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
PETITION FOR PANEL REHEARING; SUGGESTION FOR REHEARING EN BANC; AND MOTION FOR STAY OF EXECUTION

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STATEMENT REQUIRED UNDER FRAP 35 (B)

Undersigned Counsel certifies that *en banc* review is necessary in this matter for the following reasons:

1. To secure and maintain uniformity of this Court's decisions where this case presents the same issue currently pending before this *en banc* Court in *Dickens v. Ryan*, 704 F.3d 816 (Jan. 4, 2013)(ordering case be re-heard en banc). If the panel opinion in *Dickens* is affirmed by the *en banc* court, then, the panel decision here will be rendered a nullity. Further, the majority opinion conflicts with the *en banc* court's opinion in *Detrich v. Ryan*, 677 F.3d 958 (9th Cir. 2013).

2. This case presents a question of exceptional importance left open by *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011) and which this Court declined to address in *Stokely v. Ryan*, 704 F.3d 1010 (9th Cir. 2012): where to draw the line between an old, exhausted, claim subject to the limitations on relief of 28 U.S.C. § 2254(d)(1) as interpreted in *Pinholster*, versus a "new" unexhausted claim subject to procedural bar which may be excused if the habeas petitioner can establish ineffective assistance of PCR counsel under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and this Court's *en banc* decision in *Detrich v. Ryan*.

3. The majority opinion in this case conflicts with the opinions in *Lopez v. Ryan*, 677 F.3d 958 (9th Cir. 2012) and *Cook v. Ryan*, 688 F.3d 598 (9th Cir. 2012). Under factually similar situations each petitioner in those cases was

permitted to proceed on a motion pursuant to rule 60(b) and was not barred by the rule against second or successive petitions. *En Banc* is necessary to secure uniformity in the decisions of this court.

/s/ Kelley J. Henry

INTRODUCTION

The dispute between the majority and dissent is what constitutes a new claim.[1] This case starkly presents the issue left open in *Pinholster*. The importance of this distinction was animated by the Supreme Court's decision in *Martinez v. Ryan*. The resulting tension between these two cases has created confusion and instability in the lower courts. This court is poised to offer further guidance on the issue in *Dickens*. If the reasoning of the panel opinion in *Dickens* is affirmed, then the majority opinion here is wrong.

The panel majority "misses the fundamental difference between Schad's two claims." *Schad v. Ryan*, No. 13-16895, Slip Op. at 11 (9th Cir. October 4, 2013)(Reinhardt, J. dissenting). This error leads the majority to conclude that Schad presents a second or successive petition, rather than a proper 60(b) motion. The well-reasoned dissent explains precisely why Schad's new, unexhausted, claim is different from the old claim he presented in state court.

> The new claim differs from the old claim in every respect that matters. It relies heavily on new and different evidence relating to Schad's mental illness at the time he committed the crime, notably including Sanislow's report. It points to different deficiencies on the part of

[1] The term "new claim" is used to describe IATC for failure to investigate and present evidence of Schad's adult mental health and its causal connection to the crime ("mental health claim"). This is the claim Schad presented in his first federal habeas that was not finally adjudicated on the merits by the appellate court because the appellate court found the evidence to be "barred." Slip op., at p. 5. Schad's contention is that the claim became available for federal habeas review as a result of the change in procedural law brought by *Martinez v. Ryan*. His motion for rule 60(b) relief relies on this change in habeas procedural law as evidencing a defect in the integrity of the federal court judgment. *See Lopez v. Ryan*, 677 F.3d 958 (9th Cir. 2012).

> counsel than those identified in the old claim, majorityly the failure to examine Schad's mental state at the time of the murder and to obtain a full social history in support of such a claim. Finally, it turns on a different legal theory.

Id., p. 15. This Court should grant rehearing *en banc* to avoid a decision that this Court is likely to "regret in a matter of days or weeks." *Id.* at 12, n.1

ARGUMENT[2]

I. SCHAD'S MENTAL ILLNESS CLAIM IS NEW. HIS 60(B) MOTION IS NOT THE EQUIVALENT OF A SECOND OR SUCCESSIVE PETITION.

The majority opinion and the dissent do not disagree that if Schad presented a new claim of ineffective assistance of counsel in federal habeas, under *Martinez*, he would be entitled to establish cause for the procedural default of his claim. The opinions diverge on where a federal court draws the line between a new claim and an old claim. The majority opinion does not reach the 60(b) question, because it concludes that Schad's claim is based on evidence that the majority opinion observed was "barred" by its 2011 opinion.[3] *Schad v. Ryan*, No. 13-16895, Slip Op. at 5.

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[2] The relevant procedural history is set forth in the majority opinion. Attachment A. Suffice it to say despite having a meritorious constitutional claim which establishes that his sentence is unreliable and unconstitutional, Schad has found himself in a procedural no-man's land.

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

The dissent concluded that Schad's new claim, based on the barred evidence, "differs from the old claim in every respect that matters." *Id* at 15. The dissent explains that Schad's new claim differs from his old claim in three important ways. "Schad's new claim thus relies on new and different factual allegations, a new and different account of the alleged deficiency in sentencing counsel's performance, and a new and different legal theory of why sentencing counsel rendered ineffective assistance." *Id.* Unlike the majority opinion, the dissent's reasoning has support in decades-old law.

A. THE OLD CLAIM

Schad initially sought post-conviction relief in the Superior Court of Yavapai County by filing a preliminary post-conviction petition and motion for appointment of counsel. 07-99005 ER 370-387.[4] 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")

[4] 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].

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.

The dissent characterized the old claim thusly:

> In short, the old claim related only to deficiencies with respect to counsel's failure to investigate Schad's childhood and family environment, including his failure to examine records from Schad's youth and to follow up with mitigation experts. Ultimately, the old claim was based on the legal theory that counsel rendered ineffective assistance by failing to investigate or present substantial evidence that would have painted a human picture of Schad[.]

Slip op. at 13.

B. THE NEW CLAIM

The dissent accurately contrasts the old claim with the new claim. "On federal habeas, in support of the 'new' claim, Schad introduced substantial new factual evidence pertaining to his mental condition as an adult. He argued that

counsel provided ineffective assistance by failing to investigate and present evidence that Schad suffered from serious mental illness at the time of the crime." *Id.* at 14. In point of fact, in the federal district court, Schad sought to present nearly 1200 pages of new 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 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.

C. THE TWO CLAIMS CONTRASTED

The dissent thoroughly, yet succinctly, explains how the claims differ "in every respect that matters." Slip op at 15. Schad's new claim is based on 1) substantial new evidence; 2) different deficiencies on the part of trial counsel; and 3) a different legal theory. Slip op at 15-16.

Exhaustion requires that a petitioner fairly present his claim to the state court. *Weaver v. Thompson*, 197 F.3d 359, 365 (9th Cir. 1999). Fair presentation requires the petitioner to present both the operative facts that support his claim as well as his federal legal theory that his claim is based on so that the state court has a fair opportunity to apply the controlling law to the facts that bear upon the constitutional claim. *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008). "[F]or purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996). It is hornbook law that new facts that fundamentally alter a claim render that claim unexhausted and thus procedurally defaulted. *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994). Schad's mental illness claim is fundamentally different from the old claim presented to the state court. The operative facts and legal theory are different. It is therefore unexhausted and new.

D. CONFLICT WITH *DETRICH V. RYAN*

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 (emphasis supplied). The majority opinion here, which blends Schad's old claim with his new claim, cannot be squared with *Detrich*. Rather, the majority opinion's reasoning is the same reasoning that was rejected by *Detrich*. Thus, even though Schad's PCR counsel presented a narrow claim of IATC, she did not present the new claim first presented in federal habeas. As the dissent observes, "The majority nonetheless treats the two claims as one." Slip op at 16. Yet,

> It is clear that Schad's new claim bears little resemblance to his old one and, therefore, cannot be said to be the same claim that was adjudicated on the merits by the state post-conviction court. The majority errs in reaching a contrary conclusion. That error leads it to mistake Schad's procedurally proper Rule 60(b) motion for a second or successive habeas petition.

Slip op at 18. The dissent's reasoning is thus in line with the *en banc* court's reasoning in *Detrich*.

E. THE *EN BANC* COURT IS ON THE PRECIPICE OF PROVIDING FURTHER GUIDANCE ON THE TENSION BETWEEN *PINHOLSTER* AND *MARTINEZ IN DICKENS* V. RYAN.

On initial submission in habeas, the panel did not have the benefit of *Martinez*. The advent of *Martinez* has turned habeas jurisprudence on its head. Most importantly for Schad, *Martinez* makes clear that there is a defect in the court's original judgment "barr[ing]" his mental illness claim. Slip op at 5. This

tension was explored in the briefing and argument in *Dickens* and should the *en banc* court uphold the panel opinion, then, according to Appellee Ryan, who is also the Appellee in *Dickens*, the panel opinion in *Schad's* case must necessarily be overruled. *See Dickens v. Ryan*, No. 08-99017, Respondents-Appellees' Motion for Rehearing and Rehearing En Banc, Dkt. Entry 69-1, Required Statement. The two cannot live in the same Circuit. It is unconscionable to permit Schad's execution to go forward while this issue remains pending.

F. SCHAD PRESENTS A PROPER 60(B) MOTION. THIS MAJORITY OPINION CONFLICTS WITH THE OPINIONS IN *LOPEZ V. RYAN*, 677 F.3D 958 (9TH CIR. 2012) AND *COOK V. RYAN*, 688 F.3D 598 (9TH CIR. 2012).

The Supreme Court held that "Rule 60(b) has an unquestionably valid role to play in habeas cases." *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005). 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 adjudicated under the limitation on relief pursuant to 28 U.S.C. §2254(d). 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.); Slip Op. at 5 (on appeal the evidence was barred).

Schad's motion does not differ in any meaningful procedural way from the motions filed in *Lopez* and *Cook*. While each habeas petitioner was ultimately denied relief pursuant to rule 60(b), neither petitioner's motion was barred as second or successive.

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—he was unable to previously present.

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

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.* Here Schad asserts that a previous ruling "barr[ing]" evidence which precluded a merits determination of his IATC claim for failure to investigate and present adult mental illness was in error. This is a classic formulation of a proper 60(b) motion under *Gonzalez.* The panel majority erred.[5]

[5] Schad's appeal is not foreclosed by the "law of the case" doctrine as the concurring judge suggests. The author of the majority opinion did not share the view of the concurring judge and as Judge Reinhardt explained:

> In the case that she cites, the Supreme Court addressed only whether "extraordinary circumstances" justified a delay in issuing the mandate under Federal Rule of Appellate Procedure 41(d)(2)(D). *See Ryan v. Schad*, 133 S. Ct. 2548, 2552 (2013). The Supreme Court said nothing about the substance of Schad's argument. Although it did note that we had previously denied Schad's request to vacate the judgment, **we did so only on procedural grounds in an order consisting of a single sentence.** *See Schad v. Ryan*, No. 07-99005, Docket Entry No. 90 ("The petitioner appellant's Motion to Vacate Judgment and Remand to the District Court is DENIED."). Neither our one sentence order nor the Supreme Court's recitation of the procedural history of our case while

G. EQUITY FAVORS SCHAD

In its decision in *Martinez v. Ryan*, the Supreme Court recognized an equitable exception to the rules of procedural default that permits a federal habeas petitioner to demonstrate ineffective assistance of initial-opportunity collateral-review counsel as cause for failure to raise a substantial claim of ineffective assistance of trial counsel. That decision was predicated upon the tenet that "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez*, 132 S.Ct. at 1317. Likewise, Court observed that just as effective counsel is necessary to litigate claims of error on direct appeal from a conviction, "[w]ithout the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective assistance of trial counsel claim. *Id.*

Central to every capital sentencing trial is a social history of the client and expert analysis of any mental disabilities that history presents. See *Gregg v. Georgia*, 428 U.S. 153, 190 (1976)("accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)("the Eighth and Fourteenth

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> addressing an entirely different issue constitutes law of the case that controls this Rule 60(b) appeal.

Dissent at 9, n.2.(emphasis supplied).

Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death"); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (consideration of the offender's life history is a "part of the process of inflicting the penalty of death"); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse").

Schad was denied a constitutionally reliable sentencing trial because of his appointed counsel's professional errors. Though as the majority opinion correctly observes, Schad's case has "traversed every twist and turn in the path of federal habeas," Slip op. at 1, he has yet to receive a full federal adjudication of his meritorious constitutional claim because of the defects in the Court's judgment which "barred," Slip op. at 5, his claim for review even though under *Martinez* he can now, finally, establish his entitlement to relief.

II. THIS COURT SHOULD STAY SCHAD'S EXECUTION

These facts and argument warrant a stay here. Schad has demonstrated a substantial likelihood of success on the merits where this Court has already

determined that the issue presented warrants en banc review in *Dickens* and where the majority opinion conflicts with *Detrich, Lopez, and Cook*. Where Schad's underlying IATC claim relating to his adult mental illness is plainly meritorious, he is likely to ultimately prevail on the merits of his claim. The harm to Schad is irreparable and weighs heavily in his favor. The state's interest in finality is not great where Rule 60(b) is by definition an exception to finality[6] and where the capital sentence is constitutionally suspect. The public interest in carrying out this capital sentence is likewise not great. The public has no interest in executing a man unjustly. Moreover, before this court is a 71 year-old man, convicted wholly on circumstantial evidence, who was offered a life sentence, and who has served thirty-five years in prison, half his life, without a single disciplinary infraction. The public will not be served by his execution without giving him his one fair shot at adjudicating his meritorious constitutional claim. The public is served by upholding the constitution.

A stay should be granted.

[6] The victim's family has never voiced support for the death penalty in this case.

CONCLUSION

As shown by this Court's grant of *en banc* review in *Dickens* this case is likewise worthy for en banc review and a stay of execution pending the outcome of *Dickens*. "That is the least [this Court] should do before carrying out a sentence of death under the questionable circumstances presented here." Slip op. at 18-19.

WHEREFORE, Appellant prays this Court will grant rehearing, rehearing *en banc*, a stay of execution, and any and all other relief this Court deems reasonable and necessary.

Respectfully submitted this 5th day of October, 2013.

Kelley J. Henry
Denise I. Young

BY: */s/ Kelley J. Henry*
Counsel for Mr. Schad

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Consolidated Petition for Rehearing and Suggestions for Rehearing *En Banc* and Motion for Stay of Execution contains 4075 words.

/s/ Kelley J. Henry
Counsel for Mr. Schad

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 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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FILED

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U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD, Petitioner - Appellant, v. CHARLES L. RYAN, Director, Arizona Department of Corrections, Respondent - Appellee.	No. 13-16895 D.C. No. 2:97-cv-02577-ROS OPINION

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, Senior District Judge, Presiding

Submitted October 1, 2013*
San Francisco, California

Before: SCHROEDER, REINHARDT, and GRABER, Circuit Judges.

Opinion by Judge Schroeder:

SCHROEDER, Senior Circuit Judge:

Edward Harold Schad is scheduled to be executed by the State of Arizona on October 9, 2013. He was convicted in 1985 of first degree murder in the strangling

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

death of Lorimer Grove. Federal habeas proceedings began in 1997 and in the intervening years have traversed every twist and turn in the path of federal habeas. The case reached Supreme Court review for the third time last summer. The history of the litigation is summarized in its opinion, *Ryan v. Schad*, 133 S. Ct. 2548, 2549–50 (2013) (per curiam). We set forth a somewhat fuller time line here.

> **December 14, 1978** - Schad is indicted for first degree murder in Arizona.
>
> **June 27 - August 29, 1985** - Schad is convicted of first degree murder and sentenced to death.
>
> **December 14, 1989** - Schad's conviction and sentence are affirmed on direct appeal. *State v. Schad*, 788 P.2d 1162 (Ariz. 1989).
>
> **June 21, 1991** - After granting certiorari (on instruction issues), the Supreme Court affirms. *Schad v. Arizona*, 501 U.S. 624 (1991).
>
> **December 16, 1991** - Schad files for habeas relief in Arizona state court.
>
> **June 21, 1996** - The state court dismisses Schad's petition for habeas relief that claimed ineffective assistance at sentencing.
>
> **December 16, 1997** - Schad files for habeas relief in the district of Arizona.
>
> **September 28, 2006** - The district court denies Schad's petition for habeas relief, *Schad v. Schriro*, 454 F. Supp. 2d 897 (D. Ariz. 2006), holding Schad was not diligent in state court and denying on the merits with respect to evidence presented in federal court.

January 12, 2010 - This court reverses the district court and remands to determine whether Schad had been diligent in presenting evidence regarding his mental health to the state court. *Schad v. Ryan*, 595 F.3d 907, 922–23 (9th Cir. 2010).

April 18, 2011 - The Supreme Court grants Arizona's petition for certiorari and remands back to this court to reconsider its decision in light of the Supreme Court's opinion in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). *Ryan v. Schad*, 131 S. Ct. 2092 (2011) (per curiam).

November 10, 2011 - This court affirms the district court's denial of Schad's habeas petition on the merits. *Schad v. Ryan*, 671 F.3d 708, 722 (9th Cir. 2011) (per curiam).

July 27, 2012 - This court denies Schad's Motion to Vacate Judgment and Remand in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). No. 07-99005(CA9), Docs. 88, 91.

October 9, 2012 - The Supreme Court denies Schad's certiorari petition. *Schad v. Ryan*, 133 S. Ct. 432 (2012).

February 1, 2013 - This court denies Schad's "Emergency Motion to Continue Stay of the Mandate Pending En Banc Proceedings in *Dickens v. Ryan*," and construes it as a motion to reconsider its prior denial of his Motion to Vacate Judgment and Remand in light of *Martinez*. No. 07-99005(CA9), Doc. 102, pp. 1-2.

February 26, 2013 - This court grants Schad's Motion to Vacate Judgment and Remand. *Schad v. Ryan*, No. 07-99005, 2013 WL 791610 (9th Cir. Feb. 26, 2013).

June 24, 2013 - The Supreme Court grants certiorari, reverses, and remands back to this court to issue the mandate. *Ryan v. Schad*, 133 S. Ct. 2548, 2552 (2013) (per curiam).

September 4, 2013 - This court issues its mandate affirming the district court's 2006 denial of habeas relief in all respects pursuant to

its third amended opinion of November 10, 2011. No. 07-99005(CA9), Doc. 137, p. 1.

September 19, 2013 - The district court dismisses Schad's motion for relief under Federal Rule of Civil Procedure 60(b) as an unauthorized second or successive petition. *Schad v. Ryan*, No. CV-97-02577-PHX-ROS, 2013 WL 5276407 (D. Ariz. Sept. 19, 2013).

Schad now appeals the district court's dismissal of his Rule 60(b) motion seeking to reopen the district court's 2006 denial of his original federal habeas petition. Underlying both this proceeding, and the attempts to stay the mandate that led to the Supreme Court's decision earlier this year, is Schad's claim that he received ineffective assistance of counsel in his state court sentencing, because his counsel failed to present mitigating evidence of the effect that his childhood abuse had on his mental condition at the time he committed the crime.

Federal court consideration of evidence or claims not presented in the state court is generally barred. *See Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), *see also Ryan v. Schad*, 131 S. Ct. 2092 (2011). The Supreme Court later held, however, in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), that ineffective assistance of post-conviction counsel in some circumstances can establish cause for lifting the procedural bar to a claim not pursued in state court proceedings. Schad contends that his ineffectiveness claim can now be considered under *Martinez*.

When this ineffectiveness contention was presented to us in 2012 as a motion to remand, we originally denied it. We reconsidered the denial in light of intervening authority from our court. *Schad v. Ryan*, No. 07-99005, 2013 WL 791610, at *1 (9th Cir. Feb. 26, 2013). After we attempted to remand the matter to the district court to decide whether Schad's claim came within the Supreme Court's holding in *Martinez*, however, the Supreme Court ruled that there were no extraordinary circumstances justifying our reconsideration of our earlier ruling. *Schad*, 133 S. Ct. at 2552. Thus, we then issued the mandate for our November 2011 decision and Schad was barred from litigating his ineffectiveness of counsel claim under *Martinez*.

Schad has now attempted to accomplish the same purpose by filing a Rule 60(b) motion to vacate the district court's 2006 denial of habeas relief and thus reopen his original habeas petition. He wants to show that his state post-conviction counsel was ineffective in failing adequately to present a claim relating to his mental condition at the time of sentencing. He offers some evidence, principally an affidavit of a medical expert about the effect of his childhood abuse on his adult mental condition, that he has asked the federal courts to consider since these habeas proceedings began, and which we in 2011 effectively ruled was barred by *Pinholster*, following the Supreme Court's remand.

The district court in denying the Rule 60(b) motion recognized that Schad had already raised in state court habeas proceedings a claim that trial counsel was ineffective in failing to investigate his childhood abuse. The district court also recognized that the claim now being made, i.e., the failure of trial counsel to develop more evidence, is the same as it had rejected earlier. The district court therefore concluded that it had already ruled on Schad's claim and that there was no separate procedurally defaulted claim that could be the basis for applying *Martinez*.

In this appeal, Schad's principal contention is that the district court erred because he is presenting a different ineffective assistance claim than that presented in state court. He is now contending that the federal claim of counsel ineffectiveness with respect to the effect of childhood abuse is somehow distinct from the earlier claim of ineffectiveness in failing to investigate the childhood abuse itself. The two cannot be so easily separated, however, because the relevant mitigating factor in sentencing was always the effect of the childhood abuse on his adult mental state. As we explained in an earlier opinion, the point of presenting new evidence of Schad's dismal childhood was to show its effect on his adult mental health. *See Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011). For example, we wrote:

> At the sentencing hearing, defense counsel . . . [did not] seek a comprehensive psychiatric evaluation to assess the negative effects of that abuse. [*Id.* at 720.]
>
> The expert [whose affidavit counsel attached] recommended that a comprehensive psychological evaluation be performed . . . . [*Id.* at 721.]
>
> Schad sought to present mitigating evidence . . ., including extensive mental health records of [family members], as well as several declarations discussing Schad's childhood and its effect on his mental health. The first declaration . . . provided an extremely detailed discussion of the psychological impact of Schad's abusive childhood. [*Id.* at 721–22 (emphasis added).]

The claim presented here is thus not new. It is essentially the same as the claim he brought in his original habeas petition. There is no separate procedurally defaulted ineffectiveness claim.

We do not need to decide whether Rule 60(b) can ever be an appropriate vehicle for bringing a *Martinez* argument with respect to a procedurally defaulted claim. The district court in this case correctly held that "[p]etitioner's Rule 60(b) motion does not present a new claim; rather, he seeks a second chance to have the merits determined favorably." *Schad v. Ryan*, No. CV-97-02577-PHX-ROS, 2013 WL 5276407, at *6 (D. Ariz. Sept. 19, 2013) (internal quotation marks omitted). The district court correctly dismissed the Rule 60(b) motion as a second or successive petition.

AFFIRMED.

COUNSEL

Kelley J. Henry, Assistant Federal Public Defender, Nashville, Tennessee; and Denise Irene Young, Denise I. Young, Tucson, Arizona, for petitioner-appellant Edward Harold Schad.

Jon Anderson, Assistant Attorney General and Jeffrey A. Zick, Assistant Attorney General, Arizona Attorney General's Office, Phoenix, Arizona, for respondent-appellee Charles L. Ryan, Director, Arizona Department of Corrections.

FILED

OCT 04 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Schad v. Ryan, No. 13-16895

GRABER, Circuit Judge, concurring:

I concur in the majority opinion but would deny the Rule 60(b) motion for a second, independent reason.

The Supreme Court emphasized that our court already denied Schad's Martinez-based request to vacate the judgment and remand the case.[1] "The Ninth Circuit denied [Schad's] motion on July 27, 2012." Ryan v. Schad, 133 S. Ct. 2548, 2549–50 (2013) (per curiam). The Supreme Court then denied a petition for certiorari and a petition for rehearing. Id. at 2550. "Further, there 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 2552. Both motions sought a Martinez remand on the ground that post-conviction counsel should have developed more evidence to support the claim of ineffective assistance of counsel at sentencing. Id. The Court went on to suggest that Schad was not diligent in developing this claim. See, e.g., id. at 2550 n.2, 2552 n.3.

I take those statements to instruct, or at least strongly suggest, that the law of the case doctrine applies. Accordingly, I would deny the Rule 60(b) motion on this ground as well.

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[1] I question the relevance of Martinez v. Ryan, 132 S. Ct. 1309 (2012), because the district court did not rely on a procedural default that could be excused. The court examined the issue on the merits.

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Schad v. Ryan, 07-99005

REINHARDT, Circuit Judge, dissenting.

I would hold that the allegation of Schad's serious mental illness at the time he committed his offense constitutes a new ineffective assistance of counsel claim. In reaching a contrary result, the majority adopts an erroneous view of how Schad's new allegation relates to his old ineffective assistance claim—and thus misses the fundamental difference between Schad's two claims. This error leads the majority to dismiss Schad's motion by deeming it a second or successive petition. Because Schad in fact presents a new claim that satisfies the standard for relief from judgment under Federal Rule of Civil Procedure 60(b), I dissent.

My disagreement with the majority turns on an assessment of the proper interpretation of the scope of Schad's old and new claims. When Schad presented new evidence on federal habeas regarding the failure of sentencing counsel to investigate the state of his serious mental illness as of the time of the crime, he advanced a new claim distinct from his earlier one that counsel should have investigated Schad's history of childhood abuse. *See Valerio v. Crawford*, 306 F.3d 742, 768 (9th Cir. 20002) (en banc). Although the majority blends the two claims into a single argument, each of these claims relies basically on different evidence, invokes a different legal basis for mitigation, and results from a different

kind of deficiency in counsel's investigation and presentation of mitigation evidence. Those considerations dictate the conclusion that Schad's claim based on recently-obtained evidence is a new and different one.

To be sure, the line between a new claim and an old claim bolstered by more evidence is not always clear.[1] Wherever that line is drawn, however, Schad's claim is most certainly a new one. An examination of the new evidence that he has presented on federal habeas, and his legal theories supporting a finding of ineffective assistance, demonstrate that Schad has advanced two separate claims,

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[1] *Dickens v. Ryan*, a case currently pending before the en banc court, involves a similar fact pattern and presents a similar question to that which we are forced to address hastily in Schad's case. *See* 688 F.3d 1054 (9th Cir. 2012), *vacated*, 704 F.3d 816 (9th Cir. 2013). The panel that originally decided *Dickens* concluded that a petitioner's factual allegations regarding mitigation evidence in federal court may amount to a new ineffective assistance claim, even where that petitioner has already alleged a more general ineffective assistance claim based on failure to investigate. *See id.* at 1067-70. It is to be expected that the en banc court will address that question and offer guidance on how to determine when new allegations generate a new claim. In almost any other circumstance, because a hasty resolution of this complicated issue runs a high risk of error, we would await the en banc ruling in *Dickens*. As Justice Douglas once said, "It is . . . important that before we allow human lives to be snuffed out we be sure—emphatically sure—that we act within the law." *Rosenberg v. United States*, 346 U.S. 273, 321 (1953) (Douglas, J., dissenting). Although under the presently controlling case law, we are required to act quickly and without due time for reflection, Justice Douglas's maxim counsels in favor of a liberal reading of the law governing what qualifies as a "new claim" so that we may avoid making a decision that we may regret in a matter of days or weeks.

only one of which was presented to and adjudicated by the state post-conviction court.

Schad's initial claim was that "sentencing counsel was ineffective for failing to discover and present mitigating evidence regarding Schad's family background." *Schad v. Ryan*, 671 F.3d 708, 721 (9th Cir. 2011). This "old" claim did not purport to raise the question of Schad's mental condition as an adult. Rather, the old claim simply alleged an incompetent investigation of Schad's background—an investigation that resulted in an inability to present a complete picture of a person that could have helped humanize Schad before the sentencer. In short, the old claim related only to deficiencies with respect to counsel's failure to investigate Schad's childhood and family environment, including his failure to examine records from Schad's youth and to follow up with mitigation experts. Ultimately, the old claim was based on the legal theory that counsel rendered ineffective assistance by failing to investigate or present substantial evidence that would have painted a human picture of Schad—a picture that might have prompted a reasonable judge to feel sympathy and spare the defendant's life. *See Ainsworth v. Woodford*, 268 F.3d 868, 876-77 (9th Cir. 2001) (emphasizing the "essential importance of developing the background and character of a defendant in order to make an individualized assessment of the appropriateness of the death penalty.").

On federal habeas, in support of the "new" claim, Schad introduced substantial new factual evidence pertaining to his mental condition as an adult. He argued that counsel provided ineffective assistance by failing to investigate and present evidence that Schad suffered from serious mental illness at the time of the crime. One of his doctors, Dr. Sanislow, offered expert opinions regarding Schad's "cognitive and psychological development and his behavioral functioning as an adult." Sanislow's extremely thorough review of Schad's history notes that his early (pre-crime) documented behavior was consistent with "several major mental disorders, apparently none of which was ever considered previously." These disorders include "Bipolar Disorder; Major Depression or other depressive disorders; Obsessive-Compulsive Disorder; Schizoaffective Disorder; Several of the anxiety disorders; Dissociative disorders; Adjustment disorders." In his report, Sanislow concludes:

> [Schad's] behavior is consistent with mental illness in the affective spectrum, specifically some type of bipolar affective illness. Throughout his life, he had often exhibited symptoms of paranoia, anxiety, and mania, and his presentation is complicated by his history of trauma. Signs of a thought disturbance are at times present in his speech patterns; he perseverates, displays impoverished speech, and has a limited range of affect. The passive-dependent traits that [an earlier expert] described in her psychological evaluation are likely accompaniments to chronic mental illness but do not capture the complete

> diagnostic picture. In addition to manic symptoms, he displays classic signs of chronic depression including a foreshortened sense of future.

This new evidence stands in stark contrast to the pre-sentencing report, relied on heavily by the sentencing court, which stated that "[Schad] has not suffered from any mental health problems."

The new claim differs from the old claim in every respect that matters. It relies heavily on new and different evidence relating to Schad's mental illness at the time he committed the crime, notably including Sanislow's report. It points to different deficiencies on the part of counsel than those identified in the old claim, principally the failure to examine Schad's mental state at the time of the murder and to obtain a full social history in support of such a claim. Finally, it turns on a different legal theory. The new claim, unlike the old one, is not concerned with inadequacies in painting Schad as a sympathetic individual by virtue of his difficult childhood. It is not based on counsel's failure to develop evidence that Schad's abusive upbringing constituted a mitigating circumstance that outweighed the case for death. Rather, it attempts to establish that counsel was ineffective for failing to investigate and present evidence of serious mental illness as an adult that might have been responsible, at least in part, for Schad's commission of the violent act of

intentionally killing Grove. Without this evidence, Schad's crime appears to be nothing but the act of a ruthless and cold blooded killer. This was especially true in light of the other evidence at sentencing, which strongly suggested that Schad was of sound mind at the time that he committed the offense. Schad's new claim thus relies on new and different factual allegations, a new and different account of the alleged deficiency in sentencing counsel's performance, and a new and different legal theory of why sentencing counsel rendered ineffective assistance.

The majority nonetheless treats the two claims as one. Its insistence that Schad's claim has always been based on the link between childhood abuse and his mental condition at the time of the offense, however, is simply not correct. In our earlier opinion, relied upon by the majority, we revealed our awareness that Schad's claim was focused almost exclusively on his childhood. We quoted at length from the pre-sentence report's discussion of "Schad's childhood," noted that counsel "did not present additional evidence regarding Schad's troubled childhood," observed that Schad's preliminary state habeas petition "argued the sentencing court failed to give proper weight to mitigating evidence of his troubled family background," and pointed out that his supplemental state petition included "a general claim that Schad's sentencing counsel was ineffective for failing to discover and present mitigating evidence regarding Schad's family background."

Schad v. Ryan, 671 F.3d 708, 720-21 (9th Cir. 2011). Turning to his federal petition, we added:

> By the start of federal habeas proceedings in 1998, Schad's counsel had obtained a great deal more information about *his early and abusive childhood experiences*. Schad asserted that he received ineffective assistance of counsel at the penalty phase of trial when his attorney, Shaw, failed to investigate and present *mitigating evidence regarding Schad's troubled childhood*, and instead relied on the brief discussion of Schad's childhood contained in the psychiatrist's testimony and in the presentence report. During proceedings before the district court, Schad sought an evidentiary hearing in order to present a significant amount of *evidence regarding his abusive childhood*, which he contends his sentencing counsel should have presented at the sentencing hearing.

Id. at 721 (emphasis added). The unmistakable point of our opinion was that Schad based his old ineffective assistance claim on failure to present mitigation evidence consisting of his abusive childhood experiences. We said nothing whatsoever about ineffective assistance in failing to seek or obtain evidence of Schad's mental illness as an adult.

The majority bases its argument almost entirely on a few references to the lack of investigation into Schad's psychiatric status. In context, however, these statements refer to evaluations of how his traumatic experiences affected Schad as a youth and relate solely to the sympathy-based mitigation argument described

above. *See, e.g.*, *id.* at 720 (noting that counsel failed to obtain "first-hand descriptions of the abuse Schad suffered as a child" or "a psychiatric evaluation to assess the negative effects of that abuse"). At no point in our prior opinion did we say anything at all about a connection between Schad's youth and his commission of the crime or about his multi-faceted mental illness at the time he did so. Ultimately, the majority errs in concluding that because Schad's childhood trauma may be relevant to both ineffective assistance claims, those two claims must constitute a single claim. In fact, the new claim relies upon that childhood evidence only to provide an explanation of the background conditions that led to the development of Schad's serious mental ailments. It does not seek mitigation because of Schad's abusive childhood. To the contrary, it seeks mitigation because of the serious mental illness that marked Schad's adult life.

It is clear that Schad's new claim bears little resemblance to his old one and, therefore, cannot be said to be the same claim that was adjudicated on the merits by the state post-conviction court. The majority errs in reaching a contrary conclusion. That error leads it to mistake Schad's procedurally proper Rule 60(b) motion for a second or successive habeas petition. Because Schad's Rule 60(b) motion satisfies all other requirements for relief, I would remand to the district court to review his new ineffective assistance claim on the merits. That is the least

we should do before carrying out a sentence of death under the questionable circumstances present here.[2]

[2] Judge Graber suggests in her concurring opinion that law of the case doctrine provides an independent reason to affirm the district court. I disagree. In the case that she cites, the Supreme Court addressed only whether "extraordinary circumstances" justified a delay in issuing the mandate under Federal Rule of Appellate Procedure 41(d)(2)(D). *See Ryan v. Schad*, 133 S. Ct. 2548, 2552 (2013). The Supreme Court said nothing about the substance of Schad's argument. Although it did note that we had previously denied Schad's request to vacate the judgment, we did so only on procedural grounds in an order consisting of a single sentence. *See Schad v. Ryan*, No. 07-99005, Docket Entry No. 90 ("The petitioner-appellant's Motion to Vacate Judgment and Remand to the District Court is DENIED."). Neither our one sentence order nor the Supreme Court's recitation of the procedural history of our case while addressing an entirely different issues constitutes law of the case that controls this Rule 60(b) appeal.