No. 13-16895

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN,Director, Arizona Department of Corrections,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. 2:97-CV-02577-ROS

RESPONDENT-APPELLEE'S ANSWERING BRIEF

Thomas C. Horne
Attorney General
(Firm State Bar No. 14000)

Jeffrey A. Zick
Section Chief Counsel

Jon G. Anderson
Assistant Attorney General
Capital Litigation Section
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686
jon.anderson@azag.gov
CADocket@azag.gov
State Bar Number 005852

Attorneys for Respondent-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

QUESTIONS PRESENTED FOR REVIEW

1. Whether Schad's attack on a claim previously rejected on the merits by the district court and this Court constitutes a barred second or successive petitioner under Section 2244 of AEDPA? If not, has Schad shown extraordinary circumstances for reopening the district court's judgment making the district court's denial of Rule 60 relief an abuse of discretion?

2. Can *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), justify reopening the district court's judgment at this late date, when this Court's rejection of *Martinez* is the law of the case, *Martinez* does not apply to claims that have not been found procedurally defaulted by the district court, and when, even if this Court could reconsider its *Martinez* ruling, Schad does not present a substantial issue of ineffective assistance at sentencing?

STATEMENT OF THE CASE

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

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

On July 10, 2012, respondent filed in the Ninth Circuit the first motion directly at issue in this case. This motion asked the court to vacate its judgment and remand to the District Court for additional proceedings in light of this Court's decision in *Martinez* [citation and footnote omitted]. The Ninth Circuit denied respondent's motion on July 27, 2012. Respondent then filed a petition for certiorari. This Court denied the petition on October 9, 2012, 568 U.S. ——, 133 S.Ct. 432, 184 L.Ed.2d 264, and denied a petition for rehearing on January 7, 2013. 568 U.S. ——, 133 S.Ct. 922, 184 L.Ed.2d 713.

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

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

On March 4, Arizona filed an application to vacate the stay of execution in this Court, along with a petition for certiorari. This

> Court denied the application, with Justices SCALIA and ALITO noting that they would grant it. 568 U.S. ——, 133 S.Ct. 2548, 186 L.Ed.2d 644, 2013 WL 3155269 (2013).

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

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

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

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

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

On August 26, 2013, Schad filed with the district court a pleading entitled, "Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b)," based on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (ER 1.) After Respondent filed a response, and Schad filed a reply (ER 142, 160), the district court, on September 18, 2013, filed an order dismissing Schad's motion. (ER 178-188.)

The district court concluded that Schad's motion was a challenge to that court's resolution of Claim P on the merits, and therefore constituted a second or successive petition that had not been authorized by this Court. (ER 178.) The court recounted Schad's four sub-arguments in Claim P regarding ineffective assistance of counsel at sentencing. (ER 179.) It noted it had ordered the parties to address the merits of three of the four sub-parts of Claim P. (ER 180.) The district court noted Schad had presented "numerous materials not presented to the state courts." (*Id.*) It further noted that "more than three years after conclusion of merits briefing, Petitioner moved to expand the record to include a 92-page affidavit from Dr. Charles Stanislaw." (*Id.*)

The court noted it had denied habeas relief, and specifically regarding Claim P, "the Court concluded that Petitioner had failed to show that the state court's denial of the claim was an unreasonable application of *Strickland*." (ER 181.) It stated that, although it had ruled that Schad "was not entitled to an evidentiary hearing or expansion of the record, it nevertheless "determined that, *even considering the new materials*, *Claim P lacked merit*." (*Id*, emphasis added.) Finally, it noted that this Court, on appeal, had affirmed the district court's judgment denying habeas relief, and rejected Schad's motion for additional proceedings in light of *Martinez*. (ER 181-182.)

The district court found that Schad's Rule 60(b) motion was a challenge to its previous ruling on the merits of Claim P. (ER 184, 187.) It noted it had not found Claim P procedurally defaulted (ER 185-186), and that this Court on appeal had made an on-the-merits ruling rejecting the claim. (ER at 187, citing *Schad*, 671 F.3d at 721-22.) Thus, the district court concluded that Schad's Rule 60 motion constituted a barred second or successive petition, that it lacked jurisdiction to consider it, and dismissed the motion. (ER 188.)

Schad filed a timely notice of appeal on September 19, 2013. (ER 189.)

STANDARD OF REVIEW

This Court reviews the district court's denial of a Rule 60(b)(6) motion for an abuse of discretion. *See Towery v. Ryan*, 673 F.3d 933, 940 (9th Cir. 2012); *Delay v. Gordon*, 475 F.3d 1039, 1043 (9th Cir. 2007); *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir. 1971) (*per curiam*) ("60(b) motions are addressed to the sound discretion of the district court."). Relief under Rule 60(b)(6) requires the moving party to make a showing of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). 2641. "Such circumstances will rarely occur in the habeas context," and "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Id.*

SUMMARY OF ARGUMENT

The district court correctly ruled that Schad's Rule 60 petition was a challenge to its resolution of Claim P, and therefore constitutes a second or successive petition barred under 28 U.S.C. Section 2244(b)(1). Under the guise of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), Schad was simply asking the district court to reconsider the declaration of Dr. Charles Sanislow, which Schad had submitted in support of habeas Claim P, his claim of ineffective assistance of counsel at sentencing for failing to develop and present mitigating evidence. This Court's third amended opinion, *Schad v. Ryan*, 606 F.3d 1022 (9th Cir.

2010), affirmed the district court's denial of Claim P. This Court's mandate order specified that it issued from the third amended opinion and affirmed the district court's judgment in all respects. Because the district court had rejected Claim P both in light of the state court record, and in light of the additional material submitted in federal court, including Dr. Sanislow's declaration, Schad was simply asking the district court to revisit its prior ruling based on evidence it had already considered. The district court did not abuse its discretion in denying the Rule 60 motion. *See Towery v. Ryan*, 673 F.3d 933, 947 (9th Cir. 2012).

Section 2244 aside, Schad's Rule 60 motion failed to show extraordinary circumstances, as required by *Gonzalez v. Crosby*, 545 U.S. 524 (2005), for the district court to reopen its final judgment and order. The Supreme Court's recent opinion in *Ryan v. Schad*, 133 S. Ct. 2548 (2013), held that *Martinez* was not an extraordinary circumstance justifying reconsideration. Moreover, this Court's denial of Schad's *Martinez* motion on July 27, 2012, is the law of the case, barring reconsideration. Finally, even if this Court could employ the analysis from *Phelps v. Almeida*, 569 F.3d 1120 (9th Cir. 2009), to determine if extraordinary circumstances exist to reopen the final judgment, that analysis would bar reopening the final judgment and order.

Even if reconsideration were not barred by Section 2244(b)(1) and the limits on Rule 60 motions, Schad would not be entitled to relief under *Martinez*.

First, this Court's third amended opinion affirmed Claim P, and later denied Schad's *Martinez* motion. Those decisions are the law of the case. Schad is simply asking this Court to "revisit an argument" that this Court "already explicitly rejected." *Ryan v. Schad*, 133 S. Ct. 2548, 2552 (2013). That aside, *Martinez* does not apply, for two reasons: (1) the district court did not find a procedural default, but rather considered the merits of Claim P, and so there is no procedural default to excuse; and (2) there was no separate "new claim," but merely new evidence submitted in support of Claim P, and the district court already analyzed the new evidence submitted in support of Claim P, including Dr. Sanislow's declaration. A *Martinez* remand would serve no purpose to require the district court to reconsider what it had already considered. Finally, even if the *Martinez* issue could be considered anew, Schad does not make a substantial claim of ineffective assistance of counsel at sentencing, in view of the mitigating evidence counsel did present at sentencing, and because the new habeas evidence would simply be cumulative and would not have changed the sentence.

ARGUMENTS

I

SCHAD'S MOTION, BASED ON RULE 60(B), CHALLENGED THE DISTRICT COURT JUDGMENT'S DENIAL OF CLAIM P, SCHAD'S CLAIM OF INEFFECTIVE ASSISTANCE AT SENTENCING, AND THUS CONSTITUTED A BARRED SECOND OR SUCCESSIVE PETITIONER UNDER AEDPA SECTION 2244. EVEN IF IT DID NOT, SCHAD HAS NOT SHOWN EXTRAORDINARY CIRCUMSTANCES JUSTIFYING REOPENING THE DISTRICT COURT'S JUDGMENT, MUCH LESS SHOWN THAT THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING THE EXTRAORDINARY REMEDY OF RULE 60 RELIEF.

Schad argues that his Rule 60 motion was not a second or successive (SOS) petition and that he is entitled to relief under Rule 60(b)(6). The district court properly found that the motion constitutes a barred SOS petition because it was challenging its judgment denying relief on Claim P, Schad's broad claim of ineffective assistance of counsel at sentencing by failing to develop and present sufficient mitigating evidence. Furthermore, the district court did not abuse its discretion by denying Rule 60 relief when Schad has not shown extraordinary circumstances to justify reopening the district court's judgment.

A. SECTION 2244(B)(1) OF AEDPA BARS RELIEF.

1. *Relevant law.*

With the enactment of AEDPA,[1] Congress significantly "restrict[ed] the power of federal courts to award relief to state prisoners who file second or successive [SOS] habeas corpus applications." *Tyler v. Cain*, 533 U.S. 656, 661 (2001). *See generally King v. Trujillo*, 638 F.3d 726, 729–30 (9th Cir. 2011) (per curiam) (§ 2244 imposes "heavy burden" and satisfying strict limitations is "no easy task."). Section 2244(b)(1) requires dismissal of claims "presented in a prior application." *Gulbrandson v. Ryan*, 711 F.3d 1026, 1045 (9th Cir. 2013). *See also Pizzuto v. Blades*, 673 F.3d 1003, 1007-1008 (9th Cir. 2012) (claim of judicial bias barred under Section 2244 because prisoner raised judicial bias in first habeas proceeding, "relying, in part, on the same evidence that he presents here, . . ."); *West v. Ryan*, 652 F.3d 1048, 1053 (9th Cir. 2011) ("Because West's first claim regarding ineffective assistance of sentencing counsel was raised in a prior habeas petition, it must be dismissed. 28 U.S.C. § 2244(b)(1).").

Thus, the federal court must first determine whether a claim was presented in a prior application. *Gonzalez*, 545 U.S. at 530. If it has, "the claim must be dismissed." *Id.* The Supreme Court has clarified that the term "claim"

[1] AEDPA refers to the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104–132, 110 Stat. 1214.

means "an asserted federal basis for relief from a state court's judgment of conviction." *Id.*

A Rule 60(b) motion cannot be used to avoid AEDPA's limits on SOS petitions. *Gonzalez*, 545 U.S. at 530-31. A motion "that a subsequent change in substantive law is a 'reason justifying relief,' Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim," is "in substance a successive habeas petition and should be treated accordingly." *Id.* at 531. Such motions filed pursuant to Rule 60(b)(6) are reviewed on a case-by-case basis to determine whether the motion should be construed as a second or successive habeas petition. *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009).

If the Rule 60 motion is a "disguised" Section 2244 application, the district court has no jurisdiction to consider the claims in the Rule 60 motion, unless they meet the limited exception set forth in the statute that apply to claims not previously presented. *United States v. Washington*, 653 F.3d 1057, 1065 (9th Cir. 2011). For claims not previously presented, Section § 2244(b)'s "demanding standard," *Bible v. Schriro*, 651 F.3d 1060, 1063 (9th Cir.2011) (*per curiam*), requires dismissal unless:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

A movant seeking relief under Rule 60(b)(6) must show "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535. "Such circumstances will rarely occur in the habeas context." *Gonzalez*, *Id.* Rule 60(b) proceedings are subject to only limited and deferential review. *Id.*; *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 263 n.7 (1978). It is unclear whether Section 2253 imposes an additional limitation on appellate review by requiring a habeas petitioner to obtain a COA as a prerequisite to appealing the denial of a Rule 60(b) motion. *Gonzalez*, 545 U.S. at 535.

2. *The district court properly found the Rule 60 motion challenged a claim already decided on the merits, and therefore a barred SOS petition.*

The district court properly found that "because Petitioner's Rule 60(b) motion is a challenge to the Court's resolution of Claim P on the merits, it constitutes a second or successive petition that may not be considered by this Court, . . ." (ER 178.) This Court should affirm the district court's order, and consequently should reject Schad's claim as a barred SOS application. Schad

seeks to avoid this result by arguing that his Rule 60 motion is not an attack on the district court's ruling on Claim P. That argument fails.

Schad does not contest that Claim P was his multi-faceted claim of ineffective assistance of counsel at sentencing.[2] (OB at 4.) Schad does not contest that "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." (*Id.*) He does not contest that he submitted substantial new material in the habeas proceedings in support of Claim P. Nor does he contest that the district court's order alternatively ruled that, even with the new evidence, Claim P was without merit. (OB at 5.)

---

[2] The Supreme Court did not think the new evidence constituted a "new claim" when Schad made his *Martinez* argument to that court, stating: "the only claim presented [in the July 10, 2012, motion] was that respondent's postconviction counsel *should have developed more evidence to support his ineffective-assistance-of-trial-counsel claim*." *Ryan v. Schad*, 133 S. Ct. at 2552 (emphasis added). Schad argues that there was some sort of new "mental illness" claim that could not have been decided on the merits because it was procedurally defaulted. (OB at 14.) But Schad does not show that was a "claim" that was separate and apart from Claim P, his multi-faceted claim of ineffective assistance of counsel at sentencing. Nor did he move to amend his petition to add a separate claim, consisting of the alleged "new claim." As the district court noted, Schad argued that the claim had been exhausted, and offered the new evidence in support of his claim of ineffective assistance of counsel at sentencing (Claim P.) (ER 180-87.) The district court noted that Schad did not contend in his Rule 60(b) motion that the district court had actually found a procedural default on Claim P. (ER 185.) Nor, as the district court noted, did Respondent argue that the relevant parts of Claim P were procedurally defaulted, but rather that the new evidence should not be considered in deciding Claim P. (ER 186.)

Despite this clear record, Schad argues that the new evidence constituted a "new claim" that was not considered and decided as part of Claim P. Citing statements by the district court that the new evidence was not properly before it, he argues that the district court refused to consider the new evidence/claim in connection with Claim P. But the record belies his contention. Indeed, Schad admits: "The district court wrote in the alternative that even considering the new evidence Schad's claim was without merit." (OB at 5.) Certainly, the district court did not make a procedural determination that "precluded a merits determination," *Gonzalez*, 545 U.S. at 532 n.4, but rather made a merits determination.

In attempting to show that the district court did not actually consider the new evidence, Schad argues that the district court denied his motion to expand the record and found that the new materials were not properly before the court. (OB at 19.) As the district court's recent order noted, it previously found that its review of the IAC issue should be limited to the record before the state court. (ER 181.) As it turned out, that ruling correctly presaged the Supreme Court's holding in *Cullen v. Pinholster*, 130 S. Ct. 1340 (2010). Indeed, Respondents sought certiorari review of this Court's second amended opinion (*Schad v. Ryan*, 595 F.3d 907 (9th Cir. 2010)), and the Supreme Court then remanded for this

Court to reconsider the issue in light of *Pinholster.* This Court's third amended opinion subsequently found that, in light of *Pinholster*, the district court had not erred in denying the IAC claim because the state post-conviction court ruling was a reasonable application of law based on the record before the state court. *Schad v. Ryan,* 671 F.3d 708, 722 (9th Cir. 2011). That is the law of the case.

But despite the district court's correctly divining that its review of Claim P should be limited to the state court record, it nevertheless alternatively considered the new evidence and found Claim P was still meritless in light of the new evidence. *Schad v. Schriro*, 454 F.Supp.2d 897, 940 (D. Ariz. 2006) ("Moreover, the Court finds that even if Petitioner had been diligent and the new materials were properly before the Court, Claim P lacks is without merit.") Schad can scarcely complain of the district court doing so, when he was the party presenting it in support of Claim P and urging the court to consider the new evidence.

This Court should give short shrift to the argument that the district court did not consider the new evidence in connection with Claim P. The district court's order noted that: "In support of Claim P, Petitioner has submitted a number of exhibits that contain information never presented to the state courts."

454 F.Supp.2d at 938-39. It recounted the new information[3] and noted that two items of information concerned Schad's mental health. *Id.* at 938-40. The district court discussed, at some length, both Dr. "Sanislow's"[4] declaration and the other proffered new evidence. *Id.* at 941-44. The district court concluded: "Despite Petitioner's failure to develop these facts in state court, the Court *has considered* these materials and concludes that the trial court's denial of Petitioner's sentencing-stage IAC claim was not an unreasonable application of clearly established federal law as set forth in *Strickland*. Petitioner is not entitled to relief on Claim P." *Id.* at 944.

Thus, Schad's argument that the district court did not consider the new evidence in connection with Claim P is spurious. *See also Parker v. Dugger*, 498 U.S. 308, 313 (1991) ("We must assume that the (sentencer) considered all this evidence before passing sentence. For one thing, he said he did.").

Next, in an argument somewhat in conflict with the previous one, Schad admits that the district court alternatively addressed Claim P in light of the new

---

[3] The district court did impliedly criticize Schad for submitting Dr. Sanislow's declaration some 3 years after other proffered new information, under the guise of a "notice of supplemental authority." 454 F.Supp.2d at 940. Despite any criticism of the obviously late-filed declaration, the district court did consider it.

[4] The district court calls the doctor "Dr. Stanislaw." The document itself names that doctor as "Dr. Sanislow." (ER 50.) The difference in the names does not affect the legal analysis here.

evidence, but argues that the "alternative finding was merely *dicta*." (OB at 21.) Schad posits that such "dicta" violates Article III. Schad's argument is unsupported by the law. The Supreme Court has said: "where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co*., 337 U.S. 535, 537 (1949). *Accord*, *English v. United States*, 42 F.3d 473, 485 (9th Cir. 1994)); *Russell v. Commissioner of Internal Revenue*, 678 F.2d 782, 785 n. 2 (9th Cir. 1982).

Schad cites *Karsten v. Kaiser Foundation Health Plan of Mid-Atlantic States, Inc.*, 36 F.3d 8, 11 (4th Cir. 1993). First, *Karsten* is not a federal habeas case, and it precedes AEDPA, and so does not inform the present issues regarding the application of Section 2244. Second, it holds that if a court *finds a procedural default*, an alternative ruling on the merits is *dicta*. 36 F.3d at 11 ("In the present case, Kaiser's clear procedural default prevents us from addressing the matter of the applicability of Virginia's collateral source rule to HMO payments to outside contractors for, whatever our views on this interesting and important matter of law, the procedural default stands as an independent ground for affirming the admission of this evidence."). But here, the district court found no procedural default, and so its alternative ruling was not *dicta* under *Karsten's* analysis. Third, *Karsten, id*, cites *Harris v. Reed*, 489 U.S. 255, 264 (1989), a habeas case in which the Supreme Court counsels state courts not to "fear

reaching the merits of a federal claim in an *alternative* holding." The same logic should apply to alternative holdings by federal district courts.

Moreover, established precedent in this Circuit is that a district court's decision on the issue of procedural default is to be informed by furthering "the interests of comity, federalism, and judicial efficiency." *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). Where it is clear that deciding the merits of a claim will prove to be less complicated and time-consuming than adjudicating the issue of procedural default, a court may exercise discretion in its management of the case to reject the claims on their merits and decline to engage in a lengthy and involved cause and prejudice analysis. *See Batchelor v. Cupp*, 693 F.2d 859, 863–64 (9th Cir. 1982); *see also Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same."), *citing Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). In hindsight, avoiding issues of procedural default, in light of *Martinez*, was a wise path for the district court to follow in this case.

Finally, Schad argues that Article III of the Constitution prevented the district court from considering the additional evidence in an alternative ruling. First, Schad waived any such argument by not raising this argument in earlier

proceedings. Moreover, Schad certainly had Article III standing to challenge the constitutional propriety of his sentence, and there was a case or controversy on whether he should be granted relief on Claim P. Finally, Congress has broad powers to regulate the availability of habeas relief, and as long as the federal courts comply with those legislative parameters, there is no Article III violation. *See Felker v. Turpin*, 581 U.S. 651, 664 (1996).

B. EVEN IF SCHAD'S RULE 60(B) MOTION WERE NOT A BARRED SOS PETITION, HE HAS NOT SHOWN EXTRAORDINARY CIRCUMSTANCES TO JUSTIFY REOPENING THE JUDGMENT.

Schad argues that the issuance of *Martinez* constituted extraordinary circumstances sufficient for the district court to reopen its final judgment pursuant to Rule 60(b)(6). (OB at 24, 36.) AEDPA and Section 2244 aside, when seeking relief under Rule 60(b)(6), a prisoner must show "extraordinary circumstances" justifying the reopening of a final judgment. *Gonzalez*, 545 U.S. at 535. *See also Ackermann v. United States*, 340 U.S. 193, 199 (1950) (requiring a showing of "extraordinary circumstances" before a final judgment may be reopened). *Gonzalez* concluded that the prisoner there had not asserted "extraordinary circumstances" justifying relief. *Gonzalez*, 545 U.S. at 538. When a *Martinez* issue is intertwined with a Rule 60(b) motion, the federal court normally has some "leeway as to how to approach" the federal habeas case. *See Lopez v. Ryan*, 678 F.3d 1131, 1135 (9th Cir. 2012). However, the

"extraordinary circumstances" analysis cannot aid Schad here.

First, the United States Supreme Court, assuming that this Court had discretion not to issue the mandate following certiorari denial, found that the proposed reconsideration of the previously-rejected *Martinez* claim was not an "extraordinary circumstance" and therefore the this Court abused its discretion in staying the mandate and reconsidering the argument it had "already explicitly rejected." *Ryan v. Schad* , 133 S. Ct. at 2549 & 2552. The issuance of *Martinez* is an even less "extraordinary circumstance" to justify reopening the final judgment of the district court.

Second, unlike *Lopez*, where the *Martinez* claim was being presented to the federal courts for the first time in a Rule 60 motion, Schad presented the *Martinez* issue to this Court after it issued the third amended opinion; this Court summarily rejected it, after which the Supreme Court denied his petition for certiorari review based on *Martinez. Cf. Lopez*, 678 F.3d at 1136 ("Until the Supreme Court decided *Martinez* after Lopez's federal proceedings had become final, Lopez had never pursued the theory that he now advances.). Thus, not only was the Rule 60 motion not Schad's first opportunity to raise the *Martinez* issue, this Court's 2012 rejection of Schad's *Martinez* motion is the law of the case regarding this issue. Schad is not entitled to have this Court re-revisit the already-decided *Martinez* issue under the guise of a Rule 60(b) motion.

Third, *Lopez* found there was no substantial underlying IAC issue that would permit relief from a final judgment. 678 F.3d at 1137-1139. As discussed above, the district court already considered the new evidence Schad first proffered in federal habeas, but still found no prejudice because the new evidence would not have changed the sentence. 454 F. Supp.2d at 944. Thus, there could be no substantial claim regarding a claim that has already been rejected. *Cf. Lopez*, 678 F.3d at 1139 ("Even accepting and reviewing de novo Lopez's late-offered evidence at the first habeas proceeding, Lopez fails to meet the *Martinez* test of substantiality as to prejudice."). That aside—for the reasons discussed hereafter—Schad has presented no substantial claim of ineffective assistance at sentencing. *See also Styers v. Ryan*, 2013 WL 149919, at *11 (D. Ariz. 2013) (prisoner's *Martinez* motion failed to demonstrate requisite extraordinary circumstances necessary to warrant relief under Rule 60(b)(6)).

Schad argues that, to determine whether there are extraordinary circumstances to justify reopening the final judgment, this Court should employ its test from *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). But in *Phelps*, this Court agreed that the law had changed *after* this Court affirmed the dismissal of his habeas petition. 569 F.3d at 1129. In this case, by contrast, this Court considered the *Martinez* argument, but summarily denied it in 2012. Moreover, *Lopez* distinguished *Phelps*, on the basis that the "connection

between the intervening change of law [*Martinez*] and Lopez's case is not as straightforward." 678 F.3d at 1137.

Even if this Court could employ the *Phelps* test to determine if *Martinez* now constitutes an extraordinary circumstance to provide Rule 60 relief, that analysis does not show an extraordinary circumstance. Under *Phelps*, when a prisoner argues that a change in the law constitutes an extraordinary circumstance, this Court considers several factors: (1) whether "the intervening change in the law … overruled an otherwise settled legal precedent"; (2) whether the petitioner was diligent in pursuing the issue; (3) whether "the final judgment being challenged has caused one or more of the parties to change his legal position in reliance on that judgment;" (4) whether there is "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief;" (5) whether there is a "close connection" between the original and intervening decisions at issue in the Rule 60(b) motion; and (6) whether relief from judgment would upset the "delicate principles of comity governing the interaction between coordinate sovereign judicial systems." *Phelps*, 569 F.3d at 1133–40 (quotations omitted). These factors weigh against finding an extraordinary circumstance based solely on *Martinez*.

Change in the law: Schad contends that the first *Phelps* factor, whether "the intervening change in the law … overruled an otherwise settled legal

precedent," *Phelps*, 569 F.3d at 1133–40 (quotations omitted), weighs in favor of reconsideration because *Martinez* "completely changed the legal landscape." (OB at 39.) But that factor cannot apply in this case because this Court already rejected the applicability of the "intervening change it the law" when it denied Schad's *Martinez* motion in 2012.

Moreover, there was no procedural default, and because the district court considered the new evidence, *Martinez* does not change the law regarding this case. Because the district court addressed the new evidence/claim, there was no procedural bar to consideration of the new evidence/claim. Schad had no need, and never attempted, to show cause and prejudice through PCR counsel's alleged ineffectiveness regarding Claim P.

Accordingly, this first factor weighs against reopening the judgment.

Diligence: This factor also weighs against Schad in context of the Rule 60 motion, which was filed well after *Martinez* was decided, and after the Ninth Circuit and Supreme Court already rejected the *Martinez* claim. *See Lopez*, 678 F.3d at 1136 (diligence factor weighed against petitioner where he raised IAC of PCR counsel claim for the first time after *Martinez*). In *Lopez*, this Court considered that prisoner's lack of diligence in pursuing his new theory that PCR counsel's performance provided cause for his failure to raise, before the state courts, the factual record concerning his trial counsel's ineffectiveness. This

Court found this factor weighed against reopening the case. 678 F.3d at 1136. In this case, Schad did not make an argument to the district court or this Court on appeal that a claim had been procedurally defaulted, but rather he argued that the claim had been properly exhausted and that PCR counsel was diligent in trying to present additional evidence to the state PCR courts.

Reliance: This factor relates to the State's strong interest in finality, and does not support reopening the claim. *Id.* As this Court said in *Lopez*: "The State's and the victim's interests in finality, *especially after a warrant of execution has been obtained and an execution date set*, weigh against granting post-judgment relief. This factor does not support reopening [the prisoner's] habeas case. *Id.*, emphasis added.

Delay: Schad argues that his Rule 60(b)(6) motion was not delayed because he presented it to the district court as soon as possible after the first habeas proceeding was concluded. (OB at 42.) That is true.

However, Respondent relied on this Court's denial of Schad's *Martinez* argument in 2012 when it sought the previous execution warrant, only to have Schad reassert the *Martinez* claim, ultimately resulting in a stay of that execution date. *See also Styers v. Ryan*, 2013 WL 1149919, at *7 ("[R]eopening the case to permit relitigation of Claim 8 would further delay resolution of Petitioner's case and interfere with the State's legitimate interest in finality.").

Schad's continuing presentation of the already-rejected *Martinez* claim does engender undue delay. This factor therefore weighs against Schad.

Degree of connection: Schad argues this *Phelps* factor favors him. (OB at 42). To the contrary, it militates against reopening the final judgment. *Martinez* holds that PCR counsel's ineffectiveness can constitute cause to excuse the procedural default of a trial-level IAC claim. 132 S.Ct. at 1316–18. Here, Schad did not present an IAC-sentencing claim other than Claim P in his habeas petition and the district court did not find Claim P procedurally defaulted, so there is *no connection* between *Martinez* and this case. *See Lopez*, 678 F.3d at 1137 (claim that *Martinez* applied to PCR counsel's failure to develop factual basis of exhausted claim "does not present the sort of identity that [the Ninth Circuit] addressed in *Phelps*," and did not weigh in favor of Rule 60(b) relief). Moreover, *Lopez* found that *Martinez* did not have a close connection to that prisoner's claim that there is cause not only for failure to raise a claim but also for "PCR counsel's ineffective failure to develop the factual basis of a claim." 678 F.3d at 1137. It found that the difference between *Martinez* and the prisoner's new legal theory did not weigh in favor of reopening that case. *Id.*

Comity: In litigation spanning several decades, the state and federal courts have considered Schad's various claims for relief, including IAC claims. *See Lopez*, 678 F.3d at 1137 ("In light of [the Ninth Circuit's] previous opinion

and those of the various other courts that have addressed the merits of several of Lopez's claims, and the determination regarding Lopez's lack of diligence, the comity factor does not favor reconsideration."). The State is entitled to enforce its judgment against Schad after all these years. This factor weighs against reopening the district court's final judgment.

Death penalty: Finally, Schad apparently contends that his status as a death-penalty defendant is another factor in determining whether he should be given Rule 60(b) relief. (OB at 44.) But that is not one of the *Phelps* factors. Schad cites no authority for this to be a factor, and it is illogical: were the federal courts to accept a prisoner's death sentence as a Rule 60 ground for reopening final district court judgments, every capital habeas petitioner could obtain a second chance to raise federal habeas claims, despite AEDPA's clear intent and specific limitations on SOS petitions.

II

MARTINEZ DOES NOT AID SCHAD AT THIS LATE DATE BECAUSE IT IS THE LAW OF THE CASE THAT *MARTINEZ* DOES NOT APPLY; ALSO *MARTINEZ* DOES NOT AID SCHAD BECAUSE THE DISTRICT COURT FOUND NO PROCEDURAL DEFAULT, IT CONSIDERED THE NEW EVIDENCE, AND SCHAD HAS NOT PRESENTED A SUBSTANTIAL ISSUE OF INEFFECTIVE ASSISTANCE AT SENTENCING.

Even if this Court could avoid the limitations on SOS petitions and Rule 60 motions, Schad could not prevail under *Martinez*. First, this Court's rejection of the *Martinez* claim is law of the case. Second, as this Court has recently

recognized, *Martinez* does not apply when the district court has not found a procedural default; nor should it apply when the district court has already considered the evidence that would result from a successful *Martinez* motion. Third, Schad presents no substantial claim of ineffective assistance at sentencing.

A. THE LAW OF THE CASE BARS MARTINEZ RELIEF.

Because this Court denied *Martinez* relief in 2012, and because the Supreme Court recently held that this Court abused its discretion by adopting the same *Martinez* argument it had previously rejected, it is the law of the case that Schad cannot obtain relief under *Martinez.*

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

A more specific aspect of the law of the case doctrine is the "rule of

mandate doctrine," which provides that, "When a case has been once decided by this court on appeal, and remanded to the [district court], whatever was before this court, and disposed of by its decree, is considered as finally settled. The [district court] is bound by the decree as the law of the case, and must carry it into execution according to the mandate." *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) (quoting from *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895)). A district court cannot revisit its already final determinations unless the mandate allows it. *United States v. Cote*, 51 F.3d 178, 181 (9th Cir 1995).[5]

The following decisions constitute the applicable law of the case: (1) the district court's judgment denying relief; (2) this Court's third amended opinion affirming the district court's judgment; (3) this Court's 2012 order summarily denying habeas relief; (4) the Supreme Court's recent opinion reversing this Court's later grant of *Martinez* relief; and (5) this Court's mandate order specifying that the mandate issued from its third amended opinion affirming in all respects the district court's denial of habeas relief. Under this law of the case, the district court properly denied Claim P under *Strickland* and *Pinholster*,

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

and *Martinez* does not apply. Thus, under the law of the case, this Court must reject Schad's re-renewed attempt to obtain *Martinez* relief on Claim P.

Schad repeatedly refers to this Court's second amended opinion, which was vacated with the grant of certiorari by the Supreme Court and remand to consider in light of *Pinholster*, and which was replaced by this Court's third amended opinion. He also repeatedly cites this Court's 2013 order granting *Martinez* relief, which was reversed by the Supreme Court. Neither of these can be considered law of the case; rather the law of the case is contrary to Schad's arguments. *See Johnson v. Board of Educ. of City of Chicago*, 457 U.S. 52, 53-54 (1982) (vacated court of appeals' judgments not law of the case); *Doe v. Cheney*, 885 F.2d 898, 909 (D.C. Cir. 1989) ("because the Supreme Court heard this case on certiorari and reversed, the mandate in our original decision never took effect") (citing 1B MOORE, LUCAS, CURRIER, MOORE'S FEDERAL PRACTICE, ¶ 0.404[5.–3].).

B. *MARTINEZ* CANNOT APPLY BECAUSE THE DISTRICT COURT DID NOT FIND A PROCEDURAL DEFAULT ON CLAIM P, AND BECAUSE THE EVIDENCE THAT SCHAD ARGUES SHOULD NOW BE RECONSIDERED UNDER THE GUISE OF *MARTINEZ* WAS CONSIDERED.

The law of the case aside, *Martinez* does not even apply to Claim P, because the district court did not find a procedural default that could be excused under *Martinez*. Rather, it analyzed Claim P on the merits, both in view of the state court record and the additional material submitted to this Court in the

federal habeas proceeding. *See Schad v. Schriro*, 454 F.Supp.2d at 936-944. This Court subsequently affirmed, on the merits, the district court's rejection of Claim P. *Schad v. Ryan*, 671 F.3d at 722. Thus, there is no procedural default that would require *Martinez* analysis for a possible excuse, nor additional evidence that would be considered if there were a *Martinez* remand.

As this Court recently made clear in both the plurality and dissenting opinions in *Detrich v. Ryan*, "*Martinez* does not apply to claims that were not procedurally defaulted, but were, rather, adjudicated on the merits in state court." 2013 WL 4712729, at *7 (9th Cir. 2013) (plurality opinion). *See also id.* at *28 (Graber, J., dissenting) (holding of *Martinez*—that procedural default of an IAC claim can be excused if it was due to PCR counsel's ineffectiveness—"has no application when the claim was *not defaulted*") (emphasis in original). *Martinez* was an issue in *Detrich* because the district court had held that several of the prisoner's claims of ineffective assistance by trial counsel were procedurally defaulted for his failure to raise them in state PCR proceedings. 2013 WL 4712729, at *1. Thus, *Detrich* does not aid Schad, but rather supports Respondent.

Schad's other basis for claiming there is a procedural default on the "new claim" claim he now asserts is this Court's reversed order of February 26, 2013, which *sua sponte* found a procedural default on the IAC-sentencing claim, on

the theory that Schad had presented the district court with a "new" claim of IAC at sentencing for not presenting mental health evidence, a claim distinct from the claim adjudicated in the state courts, ineffective assistance of counsel at sentencing for not developing and presenting mitigation. *Schad v. Ryan*, 2013 WL 791610, **5-6 (9th Cir. 2013). But the Supreme Court found this Court had abused its discretion *by reconsidering its prior Martinez denial*, and granted certiorari relief. Thus, the law of the case is this Court's 2012 order denying *Martinez* relief.

Furthermore, even if this Court could reconsider *Martinez*, the remedy under *Martinez* is for the court to consider the "claim" that was procedurally defaulted because of deficient performance by PCR counsel, and that remedy is unnecessary here because the district court considered the mental health mitigating evidence that allegedly would have been presented by competent PCR counsel. Even assuming the new evidence constituted a new (not disclosed to the district court) IAC claim, the district court necessarily rejected that "new" IAC-sentencing claim *on the merits* because it found the new evidence neither showed deficient performance nor prejudice. *Schad v. Schriro*, 454 F.Supp.2d at 940-944. *See also Stokley v. Ryan*, 659 F.3d 802, 808 (9th Cir. 2011) (prisoner not entitled to relief either under *Pinholster* review or "if we construe his federal

claim as unexhausted such that we may consider the supplemental evidence he offered to the district court").

Second, this Court's vacated 2013 order was in error, even if the Supreme Court did not make an *alternative* ruling discussing the merits of the *Martinez* issue. The new evidence did not create a "new claim," for, as stated by the Supreme Court: "the only claim presented [in the July 10, 2012, motion] was that respondent's postconviction counsel *should have developed more evidence to support his ineffective-assistance-of-trial-counsel claim*." *Ryan v. Schad*, 133 S. Ct. at 2552 (emphasis added).

The applicability of *Pinholster*, rather than *Martinez*, to this case, besides being the law of the case, is made manifest by Chief Judge Kozinski's dissenting opinion from the Ninth Circuit's reversed opinion in *Pinholster*. Chief Judge Kozinski opined that the Ninth Circuit's habeas review should have been limited to the record presented in the state habeas petition. *Pinholster v. Ayers*, 590 F.3d 651, 688-690 (9th Cir. 2009), *reversed by Cullen v. Pinholster*, 131 S. Ct. 1388 (Kozinski, C.J., dissenting). The dissent warned:

> This is the most dangerous part of the majority opinion as it blots out a key component of AEDPA. *The statute was designed to force habeas petitioners to develop their factual claims in state court.* [citation omitted]. The majority now provides a handy-dandy road map for circumventing this requirement: *A petitioner can present a weak case to the state court, confident that his showing won't justify an evidentiary hearing. Later, in federal court, he can substitute much stronger evidence and get a district*

> *judge to consider it in the first instance, free of any adverse findings the state court might have made.* I don't believe that AEDPA sanctions this bait-and-switch tactic, nor will it long endure.

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

Thus, when the Supreme Court considered *Pinholster*, it was in a similar posture to Schad's case. California contended there "that some of the evidence adduced in the federal evidentiary hearing *fundamentally changed* Pinholster's claim so as to render it effectively unadjudicated." 131 S. Ct. at 1402 n.11 (emphasis added). Pinholster argued that the additional evidence that had not been part of the claim in state court "simply support[ed]" his alleged claim. *Id*. The Supreme Court rejected Pinholster's argument:

> We need not resolve this dispute because, even accepting Pinholster's position, he is not entitled to federal habeas relief. Pinholster has failed to show that the California Supreme Court unreasonably applied clearly established federal law on the record before that court, [citing the opinion], which *brings our analysis to an end*. Even if the evidence adduced in the District Court additionally supports his claim, as Pinholster contends, *we are precluded from considering it.*"

Id. (emphasis added.)

In *Lopez*, this Court noted the problem with the theory that new evidence makes a "new claim":

> Lopez argues that it is but a small expansion of *Martinez* to hold that the "narrow exception" in *Martinez* necessarily applies not only to PCR counsel's ineffective failure to raise a claim (the subject of procedural default) but also to PCR counsel's ineffective

> failure to develop the factual basis of a claim (the subject of § 2254(e)(2)). We need not decide whether Lopez is correct, though we do note tension between his theory and the Supreme Court's jurisprudence in this area, *see, e.g., Cullen v. Pinholster*, —— U.S. – ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

678 F.3d at 1137.

The only authority Schad can muster for his theory is the district court decision in *Barnett v. Roper*, 2013 WL 1721205 (E. D. Mo. 2013), but that case is readily distinguishable. There, the district court granted Rule 60 relief because the IAC claim had been "*deemed procedurally barred, and hence there was no decision on the merits by this Court, nor any court*." *Id.* at *6, emphasis added. Therefore, based on *Gonzalez*, it found the IAC claim presented in the Rule 60 motion did not constitute an SOS petition. *Id.* That, of course, contrasts to this case, where neither the district court nor this Court's third amended opinion found Claim P to be procedurally defaulted. Moreover, unlike this case, Barnett did not raise his *Martinez* argument for excusing the procedural default until the Rule 60 motion. *Id.* at **8-9. The district court found the procedural default on the IAC claim was excused under *Martinez*. *Id.* at *13. It found *Martinez* was an extraordinary circumstance, employing the analysis used by this Court in *Lopez*. *Id.* at **14-15, citing *Lopez*, 678 F.3d at 1136-37.

Schad also refers to *Dickens v. Ryan*, in which this Court's panel opinion, 688 F.3d 1054 (9th Cir. 2012), was vacated when this Court granted rehearing

en banc, and ordered: "The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit." *Dickens v. Ryan*, 704 F.3d 816, 817 (9th Cir. 2013). Schad now urges this Court to stay the execution until the *en banc* panel decides *Dickens*, but this Court rejected that argument when Schad made it before the last scheduled execution date. Schad filed with the Ninth Circuit an Emergency Motion to Continue Stay of the Mandate Pending En Banc Proceedings in *Dickens v. Ryan*, No. 08-99017; this Court denied the motion, although deciding to reconsider its prior denial of Schad's *Martinez* motion. Regarding the *Dickens* motion, this Court said it was "declin[ing] to issue an indefinite stay of the mandate that would unduly interfere with Arizona's execution process." (2013 order, quoted in *Ryan v. Schad*, 133 S. Ct. at 2550.) That same logic applies to the current proceeding. Moreover, if the Supreme Court opinion in *Martinez* was not an extraordinary circumstance justifying this Court reconsidering Claim P, prospective decisions of this Court interpreting *Martinez* are not an extraordinary circumstance to justify reopening the final district court judgment in this case.

Schad argues that, in the completed habeas proceeding, Respondent argued to the district court that the proffered new evidence placed the claim in a significantly different posture, and that the new evidence should not be considered. But arguing new evidence should not be considered by a federal

district court and arguing that a claim has been procedurally defaulted are two separate things. Respondent made the argument that the district court not consider the new evidence when it was commonly believed, like California in *Pinholster*, that *Vasquez v. Hillery*, 474 U.S. 254 (1986), set forth the proper analysis for whether to admit new evidence in habeas proceedings, but the Supreme Court changed that analysis when it clarified in *Pinholster* that a federal court must decide the IAC claim on the state court record. *See Pinholster*, 131 S. Ct. at 1402 n.11. Also, the district court *rejected* Respondent's procedural default theory and proceeded to analyze Claim P on the merits, even in light of the newly-proffered habeas evidence. Finally, even if *Hillery* were still good law, it would not aid Schad because the essence of his federal claim—that counsel provided ineffective assistance at sentencing by failing to adequately investigate and present mitigating evidence—was the same claim he presented to the state PCR court. *See Stokley*, 659 F.3d at 809.

Through his new evidence/new claim theory, Schad attempts to manufacture a procedural default to be used as a sword against Respondents' interest in finality. That is a perverse use of the affirmative defense of procedural default that is meant to protect the integrity of state court judgments. *See generally Trest v. Cain*, 522 U.S. 87, 89 (1997). *Cf. Wood v. Milyard*, 132 S. Ct. 1826, 1834-35 (2012) (abuse of discretion for appellate court to find

procedural default not found by district court).

III. EVEN IF THIS COURT WERE FREE TO RECONSIDER THE *MARTINEZ* ARGUMENT REGARDING CLAIM P., SCHAD WOULD NOT PREVAIL BECAUSE THE DISTRICT COURT HAS ALREADY DENIED THE CLAIM IN LIGHT OF THE NEW EVIDENCE AND HE HAS NOT PRESENTED A SUBSTANTIAL CLAIM.

Schad argues that he presents a substantial claim of ineffective assistance of sentencing counsel under *Martinez*. (OB at 27-36.) This Court should decline to grant *Martinez* relief.

First, the *Martinez* analysis in a case such as this one is a fruitless endeavor, as both this Court and the district court have already rejected Claim P on the merits, and that is the law of the case. Moreover, the district court considered the new evidence that Schad submits should be reconsidered pursuant to *Martinez*, and still found the claim lacked merit. The district court's judgment and order found that Schad had not "demonstrated that trial counsel's performance at sentencing was either deficient performance or prejudicial." *Schad v. Schriro*, 454 F. Supp.2d at 941. Because this Court has already found the underlying IAC-sentencing claim to be meritless, there is no reason to re-analyze whether the claim is "substantial" under *Martinez.*

Second, even if this Court could reconsider the alleged "new claim" part of Claim P, Schad does not present a substantial claim under *Martinez. See Miles v. Ryan*, 713 F.3d 477, 494-495 (9th Cir. 2013). *Martinez* requires a prisoner to

make a substantial showing on four separate points: (1) trial counsel's performance was constitutionally deficient, (2) trial counsel's deficient performance was prejudicial, (3) PCR counsel's performance was constitutionally deficient, and (4) PCR counsel's deficient performance prejudiced the prisoner's case. *See, e.g.*, *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012).

Schad's primary basis for his allegedly new and substantial IAC claim is this Court's vacated 2013 order. To any extent that this vacated order can be considered, it erred in finding a substantial claim of ineffective assistance at sentencing. The IAC-sentencing claim in this case is similar to other IAC claims that other panels of this Court have found not to be substantial under *Martinez*. *See, e.g.*, *Leavitt v. Arave*, 682 F.3d 1138, 1140-41 (9th Cir. 2012) (*per curiam*).

Schad does not show why this Court should reconsider its third amended opinion, rejecting Claim P, even if it were permissible to do so at this point. "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). "[T]he standard for judging counsel's representation is a most deferential one." *Id*. This Court's

third amended panel opinion noted that sentencing counsel filed a 39-page sentencing memorandum proffering 12 mitigating circumstances and presented testimony at sentencing from 15 witnesses, "including correctional officers, friends, relatives and a psychiatrist." *Schad v. Ryan*, 671 F.3d at 718-19. It further noted that the pre-sentence report prepared by a probation officer "included discussions of Schad's troubled childhood, favorable character reports from several of Schad's friends and Arizona prison officials, and Schad's good behavior and achievements in prison." *Id.* at 719. The district court's decision noted that counsel also proffered in mitigation expert psychiatric testimony that Schad was not a violent individual. *Schad v. Schriro*, 454 F.Supp.2d at 941, fn.28. In rejecting Claim P, the district court concluded that counsel reasonably chose the strategy of showing that Schad was basically a good man, who would benefit from rehabilitation; arguing that he was of "good or stable character." *Schad v. Schriro*, 454 F.Supp.2d at 941. *See Miles*, 713 F.3d at 491 (failure to investigate social history further was reasonable when strategy was to show prisoner was a relatively normal person, and additional social history was irrelevant to chosen strategy).

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

> In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not

> otherwise seek out character witnesses for respondent. [citation omitted] Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. [citation omitted].

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

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

counsel); *Stokley*, 659 F.3d at 809 ("Even considering the new evidence, we conclude that Stokley has not presented a colorable claim of ineffective assistance of counsel.").

Even if sentencing counsel had offered all of the evidence that Schad later submitted in federal court, it would not have mattered because it was cumulative to what was already presented: "The affidavits submitted by family members and psychologists repeat, rather than corroborate or elaborate on, the specific details of abuse included in the presentence report." *Schad v. Schriro*, 454 F.Supp.2d at 943. The district court specifically addressed Dr. Sanislow's declaration, "when documenting the abuse Petitioner suffered," frequently relied "on the details contained in the presentence report." *Id.* at 943. The court found the new material "is either cumulative or, . . . , contradictory to the portrait of Petitioner that trial counsel presented at sentencing." *Id.* at 944. *See Miles*, 713 F.3d at 492-94 (finding that the addition, during post-conviction proceedings of cumulative mitigating evidence relating to social history was insufficient to demonstrative prejudice even under *de novo* review). *See also Wong v. Belmontes*, 558 U.S. 15, 23 (2009) ("Additional evidence on these points would have offered an insignificant benefit, if any at all."); *Schriro v. Landrigan*, 550 U.S. 465, 481 (2007) ("the mitigating evidence he [Landrigan] seeks to introduce would not have changed the result."); *Bible v. Ryan*, 571 F.3d 860,

871-72 (9th Cir. 2009).

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

Schad cites this Court's recent opinion in *Detrich* to suggest a test that virtually assumes deficient performance and deficient performance by PCR counsel. First, only four judges joined that part of the opinion, and so it is not binding precedent. *See Lair v. Bullock*, 697 F.3d 1200 (9th Cir. 2012) (case not binding because there was "no opinion of the Court."); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1127 n. 5 (9th Cir. 2011) ("[T]he plurality opinion [in Randall] [i]s persuasive authority, though not a binding precedent." Second, *Detrich* does not alter, and cannot alter, the Supreme Court's requirement in *Martinez* that the prisoner show a substantial underlying IAC claim, which does not exist here.

Respondent agrees with the concurring opinion by Judge Nguyen, which disagrees with the plurality's view that *Martinez* does not require the prisoner to show prejudice from deficient performance by PCR counsel in not raising a claim. *Detrich*, 2013 WL 4712729, at **21-22. The current case shows why the prejudice component is a necessary requirement for *Martinez* relief. Here,

any deficiency by PCR counsel in not presenting additional evidence of mitigation that could have been presented at sentencing was cured by the district court considering the new habeas evidence that allegedly effective PCR counsel would have presented. And the district court found that it would not have made a difference. Thus, any deficient performance by PCR counsel did not prejudice Schad.

Regarding whether PCR counsel was deficient, Schad cites Respondent's position on the prior appeal that Schad was not diligent in presenting additional evidence to the PCR court, and therefore the new evidence could not be considered because of 2254(e)(2). That is not the same analysis as whether PCR counsel was deficient under *Strickland*. Diligence concerns *how* a claim was presented, not whether counsel was deficient under *Martinez* for not raising a claim.

Moreover, this Court, in its second amended opinion, *Schad v. Ryan*, 606 F.3d 1022, 1043 (9th Cir. 2010), when diligence was the main issue, did not find PCR counsel deficient, but rather found that "Schad's legal team attempted in state court to develop a factual basis for his ineffective assistance claim, but faced several obstacles." This Court then listed the difficulties faced by PCR counsel. *Id.* Accordingly, it simply cannot be said that "Petitioner's postconviction counsel performed his duties so incompetently as to be outside

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

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

In sum, there is no reasoned basis for this Court to grant relief based on Rule 60 and *Martinez* for the district court to reconsider a claim that has been denied on the merits by this Court, or to reconsider evidence that the district court already considered in rejecting Claim P.

CONCLUSION

For the above reasons, the district court should affirm the district court's finding that Schad's Rule 60 motion constitutes a barred SOS petition. Alternatively, this Court should find that the district court did not abuse its discretion by denying Schad's motion for relief pursuant to Rule 60(b).

Respectfully submitted,

Thomas C. Horne
Attorney General

Jeffrey A. Zick
Chief Counsel

s/ Jon G. Anderson
Assistant Attorney General

Attorneys for Respondents-Appellees

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 27, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Barbara Lindsay
Legal Secretary
Criminal Appeals/
Capital Litigation Sections
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

3549232

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 10,389 words.

s/ Jon G. Anderson
Assistant Attorney General

No. 13-16895

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD, Petitioner-Appellant, –vs– CHARLES L. RYAN, et al., Respondents-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. 2:97-CV-0277-ROS **STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases.

Respectfully submitted this 27th day of September, 2013.

Thomas C. Horne
Attorney General

Jeffrey A. Zick
Chief Counsel

s/ Jon G. Anderson
Assistant Attorney General
Attorneys for Respondents-Appellees