No. 13-6756

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD HAROLD SCHAD,
PETITIONER,
-vs-

CHARLES L. RYAN, Warden,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

THOMAS C. HORNE
ATTORNEY GENERAL

JEFFREY A. ZICK
CHIEF COUNSEL

JON G. ANDERSON
ASSISTANT ATTORNEYS GENERAL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
JON.ANDERSON@AZAG.GOV
CADOCKET@AZAG.GOV
TELEPHONE: (602) 542-4686

ATTORNEYS FOR RESPONDENT

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Did the district court err by concluding that Schad's Rule 60(b) motion constituted a barred second or successive habeas petition because it was asking the district to reconsider its previous denial of Claim P, which alleged ineffective assistance of counsel at sentencing in failing to develop and present addition mitigating evidence, when the district court had denied Claim P, both in light of the state court record, and in light of the additional evidence offered for the first time in federal habeas, which included the mental health evidence that Schad re-proffered with his Rule 60 motion?

2. Is the inapplicability of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the law of the case, when the Ninth Circuit denied Schad's *Martinez* motion and this Court recently held in *Ryan v. Schad*, 133 S. Ct. this Court abused its discretion in staying the mandate and reconsidering the argument it had "already explicitly rejected." *Ryan v. Schad* , 133 S. Ct. 2448, at 2549 & 2552 (2013).

3. Does *Martinez* have any applicability when the district did not find a procedural default regarding Claim P, but rather rejected it on the merits and considered the mental health evidence Schad proffered in support of Claim P.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

OPINIONS BELOW

Petitioner Schad has included as an appendix to his petition, the relevant decisions below that pertain to his Rule 60 motion. Also relevant to analysis of the issues are the Ninth Circuit's third amended opinion affirming the district court's denial of habeas relief to Schad, *Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011), and the district court's judgment and order denying habeas relief, *Schad v. Schriro*, 454 F. Supp. 2d 897 (D. Ariz. 2006).

STATEMENT OF JURISDICTION

Respondent agrees that this Court has jurisdiction in this matter.

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2244(b)(1) provides, in relevant part:

> A claim presented in a second or successive habeas application under section 2254 that was presented in a prior application shall be dismissed.

STATEMENT OF THE CASE

I. FACTS.

As this Court is well aware of the facts of this case, having rendered an opinion earlier this year, Respondent will not repeat them here, except to note that in 1978 Schad murdered the victim, Lorimer Grove, a 74-year-old resident of Bisbee, Arizona, who was driving his new Cadillac and a trailer to visit his sister in Everett, Washington.

II. PROCEDURAL HISTORY.

This Court's recent unanimous *per curiam* opinion, which summarily reversed the Ninth Circuit'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).

This 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 the Ninth Circuit had denied Schad's *Martinez* motion on July 27, 2012, and stated: "[t]here is no doubt that the arguments presented in the rejected July 10, 2012, motion were *identical to those accepted by the Ninth Circuit the following February*." *Id.* at 2551 (emphasis added). This Court found the Ninth Circuit panel majority had 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. This 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, this Court reversed the Ninth Circuit's Order of February 26, 2013, and remanded with instructions for the Ninth Circuit to issue the mandate "immediately and without any further proceedings." *Id.* Schad filed a petition for rehearing, which this 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, the Ninth Circuit 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). 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. (Petitioner's Appendix [PA], D.)

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 the Ninth Circuit. (PA, D, at 1.) The court recounted Schad's four sub-arguments in Claim P regarding ineffective assistance of counsel at sentencing. (*Id.* at 2.) It noted it had ordered the parties to address the merits of three of the four sub-parts of Claim P. (*Id.* at 3.) 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*." (*Id.* at 4.) 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 the Ninth Circuit, on the habeas appeal, had affirmed the

district court's judgment denying habeas relief, and rejected Schad's motion for additional proceedings in light of *Martinez.* (*Id.* at 4-5.)

The district court concluded that Schad's Rule 60(b) motion was a challenge to its previous ruling on the merits of Claim P. (*Id.* at 1, 11.) It noted that it had not made a procedural default determination that precluded a merits determination (*Id.* at 9) and that the Ninth Circuit on appeal had made an on-the-merits ruling rejecting the claim. (*Id.* at 10, 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. (*Id.* at 11.)

Schad took an appeal to the Ninth Circuit to dispute the district court's ruling. In addressing the appeal, the panel majority set forth a time-line of what had happened in the case. (Appendix A, at 2-4.) It noted that the Ninth Circuit's previous decision to reconsider the *Martinez* issue was reversed by this Court, and accordingly: Schad was barred from litigating his ineffectiveness of counsel claim under *Martinez.* (*Id.* at 5.) It found that Schad's Rule 60 motion was simply an attempt to "accomplish the same purpose." (*Id.*) It noted that the motion was offering 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 proceeding began, and which we in 2011 effectively ruled was barred by *Pinholster*, following the Supreme Court's remand." (*Id.*)

The opinion found that the district court had recognized that Schad had already raised the same claim, and that it had rejected the claim, and concluded

there was no separate procedurally defaulted claim that could be a basis for applying *Martinez.* (*Id.* at 6.) The opinion rejected Schad's contention that he was presenting a "different ineffective assistance claim." (*Id.*) It concluded that: (1) the claim now presented was not new; (2) it was essentially the same as the claim he brought in his original petition; and (3) there is no separate procedurally defaulted ineffective assistance claim. (*Id.*) It held that the district court correctly dismissed the Rule 60(b) motion as a second or successive petition. (*Id.*)

Judge Graber filed a concurring opinion, in which she added that there was a second reason to affirm the district court, that the rejection of the *Martinez* claim was the law of the case. (Appendix A,, Graber J. dissenting.) Judge Reinhardt filed a dissent, concluding there was a separate claim of ineffective assistance of counsel that was procedurally defaulted, and which supported a "remand to the district court to review his new ineffective assistance claim on the merits." (*Id.* at Reinhardt, J. dissenting, at 8.)

Schad filed a petition for rehearing and suggestion for rehearing en banc, and a motion for a stay. The petition for rehearing en banc was denied. (PA, B.) The panel filed an order denying the petition for rehearing and the motion for a stay. (PA, C.) Judge Reinhardt dissented, he voted to grant the petition for rehearing and the motion for a stay of execution. (*Id.*)

REASONS FOR DENYING THE WRIT

First, the district court and the Ninth Circuit extensively examined the factual background of the case to determine whether the Rule 60 motion was simply a rehash of Claim P, which had been previously rejected by the district court, and

reasonably concluded that it was. These decisions did not "decide an important federal issue in a way that conflicts with another state court of last resort or of a United States Court of Appeals, or decide an important federal question "in a way that conflicts with relevant decisions of this Court." See Rules 10(a)-(c), Rules of the Supreme Court. Rather, they simply decided, based on the complex procedural history of this case, that Schad was re-packaging an issue that the district court had already decided, and therefore the Rule 60 motion constituted a barred second or successive petition.

Second, as noted by Judge Graber, this Court already ruled that the Ninth Circuit had denied Schad's *Martinez* motion back in 2012, and could not reconsider a decision it had already made. As the Ninth Circuit panel majority opinion stated, Schad was simply trying to reassert the previously-rejected *Martinez* motion under the guise of a Rule 60 motion. As Judge Graber's concurrence pointed out, the rejection of *Martinez* was the law of the case, which also justified affirming the district court's dismissal of the Rule 60 motion.

Third, *Martinez* is simply inapplicable because there was no procedural default that needed excusing; rather Claim P was denied on the merits by the district court, considering the new mental health evidence that Schad presented in support of Claim P. Thus, *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.

Because there was no procedural default, the issue was controlled by *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), as the Ninth Circuit held in its third amended opinion. Thus, the current case does not present an important question of federal law not yet settled by this court. See Rule 10(c), but simply applied this Court's decision in *Pinholster*.

ARGUMENTS

I

THE DISTRICT COURT DID NOT ERR BY CONCLUDING THAT SCHAD'S RULE 60(B) MOTION CONSTITUTED A BARRED SECOND OR SUCCESSIVE HABEAS PETITION BECAUSE IT WAS ASKING THE DISTRICT TO RECONSIDER ITS PREVIOUS DENIAL OF CLAIM P, WHICH ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING IN FAILING TO DEVELOP AND PRESENT ADDITION MITIGATING EVIDENCE, WHEN THE DISTRICT COURT HAD DENIED CLAIM P, BOTH IN LIGHT OF THE STATE COURT RECORD, AND IN LIGHT OF THE ADDITIONAL EVIDENCE OFFERED FOR THE FIRST TIME IN FEDERAL HABEAS, WHICH INCLUDED THE MENTAL HEALTH EVIDENCE THAT SCHAD RE-PROFFERED WITH HIS RULE 60 MOTION?

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 panel majority reasonably found, that, based on the complex record in this case, 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.

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

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

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

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, . . ." (PA D, at 1.) Schad's attempt to avoid this result by arguing that his Rule 60 motion is not an attack on the district court's ruling on Claim P must fail.

Claim P was his multi-faceted claim of ineffective assistance of counsel at sentencing.[2] (OB at 4.) All of his claims of ineffective assistance of sentencing counsel, exhausted and unexhausted, were referred to collectively as Claim P by the district court. He does not contest that he submitted substantial new material in the habeas proceedings in support of Claim P. The district court's order alternatively ruled that, even with the new evidence, Claim P was without merit.

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. But the record clearly shows that the district court did consider the new mental health evidence in rejecting Claim P. Certainly, the district court did not make a procedural

---

[2] This 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.)

determination that "precluded a merits determination," *Gonzalez*, 545 U.S. at 532 n.4, but rather made a merits determination in light of the additional evidence.

The Ninth Circuit'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). Nevertheless, the district court 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

[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. *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, any claim that the district court did not consider the new mental healh evidence in connection with Claim P is spurious. *See also Parker v. Dugger*, 498 U.S. 308, 313 (1991) ("We must assume that the (刼entence) considered all this evidence before passing sentence. For one thing, he said he did.").

II

THE INAPPLICABILITY OF *MARTINEZ V. RYAN*, 132 S. CT. 1309 (2012), IS THE LAW OF THE CASE, BECAUSE THE NINTH CIRCUIT DENIED SCHAD'S *MARTINEZ* MOTION AND THIS COURT RECENTLY HELD IN *RYAN V. SCHAD*, 133 S. CT. THIS COURT ABUSED ITS DISCRETION IN STAYING THE MANDATE AND RECONSIDERING THE ARGUMENT IT HAD "ALREADY EXPLICITLY REJECTED." *RYAN V. SCHAD* , 133 S. CT. 2448, AT 2549 & 2552 (2013).

As argued by Judge Graber's concurrence, the rejection of Schad's *Martinez* argument was the law of the case, and also supported the district court's denial of Rule 60 relief. Because the Ninth Circuit denied *Martinez* relief in 2012, and this 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 district court was bound to follow the Ninth Circuit's law regarding law of the case.

"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) the Ninth Circuit's third amended opinion affirming the district court's judgment; (3) the Ninth Circuit's 2012 order summarily denying habeas relief; (4) this Court's recent opinion reversing this Court's later grant of *Martinez* relief; and (5) the Ninth Circuit's mandate order specifying that the mandate issued from its third amended opinion affirming in all

[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.*

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*, and *Martinez* does not apply. None of the Ninth Circuit's vacated opinions constituted law of the case. *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) The law of the case required rejection of Schad's re-renewed attempt to obtain *Martinez* relief on Claim P.

III

MARTINEZ DOES NOT APPLY IN THIS CASE BECAUSE THE DISTRICT COURT DID NOT FIND A PROCEDURAL DEFAULT REGARDING CLAIM P, BUT RATHER REJECTED IT ON THE MERITS AND CONSIDERED THE MENTAL HEALTH EVIDENCE SCHAD PROFFERED IN SUPPORT OF CLAIM P.

Schad suggests that this case is an opportunity to reconcile *Martinez* and *Pinholster*. Although those opinions have generated substantial litigation, their relative roles in this case is clear. Because the district court, and the state court, denied the IAC claim on the merits, *Pinholster* applies. Because there was no procedural default finding by the district court, *Martinez* does not apply. Schad's suggestion that presenting new evidence in support of an IAC claim in federal court makes a new claim that is procedurally defaulted, would render the absurd result that *Pinholster* never applies and *Martinez* always applies.

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. The Ninth Circuit 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.

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 this 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.)

This case has nothing to do with other opinions from this Court, such as the pre-*Pinholster* opinion in *Panetti v. Quarterman*, 551 U.S. 930 (2007). That case had to do with the presentation of evidence of *competence to be executed* in support of *a second or successive habeas petition*. This Court noted that the issue raised in *Panetti* is unique because it only becomes ripe after the completion of the federal habeas corpus process, and its later consideration is therefore not barred by the limits on second or successive petitions. 551 U.S. at 942-48. This Court also found that the state court had failed to provide the minimum procedural due process required by *Ford v. Wainwright*, 477 U.S. 399 (1986), and therefore its decision constituted an unreasonable application of clearly established Supreme Court law. 551 U.S. at 948. The narrow scope of *Panetti* does not affect the general principle reaffirmed in *Pinholster*.

Martinez explains that the general procedural default rule of *Coleman v. Thompson*, 501 U.S. 722, 754 (1991), "governs all but the limited circumstances recognized here." 132 S. Ct. at 1320. *Martinez* recognized this "narrow exception" to

Coleman: "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, *a procedural default* will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial, if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 132 S. Ct. at 1320, emphasis added. In other words: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's *procedural default of a claim* of ineffective assistance at trial." *Id.* at 1315, emphasis added. This exception does not apply "even though that initial review collateral proceeding may be *deficient for other reasons*"). *Id.* (Emphasis added.) *Martinez* does not apply in this case because the district court did not find that the IAC-sentencing claim was procedurally defaulted, but rather rejected it on the merits.

Schad proposes a massive expansion of *Martinez* that would eviscerate this Court's proclamation that *Martinez* is a narrow decision. Schad attempts to expand *Martinez'* narrow rule to allow a prisoner to argue that PCR counsel was ineffective in *how* he presented the claims in state post-conviction proceedings, *i.e.*, whether he presented sufficient factual support for his claim. That expansion would make *Martinez* apply to every federal habeas proceeding, because there is always some other evidence that PCR counsel could have presented in support of an IAC claim.

Martinez provides possible cause for excusing a procedural default when "a well-established state procedural rule, which, under the doctrine of procedural default, *would prohibit a federal court from reaching the merits of the claims*." 132 S. Ct. at 1314. *Martinez* explains: "[A]n attorney's errors during an appeal on direct

review may provide cause to excuse procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, *the prisoner has been denied* fair process and *the opportunity* to comply with the State's procedures and *obtain an adjudication on the merits of his claims*."). *Id.* at 1317 (citing *Coleman*, 501 U.S. at 754). As discussed above, Schad obtained a review of his claim on the merits by both the state court and the federal district court.

Martinez holds that: "Inadequate assistance of counsel at initial-review collateral proceedings *may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial*." *Id.* at 1315. Here, there was no procedural default, and so *Martinez* simply cannot apply to excuse to a procedural default that was never found.

Even if *Martinez* applied, it would not aid Schad, because the federal district court alternatively considered all the new evidence presented in federal court (which PCR counsel was supposedly deficient in not presenting), and found: Claim P was without merit. The district court found that the new evidence presented in federal court was either cumulative to what had been presented at sentencing, or "contradictory" to what had been presented at sentencing. 454 F. Supp. 2nd at ---- *See, e.g., Bobby v. Van Hook*, 558 U.S. 4, 130 S. Ct. 13, 19 (2009) (additional evidence would not have made a difference); *Wong v. Belmontes,* 558 U.S. 15, 130 S. Ct. 383, 391 (2009) (*per curiam*) ("Shick's mitigation strategy failed, but the notion that the result could have been different if only Shick had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful."); *Pinholster*, 131 S. Ct. at 1409 ("new" evidence "largely duplicated the mitigation

evidence at trial"); *Strickland*, 466 U.S. at 699–700 ("The evidence that respondent says his trial counsel should have offered at the sentencing hearing would have barely altered the sentencing profile presented to the sentencing judge.").

Moreover, the additional evidence was unlikely to change the sentence in view of the fact that Schad had committed a prior murder. This Court has recognized that a defendant having committed another murder is "the most powerful imaginable aggravating evidence." *Belmontes*, 558 U.S. at ___, 130 S. Ct. at 391.

Finally, there is no conflict with *Williams v. Taylor*, 529 U.S. 420 (2000), and 28 U.S.C. Section 2254€(2), for reasons set forth in *Pinholster* itself. Part I of the *Pinholster* opinion, joined by eight justices, rejected Justice Sotomayor's contention that Part I of the opinion was inconsistent with *Williams*. 131 S. Ct. at 1400 fn. 5. Justice Sotomayor's concern was that *Pinholster* put a prisoner who entirely defaulted a claim in a better position than one who inadequately supported a presented claim, and she presented the hypothetical example of new evidence of exculpatory witness statements withheld by the State. 131 S. Ct. at 1417. However, the Court responded that, under the hypothetical circumstances, the defendant "may well present a new claim." 131 S. Ct. at 1401 fn.10. It refused, however, to adopt Justice Sotomayor's view. *Id.*

Pinholster also rejected the claim that its holding rendered Section 2254€(2) "superfluous." 131 S. Ct. at 1401 fn.8. This Court explained that: "Section 2254€(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief" and noted that not all federal habeas claims by state prisoners fall within the scope of §

2254(d), which applies only to claims "adjudicated on the merits in State court proceedings." 131 S. Ct. at 1401. As discussed above, the claim at issue was adjudicated on the merits by the state post-conviction court (as well as the district court), so Section 2254€(2) does not apply.

In any event, as the Ninth Circuit's third amended opinion indicates, *Pinholster* makes the diligence question irrelevant in this case.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny Schad's petition for writ of certiorari.

Respectfully submitted,

Thomas C. Horne
Attorney General

Jeffrey A. Zick
Chief Counsel

Jon G. Anderson
John Pressley Todd
Matthew H. Binford
Assistant Attorneys General
(Counsel of Record)
Attorneys for Respondent

3566611

NO APPENDIX