he was entitled to relief under *Martinez. Schad v. Ryan*, 2013 U.S. App. LEXIS 5595 *8, n.1 (9th Cir. Feb. 26, 2013)(Respondent advised the Court that state court decision on successor Rule 32 "has no effect on this Court's [the Ninth Circuit's] review of this claim" because it decided the Martinez issue only under Arizona state law and it was not bound to follow *Martinez*. Respondents-Appellees' Supp. Br. at 18, Dkt. 103.")

> ineffectiveness. In deciding whether to excuse the state-court procedural default, the district court thus should, in appropriate circumstances, allow the development of evidence relevant to answering the linked Martinez questions of whether there was deficient performance by PCR counsel and whether the underlying trial-counsel IAC claims are substantial.

Id., at *7-8.

Finally, Petitioner acknowledges that the Ninth Circuit's February 26, 2013 order has been vacated, but the Supreme Court did not address the question presented here in a motion pursuant to Rule 60(b). This Court has the benefit of knowing that the panel majority agrees that the claim Schad presented in federal habeas so fundamentally altered the claim presented to the state court that the claim is a new, procedurally defaulted claim. The Supreme Court did not reverse or criticize that holding. Respondent invites error when it urges this Court to simply forget what it already knows.

III. SCHAD'S CLAIM IS SUBSTANTIAL; TEST IS "DEBATABLE AMONG JURISTS OF REASON"

While Respondent acknowledges that the test for determining whether a petitioner may proceed under Martinez is substantiality, he fails to define, analyze, or apply the test. They also mislead the Court as to the proper analytical framework. Though the Ninth Circuit's en banc decision *Detrich v. Ryan* was announced prior to Respondent's filing, and Respondent cites Detrich for another reason, he completely ignores the holding of Detrich and its impact on this Court's analysis.

A. THE THRESHHOLD TEST FOR SUBSTANTIALITY IS EXTREMELY LENIENT

The Detrich opinion announced the framework in which *Martinez* arguments are to be addressed in the Ninth Circuit. A prisoner must show four things: First, that his underlying claim is substantial. Second, that there is a substantial claim of ineffective assistance of post-conviction counsel. Third, that the state collateral review proceeding was the first opportunity to raise the IAC claim. Fourth, state law requires IAC claims to be raised in collateral review. Schad, like Detrich, is a death row inmate in Arizona. Just like Detrich, the court need not "pause" over the third and fourth prongs of the test as they are clearly established for Arizona inmates. *Detrich*, at *5.

To establish that a Petitioner presents a substantial claim, he must show that his claim "has some merit." *Martinez*, 132 S.Ct. at 1318-19. To establish that a claim has some merit, the petitioner must show that the claim is debatable amongst jurists of reason. *Detrich*, at *6 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).

B. SCHAD'S NEW CLAIM IS CLEARLY DEBATABLE AMONG JURISTS OF REASON; THE NINTH CIRCUIT'S TWO PRIOR OPINIONS CONCLUSIVELY ESTABLISH THIS PRONG. *RES IPSA LOQUITUR*.

Here, we know for a fact that the merits of Petitioner's new claim of ineffective assistance of sentencing counsel for failure to investigate, present, and prepare mitigating mental health evidence, and the corroboration that supported that mental health evidence, is debatable amongst jurists of reason. We know this because the panel majority found that the underlying claim, if proven, is "more than substantial…. Schad's counsel's

failure to investigate and present evidence of his serious mental illness 'had a substantial and injurious effect or influence in determining the [sentence.]'" *Schad v Ryan*, 2013 WL 791610, *6 (9th Cir. 2013), *quoting, Brecht v.Abrahamson,* 507 U.S. 619, 623 (1993).

Thus, Respondent's reliance on this court's previous dicta is erroneous. The panel majority wrote:

> Perhaps most important, Schad's new mitigating evidence, which was never presented to the state court …likely would have affected the outcome. The evidence Schad would have presented in mitigation, had it not been for sentencing counsel's and post-conviction counsel's errors, would have demonstrated that Schad was suffering from "several major mental disorders" at the time of the crime, specifically extremely serious mental conditions such as bipolar disorder, schizoaffective disorder, and dissociative disorders, among others. ER 540. As we have stated previously, these facts provided
>
> > [t]he missing link [to] what in [Schad's] 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.
>
> With the missing evidence before it, however, the sentencer could well have concluded that due to his serious mental illnesses, Schad did not bear the same level of responsibility for the crime as would someone with normal mental functioning.

Id. at * 4, *quoting, Schad v. Ryan,* 581 F.3d 1019, 1034 (9th Cir.2009) (subsequent history omitted).

The Supreme Court did not comment on this aspect of the Ninth Circuit's opinion. Thus, though it is not precedent, this Court can acknowledge and consider the thinking of of the appellate judges on the Ninth Circuit who have also reviewed the facts of this case.

C. SCHAD HAS PLED A SUFFICIENT CLAIM OF CAUSE AND PREJUDICE UNDER *MARTINEZ*

The Ninth Circuit in *Detrich* wrote, "*Martinez* authorizes a finding of "cause" excusing procedural default of any substantial trial-counsel IAC claim that was not raised by an ineffective PCR counsel, even if some trial-counsel IAC claims were raised." *Detrich*, at *9. The en banc court in *Detrich* was careful to acknowledge that once a Petitioner shows that he has 1) a substantial claim that was 2) not raised, further evidentiary development is necessary. In other words, at this juncture, the Court should order discovery and an evidentiary hearing.

Schad has shown that he has a substantial claim that was not raised by his PCR counsel. But Schad has shown even more through an analysis of the previous proceedings in this case where Respondent has serially and repeatedly argued that PCR counsel was not diligent. Respondent used this argument with great effect and secured important litigation advantages. Respondent's efforts to walk back those comments now are unavailing. Here again, Respondent fail to cite, acknowledge, analyze or argue how Schad has not met the standard under *Martinez/Trevino* as announced in *Detrich.*

And once again, we know from the panel majority, that Schad has established cause and prejudice under *Martinez/Trevino*.

IV. 60(B) RELIEF IS WARRANTED

Respondent's remaining potpourri of arguments is similarly unavailing. First, Respondent ignores the cases cited by Petitioner in his motion. The Supreme Court's

orders vacating the decisions of the Fifth Circuit in two Texas cases establish the availability of Rule 60(b) as an appropriate and available procedural vehicle for the presentation of Martinez arguments. *See Balentine v. Thaler*, 133 S.Ct. 2763 (2013)(mem.); *Haynes v. Thaler*, 133 S.Ct. 2764 (2013)(mem.). Second, Respondent ignores the Phelps factors. Third, Respondent repeats his law of the case argument. But we have already established that the Supreme Court's opinion was narrow and limited to whether Schad had shown actual innocence in order to justify a deviation from the mandate procedures. There has been no adjudication of the applicability of *Martinez* to Schad's procedurally defaulted claim of IAC of sentencing counsel. Fourth, Respondent castigates Schad for seeking to invoke *Martinez* relief earlier. But this argument makes no sense as it simply reinforces Schad's diligence in litigating his new claim. Fiftth, Respondent repeats his conclusory statement that Schad has not shown that his claim is substantial. We have conclusively shown that indeed it is. Finally, Respondent repeats his claim that the Ninth Circuit has summarily denied the merits of Schad's *Martinez* argument. But as we explained above, the Circuit's order denying an unauthorized second petition for rehearing after expressly stating that it would not entertain any further petition's for rehearing cannot be fairly read as a ruling on the merits of the claim-only that the Court would not entertain the presentation of that claim in that procedural posture.

V. CONCLUSION

This case has followed a tortured procedural path: Edward Schad has never received a hearing, in any court, on the merits of his substantial and meritorious claim that his trial counsel was ineffective in failing to investigate, present, and prepare competent mental health evidence that would have shown that although he is a good man, he is also a man with mental illness. Mentally ill persons are not inherently bad people as Respondent suggests. But rather, they are individuals with mental illness, and as such, are victims of a disease that is beyond their control. Evidence of Schad's mental illness would have provided crucial mitigating evidence to the sentencer. His trial and PCR counsel failed him when they failed to discover and present this key, existing and accessible evidence. The law in this area has changed dramatically and for the first time, Schad's claim is available for federal habeas review. This Court should grant the motion and any other relief it deems just and necessary.

Respectfully submitted this 13th of September, 2013.

/s/ Kelley J .Henry
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Copy of the foregoing served this
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