CAPITAL CASE: EXECUTION SET OCTOBER 9, 2013 at 10:00 A.M

No. 13-16895

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD

Appellant-Petitioner
v.

CHARLES RYAN, ET. AL

Appellee-Respondent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
OPENING BRIEF OF EDWARD HAROLD SCHAD
(ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

The district court's Order dismissing Mr. Schad's Motion for Relief From Judgment is a final, appealable order. ER 178. This Court has jurisdiction under Article III of the United States Constitution, 28 U.S.C. §§ 1291 and 2253. *See Gonzalez v. Crosby*, 545 U.S. 524 (2005).

This appeal is timely. The district court's Order is dated September 19, 2013. ER 178. Schad filed his notice of appeal that same day. ER189. See Fed. R. App. P. 4(a)(1)(A).[1]

ISSUES PRESENTED FOR REVIEW

1. Whether Schad's Motion for Relief from Judgment Pursuant to Fed.R.Civ. P. 60(b) requesting relief from the federal court judgment that precluded a merits determination of his unexhausted, procedurally defaulted ineffective-assistance-of-sentencing-counsel claim is a true 60(b) motion.

2. Whether Schad is entitled to relief from the federal court judgment precluding merits review of his unexhausted, procedurally defaulted,

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[1] It remains an open question as to whether a Certificate of Appealability is needed to appeal a District Court's Order denying a Rule 60(b) Motion in habeas matters. *See Gonzalez*, 545 U.S. at 536, n.7. Owing to the expedited nature of this appeal, to the extent this Court determines that a COA is required to review the District Court's order, it should grant one. As demonstrated, *infra*, the district court's decision that Schad's Rule 60(b) motion, that challenges the integrity of the federal court's judgment by asserting that the previous ruling that precluded merits determination of Schad's IAC claim as it relates to mental illness is in error in light of *Martinez v. Ryan*, 132 S.Ct. 1309(2012), is an unauthorized second or successive petition, is clearly debatable among jurists of reason. *See Cook v. Ryan*, 688 F.3d 598 (9th Cir. 2012)(Motion raising *Martinez* not a second or successive petition). See also, *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012); *Barnett v. Roper*, ___F.Supp.2d___, 2013 WL 1721205 (E.D.Mo. 2013); *Landrum v. Anderson*, 2012 WL 5309223 (S.D. Ohio 2012).

ineffectiveness (mental illness) claim in light of the remarkable change in habeas procedural law brought by *Martinez v. Ryan*, where Schad's underlying procedurally defaulted ineffectiveness claim is "more than substantial." *Schad v. Ryan*, 07-99005, 2013 WL 791610, *6 (9th Cir. Feb. 26, 2013), *vacated on other grounds by Ryan v. Schad*, 133 S. Ct. 2548, 186 L. Ed. 2d 644 (2013) *reh'g denied*, 12-1084, 2013 WL 4606329 (Aug. 30, 2013).

STATEMENT OF FACTS RELEVANT TO THE DECISION[2]

Ed Schad was convicted and sentenced to death for the murder of Lorimer Grove. *State v. Schad*, 633 P.2d 366 (Ariz. 1981). His conviction was overturned due to an instructional error. *State v. Schad*, 691 P.2d 710 (Ariz. 1984). He was re-tried and once again sentenced to death. *State v. Schad*, 788 P.2d 1162 (Ariz. 1989). Schad sought review in the United States Supreme Court which was granted. In a 5-4 decision, the Court affirmed the decision of the Arizona Supreme Court that the jury was not required to unanimously agree on a single theory of first-degree murder and that a lesser included instruction on the offense of robbery was not required. *Schad v. Arizona*, 501 U.S. 1277 (1991), *reh'g denied*, 501 U.S. 1277 (1991).

Schad promptly sought post-conviction relief in the Superior Court of Yavapai County by filing a preliminary post-conviction petition and motion for

[2] Due to the expedited nature of this appeal, Schad outlines the most basic facts necessary to an understanding of the current issues presented in this appeal.

appointment of counsel. 07-99005 ER 370-387.[3] The preliminary petition did not contain an ineffective assistance of counsel at sentencing claim. Schad was appointed a series of counsel who requested multiple continuances and then withdrew. Schad's third appointed counsel finally filed a document titled "Defendant's Supplemental Statement of Grounds for Relief." In that document, Schad's third appointed lawyer alleged a newly-discovered evidence claim that recently discovered omissions and inadequacies in the presentence report ("PSR") were relevant to sentencing. The supplement argued in the alternative that trial counsel was ineffective in failing to correct the inadequate PSR. 07-99005 ER 344. The post-conviction court described the claim as "defendant contends that counsel was ineffective for failing to uncover mitigating evidence that might exist." 07-99005, ER 144. Importantly, appointed PCR counsel did not request appointment of a mental health expert or allege that Mr. Schad suffered from any mental illness. PCR counsel did not offer social history records, data, or interviews. The PCR court did not conduct an evidentiary hearing. The PCR court denied relief on this very narrow claim. Schad sought a petition for review that was summarily denied. 07-99005 ER 142.

[3] Schad has prepared an Excerpt of Record for this appeal that contains the filing in the lower court on the 60(b) motion. Schad will cite those filings as ER [page]. Schad will separately refer to filings presented on initial submission as 07-99005 ER [page].

Schad next initiated federal habeas proceedings. Undersigned counsel were appointed to represent Schad. Undersigned filed an amended petition for writ of habeas corpus that presented both the exhausted IAC for failure to correct the errors and inadequacies in the PSR claim as well as a different claim of ineffectiveness, *viz*. that counsel was ineffective for failing to investigate and present evidence of Petitioner's mental illness as evidence in mitigation of sentence.[4] Respondent, in his answer, assigned letters to categories of claims and thereafter, all of Petitioner's claims of ineffective assistance of sentencing counsel, exhausted and unexhausted, were referred to collectively as Claim P by the district court.

In the district court, Schad sought to present nearly 1200 pages of evidence in support of his mental illness claim. Respondent repeatedly, vigorously, and successfully argued that the evidence of Schad's mental illness was unexhausted, that it violated the fair presentation requirement, and that it was procedurally barred from federal habeas review. Respondent filed a Motion to Strike, an Opposition to Motion to Expand the Record, and successfully obtained an order from this Court striking Schad's original opening briefs and excerpts of record. Respondent secured from this Court an order requiring Schad to present all of his evidence which supported his mental illness claim in a "second set" of ER's with

[4] Schad also presented a federal habeas claim that trial counsel was ineffective in failing to present evidence that Schad's sentence was disproportionate.

this Court so that the Court would be clear on what evidence was not fairly presented to the State Court. 07-99005 ER Set 2, Vol 1-3, pp. 452-1152.

The district court summarily denied Schad's amended petition for writ of habeas corpus. 07-99005, ER 10-96. The district court described the evidence contained in Set 2 of the original ER's as "new" (i.e. unexhausted) evidence. 07-99005 ER 57-60. The court held that the new evidence was not "properly before" the federal court. 07-99005 ER 60. The court held that the decision of the PCR court's denial of Schad's claim was "not unreasonable." *Id.* The court found "that with respect to Petitioner's "attempt to introduce factual information **that was not presented to the state court**, Petitioner was not diligent in developing these facts." *Id.* (emphasis supplied).[5] The district court wrote in the alternative that even considering the new evidence Schad's claim was without merit.[6] *Id.* The District Court granted a COA and Schad appealed. 07-99005 ER 8, 195.

On appeal, this Court held that the district court applied the wrong diligence standard and disagreed with the district court's observations with respect to Schad's unexhausted evidence of ineffectiveness. This Court specifically observed that the new evidence was not presented to the state court. *Schad v. Ryan*, 595

[5]The Court repeated that the mental health evidence was not presented to the state court later in her order. 07-99005 ER 76.

[6] Though this portion of the district court's order is *dicta*, see *infra*, it is interesting to note that the district court appears to use two different standards of review. With respect to the exhausted claim, the Court uses the language of 2254(d) "unreasonable application of federal law." The court did not use the language of 2254(d) with respect to her observations relating to Schad's unexhausted claim of IAC relating to mental illness.

F.3d 907, 923 (9th Cir. 2010). Subsequent to this Court's opinion, the United States Supreme Court granted certiorari in the case of *Cullen v. Pinholster*, 130 S.Ct. 1340 (2010)(mem.). Respondent sought certiorari review of this Court's 2010 opinion. Subsequent to its opinion in *Pinholster*, the Court granted Respondent's petition, vacated this Court's opinion and remanded for reconsideration in light of *Pinholster*. *Ryan v. Schad*, 131 S.Ct. 2092 (2011). Schad immediately requested the opportunity for full briefing that was not granted. Instead, the Court ordered the submission of letter briefs. This Court later issued an amended opinion, deleting any discussion of Schad's unexhausted and procedurally defaulted mental illness claim. *Schad v. Ryan*, 671 F.3d 708(9th Cir. 2011). In its third amended opinion, the Court specifically forbid the filing of any subsequent petitions for rehearing. *Id.*

Schad sought leave of the Court to file a petition for rehearing that was denied. Schad then sought an order from the en banc court to permit the filing of the petition for rehearing. The panel vacated its prior order and permitted the filing of the petition for rehearing. A response was ordered and rehearing was denied. In the order denying rehearing, the Court warned that no further petitions for rehearing would be entertained. Schad sought, and obtained, a stay of the mandate pending Schad's filing of a petition for writ of certiorari. Following this Court's Order denying rehearing and forbidding any further filings, the United States

Supreme Court issued its opinion in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). The decision in *Martinez* brought a remarkable sea-change in habeas procedural law. Despite the Court's clear direction that no further rehearing petitions would be entertained, Schad filed a motion styled "Motion to Vacate Judgment and Remand in light of *Martinez v. Ryan*." In a terse, one sentence order the Motion was denied.[7] Schad sought certiorari review which was denied. *Schad v. Ryan*, 133 S.Ct. 432 (2012). Schad immediately requested that the mandate stay continue pending rehearing. That request was granted. While rehearing was pending in the United States Supreme Court, this Court accepted the Warden's petition for rehearing in another capital case (*Dickens v. Ryan*) to address the tension between *Martinez* and *Pinholster* and because the Warden argued the decision in that case (*Dickens*) conflicted with the decision in Schad's case.[8] The Order granting

[7] The Court has described that denial as one that "that left unanswered several serious legal questions." *Schad v. Ryan*, 07-99005, 2013 WL 791610, *3 (9th Cir. Feb. 26, 2013), *vacated on other grounds*, 133 S. Ct. 2548 (2013), *reh'g denied*, 12-1084, 2013 WL 4606329 (2013).

[8] This Court would later observe,

> Our court decided to take the issue presented in the case before us en banc in *Dickens v. Ryan*, No. 08–99017. *See* Respondent–Appellee's Motion for Panel Rehearing and Rehearing En Banc, *Dickens v. Ryan*, No. 08–99017 (9th Cir. Aug. 17, 2012), Dkt. 69 (noting the conflict between that case and our decision in *Schad*); Petitioner–Appellant's Response to Petition for Panel Rehearing and Rehearing En Banc, *Dickens v. Ryan*, No. 08–99017 (9th Cir. Sept. 13, 2012), Dkt. 72. In addition, at oral argument before an en banc court in *Detrich v. Ryan*, December, 2012, pursuant to a pending *Martinez* motion, the court ordered counsel to address the circumstances under which a remand under *Martinez* was warranted. Order, *Detrich v. Ryan*, No. 08–99001 (9th Cir. Dec. 7, 2012), Dkt. 159. We have reviewed the briefs regarding the motion to remand in that case as well, and listened to the oral argument.

rehearing in *Dickens* was Friday, January 4, 2013. The following Monday, January 7, 2013, Schad's petition for rehearing was denied by the Supreme Court. *Schad v. Ryan*, 133 S.Ct. 922 (2013).

Also on January 7, 2013, in light of the intervening developments in *Dickens v. Ryan*, Schad filed an "Emergency Motion to Continue Stay of the Mandate Pending En Banc Proceedings in *Dickens v. Ryan*, No. 08–99017." The Court denied that motion, but reconsidered Schad's earlier motion to vacate its opinion in light of *Martinez*. The Court granted that motion and remanded the case to the district court for further proceedings.[9] The Warden sought certiorari review.[10] Ultimately, the U.S. Supreme Court issued a *per curiam* opinion holding only that this Court abused its discretion in not issuing the mandate. *Ryan v. Schad*, 133 S.Ct. 2548 (2013). Importantly, the Supreme Court did not disagree with any of this Court's observations regarding the procedural status of Schad's IAC as to mental illness claim or the merits of his argument that *Martinez* provided cause to excuse his procedural default of his mental illness claim.

> In light of these developments, it has become clear that Schad's case raises the same issues our court is currently considering en banc."

Schad v. Ryan, 07-99005, 2013 WL 791610 (9th Cir. Feb. 26, 2013).

[9] Later, the Court issued a stay of execution.

[10] The Warden also sought an order vacating the stay of execution issued by this Court. That motion was denied by the Supreme Court.

Though the Supreme Court's order clearly stated that its opinion was not final and its mandate had not issued, the State filed a motion in the Arizona Supreme Court for a warrant of execution. Schad opposed the motion on grounds, *inter alia*, that the Stay of Execution issued by this Court was still in effect and 28 U.S.C. §2251 deprived the inferior court of jurisdiction to issue an execution warrant.

On August 27, 2013, Schad lodged the instant Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b). ER 1. On August 30, 2013, the Supreme Court denied Schad's Petition for Rehearing which concluded proceedings in Case No. 07-99005, and re-vested jurisdiction in the district court. *Schad v. Ryan*, 2013 WL 4606329 (2013). On September 3, 2013, the Arizona Supreme Court issued an execution warrant setting October 9, 2013 as Schad's execution. Respondent filed his response to the 60(b) motion on September 6, 2013. ER 142. Respondent did not allege that Schad's motion was the equivalent of an unauthorized second or successive petition. Schad replied on September 13, 2013. ER 160. In an order that did not address Respondent's arguments, or Schad's, the district court dismissed Schad's 60(b) motion on September 19, 2013. ER 178. The district court held that Schad's motion was the equivalent of an

unauthorized second or successive petition. ER 178. Schad immediately filed a notice of appeal. ER 189. This Court ordered expedited briefing.[11]

SUMMARY OF ARGUMENT

The Supreme Court has held that "Rule 60(b) has an unquestionably valid role to play in habeas cases." *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005). Here Schad challenges a "nonmerits aspect of the first federal habeas proceeding", *Gonzalez*, 545 U.S. at 534, and as such is properly brought under Rule 60(b). *See Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. 2007)(Motion which challenged the denial of petitioner's claim for procedural default and failure to exhaust was properly brought under Rule 60(b)). Plainly, Schad's motion is not an application for writ of habeas corpus. It does not present an asserted federal basis for relief from the state court's judgment but rather asserts that the intervening change in the habeas procedural law brought by *Martinez v. Ryan* constitutes an extraordinary circumstance which warrants Rule 60(b) relief from judgment. Schad does not present a new federal claim for relief nor does he present additional evidence not previously presented to the federal court. Schad is not asking the Court to revisit the merits of the district court's ruling on the narrow claim of ineffective assistance of counsel that was presented to the state court and that the district court

[11] Schad has contemporaneously filed a Motion for Stay of Execution. Schad respectfully suggests that Motion should be granted, this appeal should be held, and further briefing should be ordered following the *en banc* Court's imminent decision in *Dickens v. Ryan*. Schad also respectfully requests oral argument.

adjudicated under the limitation on relief pursuant to 28 U.S.C. §2254(d). The district court acknowledges that her alternative observations respecting the IAC as to mental illness claim were *dicta*. ER 187. Importantly, this Court's ultimate opinion on initial submission did not decide the mental illness claim. "Schad raised his "new claim" of ineffectiveness of sentencing counsel for the first time before the district court by submitting newly discovered evidence of his 'mental illness' as an adult. **We did not review the claim on appeal…**" *Schad*, 07-99005, 2013 WL 791610, *2 (emphasis supplied), see also ER 187 (observing that Schad is correct that this Court's final opinion on initial submission was limited to that which was presented in state court.). The district court's alternative *dicta*, which was ultimately not addressed in the final opinion on appeal,[12] was not an adjudication on the merits that can render Schad's otherwise proper motion under Rule 60(b) an unauthorized second or successive habeas petition.

Rule 60(b) is a rule of equity. It operates to allow a petitioner, like Schad, a fair opportunity to present his *Martinez* claim—a claim that—through no fault of his own--Schad was unable to previously present. This case presents a classic case that cries out for 60(b) equitable relief.

> [W]hen a prisoner has shown reasonable diligence in seeking relief based on a change in procedural law, and when that prisoner can show

[12] But it bears mentioning that this Court has twice had the opportunity to express its disagreement with the district court in its second amended opinion and in the February 26, 2013 opinion.

> that there is probable merit to his underlying claims, it would be well in keeping with a district court's discretion under Rule 60(b)(6) for that court to reopen the habeas judgment and give the prisoner the one fair shot at habeas review that Congress intended that he have. After all, we have consistently recognized that Rule 60(b)(6) 'provides courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 614- 615 (1949)) .").

Schad has been denied one fair shot at adjudication of his federal constitutional claim—a claim this Court described as "more than substantial." Schad has demonstrated extraordinary circumstances here where *Martinez* changed twenty years of habeas jurisprudence which, when applied to Schad's case, reveals the defect in the integrity of the district court's (and this Court's) judgment.

> *Martinez* is not "an independent basis for overturning [a] conviction" but only an equitable rule that allows a federal habeas court to decide a claim, such as ineffective assistance of (sentencing) counsel, that would have been properly before the state post-conviction court, and thereafter before the federal habeas court, *but for* the ineffectiveness of post-conviction counsel.

Schad v. Ryan, 07-99005, 2013 WL 791610, *5.

ARGUMENT

I. SCHAD'S MOTION IS PROPERLY BROUGHT UNDER FED.R.CIV.P.60(B)

In *Gonzalez*, the Supreme Court began its analysis by noting, "'as a textual matter, §2244(b) applies only where the court acts pursuant to a prisoner's 'application'" for a writ of habeas corpus." 545 U.S. at 530, *quoting Calderon v. Thompson*, 523 U.S. 538, 554 (1998). An application, the Court explained, is a "filing that contains one or more 'claims.'" *Id.* A claim is "an asserted federal basis for relief from a state court's judgment of conviction." *Id.* A motion under Rule 60(b) that seeks to present a new claim for substantive relief or one that seeks to present new evidence in support of a claim already adjudicated on the merits or a motion seeking relief on the basis of a change in substantive law is a second or successive petition. *Id.* at 531. Conversely, a motion that "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar" is not challenging an adjudication "on the merits" and is not a second or successive petition. *Id.* at 532, n.4.

This Court has already held that *Martinez* arguments may be entertained in a motion pursuant to Rule 60(b). *Lopez, supra; Cook, supra.*

A. SCHAD'S MOTION ALLEGES A DEFECT IN THE INTEGRITY OF THE DISTRICT COURT'S JUDGMENT AS IT RELATES TO A PROCEDURAL MATTER AND IS A PROPER 60(B) MOTION

The district court took Schad's motion as a request to reopen judgment on that court's merits adjudication of the narrow claim presented to the state court, that Schad's sentencing counsel was ineffective for failing to correct errors and omissions in the PSR. As such, the district court apparently believed that Schad's motion was a challenge to a previous merits ruling of the court. The district court misapprehended Schad's motion.

Schad clearly alleged that the integrity of the district court's previous ruling that the evidence supporting his separate, unexhausted mental illness claim was not properly before the court was now undermined by the remarkable change in habeas procedural law brought about by *Martinez*. Contrary to the district court's opinion, Schad did not previously obtain a final, merits adjudication on the underlying mental illness claim.[13] He could not have. The claim was procedurally defaulted for failure to exhaust and, until *Martinez*, he could not establish cause.[14] The

[13] On this point, respectfully, the district court's order is contradictory. The district court wrote, "Petitioner rightly notes that the Ninth Circuit affirmed denial of Claim P based solely on the record that was before the state court…without considering the new evidence developed in these federal habeas proceedings." ER 187.

[14] "**We did not review the claim on appeal** because the district court found that Schad was not diligent in presenting the evidence of mental illness to the state court under § 2254(e)(2) and,

whole point of Schad's motion is that *Martinez* provides a procedural defense to failure to exhaust that was not available during initial habeas proceedings.

Schad's motion clearly states in the first sentence that he seeks 60(b) relief "because there has been a significant change in procedural law under which he is entitled to relief from judgment." ER 2. The first heading in his Memorandum in Support of Motion is, "The Remarkable Change In Habeas Law Brought By Martinez Is Extraordinary And Justifies Relief Under Rule 60." ER 3. Schad then went on for seven pages to describe why *Martinez* applies to his defaulted mental illness claim. ER 3-10. Schad then went on to set forth his prima facie case for relief under *Martinez*. ER 10-28. Finally, Schad explained how the application of the *Phelps* factors weigh in favor of 60(b) relief. To be sure, Schad did argue that the underlying defaulted mental illness claim was substantial, and indeed as this Court has observed, "more than substantial." Perhaps the district court confused Schad's substantiality arguments with a request to re-litigate the merits of the narrow claim that was previously decided under 2254(d). But plainly, he did not. His conclusion to the Motion states:

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

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therefore, excluded that evidence." *Schad v. Ryan*, 07-99005, 2013 WL 791610, *2 (emphasis supplied).

> (2012), however, Schad can establish "cause" for the default by showing that **initial post-conviction counsel ineffectively failed to raise and exhaust his claim**.

ER 36-37 (emphasis supplied). In his reply, Schad explained once more that he was relying only on *Martinez* as a procedural defense to the default of his mental illness claim for post-conviction counsel's failure to raise and exhaust. ER 164-171. Schad's motion like that in *Gonzalez*, "confines itself not only to the first federal habeas petition, but to a non-merits aspect of the first federal habeas proceeding." *Gonzalez*, 545 U.S. 534. The motion is not a second or successive application. It does not present an "asserted basis for relief from a state court judgment of conviction." *Gonzalez*, 545 U.S. at 531. Rather the motion seeks relief from the original habeas judgment on grounds that the "previous ruling which precluded a merits determination [is] in error[.]" *Id*. at 532, n.4. ER 36-37, 176.

This Court has previously observed that Schad's mental illness claim was procedurally defaulted:

> 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**, <u>it is procedurally defaulted.</u>** If Schad meets the requirements of *Martinez*, however, he may well have established cause for that procedural default.

Schad, *supra*, at *5-6 (emphasis supplied). The fact that the district court issued a merits ruling on a separate ineffectiveness claim does not change this analysis.

The en banc opinion in *Detrich v. Ryan* ___F.3d____, 2013 WL 4712729 (9th Cir. en banc 2013) emphasized that *Martinez* allows:

> 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 Court also explained:

> 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 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 (emphasis supplied).

The district court abused her discretion by dismissing Schad's motion as an unauthorized successive petition.

B. THE DISTRICT COURT'S ALTERNATIVE *DICTA* RESPECTING EVIDENCE IT DETERMINED *WAS NOT PROPERLY BEFORE IT* WAS NOT A RESOLUTION OF THE CLAIM ON THE MERITS THAT PRECLUDES 60(B) RELIEF

During Schad's initial habeas proceedings, the district court concluded that the sentencing-ineffectiveness claim that Schad now raises in his Rule 60(b) motion – which contains all the mitigating mental illness evidence that was never presented at sentencing – was not properly before the Court for resolution on the merits. As the district court explained, Schad's current claim was predicated on "a number of exhibits that contain information that was never presented to the state courts." 07-99005 ER 66. Consequently, the district court could not actually consider the new mitigating evidence, because *"the new materials were not properly before the Court*." *Id.*, 69 (emphasis supplied). That statement alone makes it clear that the District Court *did not* reach the merits of Schad's current

ineffectiveness claim, because Schad's evidence simply was "not properly before the Court."

Put another way, and to quote this Court, Schad's current claim was (and is) procedurally defaulted, because it was based upon mitigating evidence that (as the district court rightly concluded) was never properly presented to the state courts:

> Because Schad did not present this claim in his original petition for post-conviction relief to the state court, it is procedurally defaulted.

Schad, 2013 WL 791610, *6. And indeed, when a habeas petitioner fails to exhaust his claim in state court (as Schad did with his present claim), the district court was prohibited from deciding that claim on the merits, because "we may not reach the merits of procedurally defaulted claims." *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007).

Admittedly, the district court did decide *an* ineffectiveness claim on the merits. But that was a very *different* claim from the ineffectiveness claim raised by Schad here. *See Detrich, supra*. The district court only decided on the merits the bare-bones ineffectiveness claim that had actually been presented and exhausted in state post-conviction, *i.e.,* inadequate PSR, but that claim is a far different claim from the claim upon which Schad seeks relief now. As this Court earlier acknowledged: "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." *Schad*, 2013 U.S.App.Lexis 559 *16.

To reiterate, because Schad's current claim was never presented during initial post-conviction proceedings it was never properly before the District Court on initial submission, it was procedurally defaulted (as this Court has earlier concluded), and that claim could not be, and indeed was not, adjudicated on the merits by the district court and was not decided by this Court on appeal. *Schad*, 2013 WL 791610, *2. Thus, Schad may now proceed under Rule 60(b) seeking, ultimately, a true merits resolution of that claim.

On initial submission, the District Court did alternatively opine that Schad's new ineffectiveness claim was not meritorious, but that alternative finding was merely *dicta*, constituting an advisory opinion prohibited by Article III. Thus, that alternative discussion cannot, and does not, thwart the application of Rule 60(b) here.

Indeed, an alternative merits ruling following a finding that a claim is not properly before the federal court is nothing but *dicta*, and it cannot constitute a decision on the merits of a claim for Rule 60(b) purposes. As the Fourth Circuit has explained under similar circumstances, a district court's alternative merits discussion of a claim that is procedurally defaulted is nothing but *dicta*, nothing

more than an advisory opinion which is categorically prohibited by Article III of the Constitution:

> Rulings in the alternative are a tricky subject. On the one hand, they have great appeal, for they allow a judge to give multiple reasons to support his or her holding and thus, in some circumstances, allow a reviewing court the opportunity to address each of the issues at once, without the cost in time and effort that would arise from each justification for a particular result being handled by seriatim appeal. Thus, from the perspective of judicial economy, alternative holdings are a welcome blessing for courts at all levels.
>
> But alternative holdings also provide courts, particularly appellate courts reviewing alternative holdings below, with the tempting opportunity to stray into the practice of advisory opinion-making, solving questions that do not actually require answering in order to resolve the matters before them. **If the first reason given is independently sufficient, then all those that follow are surplusage; thus, the strength of the first makes all the rest *dicta*. This danger is particularly apparent where the alternative holdings are a pair, one substantive and the other procedural**. In such circumstances, a reviewing court that affirms on the procedural ground faces a dilemma as to the substantive ground. **To address the question on the merits is to ignore the procedural reason for the affirmance; to ignore the question on the merits allows the lower court's treatment of that issue to stand, when the appellate court's affirmance makes that part of the lower court's holding *dicta*. Where there is a procedural default, it is entirely understandable for a court to want to explain to the losing party that, even had it not defaulted, it would have lost anyway. *See Harris v. Reed*, 489 U.S. 255, 264 n. 19 (1989). Nevertheless, while that explanation may comfort the party, it creates new law in a strictly advisory fashion**.

Karsten v. Kaiser Foundation Health Plan, 36 F.3d 8, 11 (4th Cir. 1994)(per curiam) (emphasis supplied). *See also Oken v. Corcoran*, 220 F.3d 259, 274 (4th Cir. 2000)(Michael, J., concurring)(where the rule of procedural default precludes

a federal court from addressing the merits of a claim, any discussion of the merits is pure *dicta*).

Thus, where – exactly as occurred in Schad's case – a "procedural default stands as an independent ground" for denying relief, "[a]ny treatment of the matter on its merits would be nothing more than pure *dicta*, unnecessary for the determination of this case." *Karsten*, 36 F.3d at 11. Such was the District Court's alternative merits discussion on initial submission: It was *dicta*. Indeed, as a constitutional matter, the District Court was "constitutionally limited to deciding only cases or controversies properly presented, and that . . . prohibit[ed] it from dispensing the type of free advice. *Karsten*, 36 F.3d at 12. Thus, when the District Court opined that Schad would still lose even if his claim with all its evidence were properly before the Court, the District Court gave an advisory opinion, not an actual, valid ruling on the merits of Schad's current claim.

Because Article III prohibited the District Court from even providing this alternative discussion in the first place, such *dicta* does not constitute a valid merits ruling whatsoever. Schad's claim was never properly the subject of a merits ruling by the District Court, the District Court never issued a valid Article III decision on the merits of the mental illness claim, and thus, Schad's claim may now be reviewed under Rule 60(b).

II. SCHAD IS ENTITLED TO RELIEF FROM JUDGMENT

A. 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). 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. Schad's mental illness claim fits precisely within the ambit of *Martinez.*

This Court has found *Martinez* was a "remarkable" change in habeas procedural law justifying the federal court's exercise of equitable relief pursuant to Rule 60(b) in *Lopez*. This Court echoed the holding in *Lopez*, and in *Cook, supra*. Other courts have likewise found the change worked by *Martinez* to be extraordinary. *Barnett, supra; Landrum, supra.*

B. SCHAD HAS PLED A PRIMA FACIE MARTINEZ ARGUMENT TO WARRANT EQUITABLE RELIEF

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)). Schad meets this test.

The En Banc Court 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, which is the same thing as ineffective. Respondent used this argument with great effect and secured important litigation advantages.

1. 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.* (Prong 1 of *Detrich*).

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).

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 Court's February 26 opinion.

Indeed, Schad's mental illness claim is supported by significant mitigating expert testimony, lay testimony, and documentation all of which was previously filed with this Court as separate ER's to denote that they were not exhausted. 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.

ER 77. 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." ER 90. 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. ER 98-99. Ongoing instability in the home led to continued chaos in Ed's life during adolescence, leading him into juvenile criminal activity. ER 100-101.

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." ER 111; ER 108-121. 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. ER 129-146. All the while, mental health professionals noted that he suffered mental problems, including paranoia, depression, and obsessive-compulsive tendencies. ER 131-132.

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. ER 139. 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 that 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, 943-947 (9th Cir. 2008)(sentencing counsel "provided constitutionally deficient representation during his investigation," in failing to adequately investigate "extremely troubled childhood," family dysfunction); *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 this Court 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.

2. SCHAD'S SUBSTANTIAL MENTAL ILLNESS CLAIM WAS PROCEDURALLY DEFAULTED BY INITIAL POST-CONVICTION COUNSEL WHO RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL (Prong 2 of *Detrich*)

Under *Martinez* and *Detrich*, the lone remaining question is whether initial post-conviction counsel was ineffective for failing to present the defaulted mental illness 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, Respondent has emphasized that post-conviction counsel did not present the state court any evidence in support of the mental illness 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 has 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 this Court:

> **[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, the mental illness *Strickland* claim 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,[15] 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.

C. 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

[15] By definition, counsel who is not diligent is ineffective because her conduct falls below objectively reasonable norms. Counsel who is not diligent performs deficiently.

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.

This Court 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]" brough). *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 supplied).

Each of the *Gonzalez/Phelps* factors are discussed seriatim and each weigh 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. This 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. Petitioner deserves relief from the district court's erroneous judgment.

2. SCHAD HAS BEEN DILIGENT IN PURSUING RELIEF

Schad has diligently sought relief on his mental illness claim since first presenting it to this Court in his amended petition for habeas relief. The procedural history of this case, with which this Court is well familiar, and is outlined above, demonstrates Schad's extraordinary diligence in attempting to obtain review of his underlying mental illness claim.

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

The Court in *Gonzalez*, recognized that interests in finality are not particularly weighty in a 60(b) context. "That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose **whole purpose is to make an exception to finality**." 545 U.S. 529 (emphasis supplied).

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.

Schad is in an even better posture than the habeas 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. Though calling it a

"close call" the Court found that the State's interest in finality was outweighed by Barnett's interest in review of his fundamental claim of constitutional error.

4. NO UNDUE DELAY

As stated, Schad has not delayed. 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. The district court did not have jurisdiction over Schad's case until the Supreme Court denied rehearing.

5. CLOSE CONNECTION BETWEEN *MARTINEZ* AND SCHAD'S CLAIM.

This factor is the most obvious and the most weighty. This Court's February 26, 2013 opinion, vacated on procedural grounds only, 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 supplied). 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 supplied). Here, 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.

CONCLUSION

WHEREFORE, this Court should grant a stay of execution, grant oral argument, and after careful, unhurried consideration, reverse the district court and remand this case with instructions to reopen the first habeas proceedings and adjudicate Schad's procedurally defaulted mental illness claim. Alternatively, the Court should grant a stay of execution, grant oral argument, and remand the case for a determination of Schad's 60(b) motion by the district court. Alternatively, the Court should grant a stay of execution and hold this matter pending the imminent decision in *Dickens v. Ryan*,[16] after which the Court should order further briefing and oral argument.

[16] The pending en banc decision in *Dickens* is directly relevant to Schad's case, 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*.

Respectfully submitted this 23rd day of September, 2013.

Kelley J.Henry
Denise I. Young

BY: /s/ Kelley J.Henry

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*.

CERTIFICATE OF COMPLIANCE

I hereby certify that appellant's opening brief contains 11, 665 words and is in compliance with the Word limits imposed by the Rules of this Court.

/s/ Kelley J. Henry
Attorney for Edward Schad

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

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