No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Edward Harold Schad, Petitioner,

vs.

Charles L. Ryan, Director, Arizona Department of Corrections,
and Ron Credio, Warden, Arizona State Prison Complex—Eyman Unit,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAPITAL CASE

EXECUTION SCHEDULED FOR OCTOBER 9, 2013 AT 10:00 AM (MST)

PETITION FOR A WRIT OF CERTIORARI

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*****CAPITAL CASE*****
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QUESTIONS PRESENTED

This Court's decisions in *Cullen v. Pinholster,* 131 S.Ct. 1388 (2011) and *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), created doctrinal cross currents which have resulted in chaos and confusion in the lower courts. Central to the conundrum is the question what constitutes a claim for purposes of federal habeas review: a critical question which the Court posited, but did not answer, in *Pinholster*. Some courts adhere to this Court's holding in *Vasquez v. Hillery*, 474 U.S. 254 (1986) that facts which fundamentally alter a claim render that claim new, unexhausted and procedurally defaulted. Respondents have urged that *Pinholster* overruled *Hillery* and that the contour of *any* federal habeas claim of ineffective assistance of counsel is defined by the old claim presented in state court no matter how different.

At the core of the disagreement in the panel opinion below is whether *Cullen v. Pinholster* circumscribes review of all claims of ineffective assistance of trial counsel presented in federal habeas or whether *Pinholster* should be read more narrowly and apply only to the specific theory of ineffective assistance of trial counsel raised in the state court. The majority adopted the former approach. The crux of its opinion is its belief that because Schad presented an IATC claim to the State court, his mental illness claim, though based on different facts, different legal theory, and different deficiencies, was the same claim for purposes of federal court review. The dissent, echoing the "new claim" "old claim" nomenclature from the majority opinion in *Pinholster*, faithfully adhered to well-settled principles of exhaustion as articulated in *Vasquez v. Hillery* and found that because Schad's mental illness claim relied on different facts, a different legal theory, and different deficiencies his IATC claim was a new, unexhausted claim. The dissent further recognized that the new claim was unexhausted, and therefore unavailable for federal review **until** this Court decided *Martinez v. Ryan*. *Martinez* was a remarkable sea-change in habeas procedural law.

In the year and a half since *Martinez* lower courts have struggled with how to harmonize *Martinez* and *Pinholster*. This struggle is ongoing in the lower courts. Ultimately, this Court must give guidance to the lower courts. Judicial economy counsels in favor of this Court providing guidance now, rather than waiting for the issue to percolate further which risks countless reversals. The Questions Presented are:

1. Does *Martinez v. Ryan* apply only when no claim of ineffective assistance of counsel was raised in State Court?

2. Did *Martinez v. Ryan* create an exception to *Cullen v. Pinholster* for claims of ineffective assistance of counsel?

3. How are federal habeas courts to define a claim in light of *Cullen v. Pinholster*? Did *Pinholster* overrule *Vasquez v. Hillery? See Gallow v. Cooper*, 133 S. Ct. 2730 (2013) (Statement of Breyer, J, respecting denial of cert).

4. Does Ed Schad present a procedurally proper Motion for Relief from Judgment Under Fed. R. Civ. P. 60(b) when he relies on the change in habeas procedural law brought by *Martinez v. Ryan* and if so, should this Court remand this case to the Ninth Circuit for further proceedings?

PARTIES TO THE PROCEEDING

The petitioner is not a corporation. The respondents throughout the federal habeas corpus proceedings have been the Director of the Arizona Department of Corrections and the Warden of the Arizona State Prison Complex—Eyman Unit, the facility where Schad is currently incarcerated.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other

Arizona death-row prisoner Edward Harold Schad seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

DECISIONS BELOW

The decision of the Ninth Circuit panel affirming dismissal of Schad's 60(b) motion as procedurally improper is reported. *Schad v. Ryan*, __F.3d___, 2013 WL 5498094 (9th Cir. October 4, 2013). Appendix A. The Order denying Petition for Rehearing En Banc is unpublished. Appendix B. The 2-1 Order denying panel rehearing is unpublished. Appendix C. The district court opinion dismissing Schad's motion is published. Appendix D.

STATEMENT OF JURISDICTION

This petition is timely under Supreme Court Rule 30.1. This court has jurisdiction under 28 U.S.C. § 1254(1). This court has jurisdiction to consider the procedural question of whether Petitioner's Motion for Relief Pursuant to Rule 60(b) is the equivalent of a barred second or successive petition or a procedurally proper motion for relief from judgment. *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const amend VI: right to effective assistance of counsel

U.S. Const. amend VIII: right to be free from cruel and unusual punishment.

U.S. Const. amend XIV: right to due process of law

28 U.S.C. § 2244(b)(1): A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

28 U.S.C. § 2254(d)(1): An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

Fed. R. Civ. P. 60(b)(6): On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (6) any other reason that justifies relief.

STATEMENT OF THE CASE

Drowning in a sea of doctrinal cross currents, Ed Schad has yet to achieve federal review of his plainly meritorious claim that his trial counsel failed to investigate and present evidence of his adult mental illness. Such evidence, the dissent concluded would have made the difference between life and death for Schad.

Schad's appointed state post-conviction lawyer presented a conclusory, unsupported, narrow claim that Schad's trial counsel was ineffective for failing to correct errors in the pre-sentence report which the trial judge relied on to sentence Schad to death. The State urged summary dismissal of the petition because it did not allege a causal connection between the hypothetical mitigation and the crime. The post-conviction court summarily denied the claim as nothing more than "a fishing expedition." Plainly, the IATC claim as presented in state court was not a colorable claim. *See Gallow v. Cooper*, 133 S. Ct. 2730 (2013) (Breyer, J., statement respecting the denial of cert) (a factually unsupported claim is no claim at all)

In federal court, Schad's appointed habeas counsel presented more than 1200 pages of documents and expert opinion in support of a different theory, *viz.* that trial counsel was ineffective for failing to investigate and present evidence of Schad's mental illness which that provides a causal connection to the crime and would likely have led to a sentence of life imprisonment.

The parties bitterly disputed the admissibility of this evidence in habeas. Respondent successfully kept all of this evidence out of the habeas record because it was unexhausted and defaulted. Ultimately, the court of appeals in its third amended opinion on initial submission did not address the merits of the mental illness claim. Unsurprisingly, it agreed that the state court decision to deny relief on the IATC claim relating to the PSR was not unreasonable – after all it wasn't even a well-pled claim and it was factually unsupported. *Compare Gallow v. Cooper*, *supra* (Breyer, J., statement respecting the denial of cert).

On appeal, the Ninth Circuit held that the district court violated *Williams v. Taylor*, 529 U.S. 362 (2000) in excluding Schad's unexhausted evidence from habeas review. The Court specifically observed that the new evidence was not presented to the state court. *Schad v. Ryan*, 595 F.3d 907, 923 (9th Cir. 2010). Subsequently, this Court granted certiorari in *Cullen v. Pinholster*, 130 S.Ct. 1340 (2010)(mem.). Respondent sought certiorari review of this Court's 2010 opinion. This Court granted Respondent's petition, vacated the appellate opinion and remanded for reconsideration in light of Pinholster. *Ryan v. Schad*, 131 S.Ct. 2092 (2011). Schad immediately requested the opportunity for full briefing that was not granted.

Instead, the Court ordered the submission of letter briefs. The panel later issued an amended opinion, deleting any discussion of Schad's unexhausted and procedurally defaulted mental illness claim, excluding that evidence from federal review. *Schad v. Ryan*, 671 F.3d 708(9th Cir. 2011). In its third amended opinion, the panel specifically forbid the filing of any subsequent petitions for rehearing. Id.

Schad sought leave to file a petition for rehearing that was denied. Schad then sought an order from the *en banc* court to permit the filing of the petition for rehearing. The panel vacated its prior order and permitted the filing of the petition for rehearing. A response was ordered and rehearing was denied. In the order denying rehearing, the Court warned that no further petitions for rehearing would be entertained. Schad sought, and obtained, a stay of the mandate pending Schad's filing of a petition for writ of certiorari. Following the order denying rehearing and forbidding any further filings, this Court decided *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). *Martinez* brought a remarkable sea-change in habeas procedural law which is in tension with *Pinholster*. *Lopez v. Ryan,* 677 F.3d 958 (9th Cir. 2012); *See also*, Br. Of Amici Curiae Utah and 24 Other States in Support of Respondent, *Trevino v. Thaler*, No. 11-10189, p.2 (Jan. 22, 2013)(Amici included Arizona).

Despite the panel's clear direction that no further rehearing petitions would be entertained, Schad filed a motion styled "Motion to Vacate Judgment and Remand in light of *Martinez v. Ryan*." Respondent opposed the motion on procedural grounds, arguing that it was an unauthorized petition for rehearing. In a terse, one sentence order the Motion was denied. Schad sought certiorari review

which was denied. *Schad v. Ryan*, 133 S.Ct. 432 (2012). Schad immediately requested that the mandate stay continue pending rehearing which was granted. While rehearing was pending in this Court, the Ninth Circuit accepted the Warden's petition for rehearing in another capital case (*Dickens v. Ryan*) to address the tension between *Martinez* and *Pinholster* and because the Warden argued the decision in that case (*Dickens*) conflicted with the decision in Schad's case. The Order granting rehearing in *Dickens* was Friday, January 4, 2013. The following Monday, January 7, 2013, Schad's petition for rehearing was denied by the this Court. *Schad v. Ryan*, 133 S.Ct. 922 (2013).

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

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

On August 27, 2013, Schad lodged the subject Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b). CA9ER 1. On August 30, 2013, this Court denied Schad's Petition for Rehearing which concluded proceedings in Case No. 07-99005, and re-vested jurisdiction in the district court. *Schad v. Ryan*, 2013 WL 4606329 (2013). On September 3, 2013, the Arizona Supreme Court issued an execution warrant setting October 9, 2013 as Schad's execution. Respondent filed his response to the 60(b) motion on September 6, 2013. CA9ER 142. Respondent did not allege that Schad's motion was the equivalent of an unauthorized second or successive petition. Schad replied on September 13, 2013. CA9ER 160. In an order that did not address Respondent's arguments, or Schad's, the district court dismissed Schad's 60(b) motion on September 19, 2013. CA9ER 178. The district court held that Schad's motion was the equivalent of an unauthorized second or successive petition. CA9ER 178. Schad immediately filed a notice of appeal. CA9ER 189. The panel ordered expedited briefing.

In a 2-1 decision, the panel affirmed the dismissal of Schad's 60(b) motion as improperly filed.

REASONS THE WRIT SHOULD BE GRANTED

The dispute between the majority and dissent is what constitutes a new claim.[1] This case starkly presents the issue which was left open in *Pinholster*.[2] The importance of the distinction between "old" and "new" claims was animated by this Court's decision in *Martinez v. Ryan*. The resulting tension between these two cases has created confusion and instability in the lower courts.

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 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.

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[1] The term "new claim" is used to describe 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." *Schad*, 2013 WL 5498094, *3. 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).

[2] The majority surmised that a federal petitioner who developed facts in federal court not presented to the state court may well have a "new claim" which if excused from procedural default would be entitled to *de novo* review.

Id. at 15. To understand the confusion of the panel here, it is necessary to review this Court's habeas jurisprudence.

In *Vazquez v. Hillery,* 474 U.S. 254 (1986), this Court held that when a claim raised in federal court presents new facts and/or new legal theories than that which was presented in state court, the claim is fundamentally altered and thus a "new claim" unreviewable in habeas absent a showing of cause and prejudice or a fundamental miscarriage of justice.

In *Coleman v. Thompson*, 501 U.S. 722 (1991) the Court held that to establish cause to excuse a procedural default, a petitioner must demonstrate that something external to the petitioner caused the failure to present the claim to the state court in a procedurally proper manner. For example, a *Brady* claim. If a State withheld material exculpatory evidence, then the petitioner has cause because the state interfered with his ability to present his claim.

In *Williams (Michael) v. Taylor*, 529 U.S. 470 (2000), the Court held that a petitioner is barred from presenting new evidence, and a new claim, in federal court if he culpably failed to develop his claim in state court. In that case, *Williams* did not culpably fail to develop his unpresented juror misconduct claim because the information was kept secret from him and he had no way of knowing that the misconduct occurred.

In *Pannetti v. Quarterman*, 551 U.S. 930 (2007), this Court held that when a State Court unreasonably fails to provide adequate process to present a claim for relief, there a competency to be executed claim under *Ford v. Wainwright*, then

2254(d) does not act as a limitation on relief since the state court's decisionmaking was unreasonable.

In *Pinholster*, the Court ruled that review under 28 U.S.C. § 2254(d)(1) of an exhausted claim of IAC for failure to investigate and present evidence of mental illness claim is limited to the evidence of mental illness presented at a full and fair state court hearing and could not include new evidence of mental illness presented for the first time in federal court. Foreshadowing problems with the decision, in dissent Justice Sotomayor noted, "Some habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own." Pinholster, 131 S. Ct. at 1413. (Sotomayor, J., dissenting). Justice Sotomayor outlined the inequity and confusion that would follow in the wake of the *Pinholster* decision. "The problem with this approach is its potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court." *Id.* at 1417. Justice Sotomayor illustrated her point:

> Consider, for example, a petitioner who diligently attempted in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The state court denied relief on the ground that the withheld evidence then known did not rise to the level of materiality required under Brady. Before the time for filing a federal habeas petition has expired, however, a state court orders the State to disclose additional documents the petitioner had timely requested under the State's public records Act. The disclosed documents reveal that the State withheld other exculpatory witness statements, but state law would not permit the petitioner to present the new evidence in a successive petition.
>
> Under our precedent, if the petitioner had not presented his *Brady* claim to the state court at all, his claim would be deemed defaulted and the petitioner could attempt to show cause and prejudice to overcome

> the default. *See Michael Williams*, 529 U.S., at 444, 120 S.Ct. 1479; *see also* n. 1, *supra*. If, however, the new evidence merely bolsters a *Brady* claim that was adjudicated on the merits in state court, it is unclear how the petitioner can obtain federal habeas relief after today's holding. What may have been a reasonable decision on the state-court record may no longer be reasonable in light of the new evidence. *See Kyles v. Whitley*, 514 U.S. 419, 436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (materiality of *Brady* evidence is viewed "collectively, not item by item"). Because the state court adjudicated the petitioner's Brady claim on the merits, § 2254(d)(1) would still apply. Yet, under the majority's interpretation of § 2254(d)(1), a federal court is now prohibited from considering the new evidence in determining the reasonableness of the state-court decision.

Id., at 1417-1418. The majority responded to Justice Sotomayor's hypothetical suggesting that a petitioner who discovers evidence which bolsters an old claim, "may well have a new claim." *Id.,* at 1401, n. 10. Thus, the majority in *Pinholster* encouraged the approach adopted by the panel dissent here.

In *Martinez*, this Court created a limited exception to procedural bar for claims of ineffective assistance of counsel where the habeas petitioner received ineffective assistance of post-conviction relief counsel and post-conviction was the first opportunity to present the ineffectiveness claim.

In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Court made clear that the *Martinez* rule applied in states where the appellate scheme discouraged the presentation of ineffectiveness claims on direct appeal. Importantly for present purposes, the petitioner in *Trevino* had exhausted some, but not all, ineffectiveness claims. No court found that *Pinholster* served as a separate bar to relief.

In *Gallow v. Cooper*, Justice Breyer observed that the petitioner in *Gallow* who presented a factually unsupported claim in state court was no different from the Petitioner in *Trevino* whose claim wasn't presented at all:

> Each of these two petitioners failed to obtain a hearing on the merits of his ineffective-assistance-of-trial-counsel claim because state habeas counsel neglected to "properly presen[t]" the petitioner's ineffective-assistance claim in state court. *Martinez v. Ryan*, 566 U.S. 1, ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). A claim without any evidence to support it might as well be no claim at all. In such circumstances, where state habeas counsel deficiently neglects to bring forward "any admissible evidence" to support a substantial claim of ineffective assistance of trial counsel, there seems to me to be a strong argument that the state habeas counsel's ineffective assistance results in a procedural default of that claim. The ineffective assistance of state habeas counsel might provide cause to excuse the default of the claim, thereby allowing the federal habeas court to consider the full contours of Gallow's ineffective-assistance claim. For that reason, the Fifth Circuit should not necessarily have found that it could not consider the affidavit and testimony supporting Gallow's claim because of *Cullen v. Pinholste*r, 563 U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

Gallow v. Cooper, 133 S. Ct. 2730 (2013)(Breyer, J. statement respecting the denial of cert.).

These cases have resulted in an inequity for habeas petitioners. The lower courts who are weary of the ever-changing tides of habeas procedural law, cling to *Pinholster* and ignore *Vazquez*, *Williams, Panetti,* and *Martinez.* If the trend is allowed to continue, *Martinez* is dead letter.

The doctrinal cross currents have created a situation where States use exhaustion as both sword and shield. If a petitioner fails to present facts in support of his claim they can argue that the petitioner presents a new claim that is unexhausted and procedurally barred. Or, if it appears that the petitioner has a

valid defense to procedural bar under *Martinez,* like *Schad,* they can argue that the new facts are barred because they are part of an old claim that can't be heard outside of the state court record under *Pinholster*.

This heads-we-win-tales-you-lose approach undermines the Court's longstanding exhaustion principles. Moreover, it breeds chaos and conflict in the lower courts who are left to follow either *Pinholster* or the Court's exhaustion principles, both of which lead to conflicting results. Lower courts are overreading *Pinholster* as if it erased the exhaustion line of cases culminating in *Vazquez.* For example, the Ninth Circuit's opinion here is in conflict with the Fifth Circuit's decision in *Smith v. Quarterman*, 515 F.3d 392, 402 (5th Cir. 2008). In *Smith*, the Fifth Circuit held that an ineffective assistance of counsel at sentencing claim based upon "new facts" (like Schad's) is a "procedurally barred" ineffectiveness claim, *i.e.* a new claim. Indeed, compare *Smith v. Quarterman*, 515 F.3d 392, 402 (5th Cir. 2008) with *Schad*, two capital cases which reach completely opposite results on an identical question. The dissent in *Schad* endorsed the approach of the Fifth Circuit in Smith:

> Further, Smith alleges new facts in his federal petition not considered by the state court, even assuming arguendo that Smith presented the substance of his ineffective assistance of counsel claim to the state court (in a most general sense). The affidavits submitted in these federal proceedings, regarding Smith's childhood and the effects of his substance abuse, are procedurally barred from consideration because the statements constitute "material additional evidentiary support [presented] to the federal court that was not presented to the state court." *Dowthitt*, 230 F.3d at 745-46. The exhaustion of state remedies, codified in § 2254(b)(1), requires a petitioner to provide the highest court of the state a fair opportunity to apply the controlling federal constitutional principles to the same factual allegations before a

> federal court may review any alleged errors. *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995). In this case, Smith failed to allow the TCCA an opportunity to review the credibility of his family's affidavits presented to this court regarding trial counsel's investigation and Smith's abusive childhood. "The exhaustion requirement is not satisfied . . . where the petitioner presents new legal theories or factual claims in his federal habeas petition. *Neville v. Dretke*, 423 F.3d 474, 478 (5th Cir. 2005) (citing *Bagwell v. Dretke*, 372 F.3d 748, 755 (5th Cir. 2004)). Smith's attempt to submit new evidence threatens the state's right "to pass upon and correct alleged violations of its prisoners federal rights . . . ." *Summers v. Dretke*, 431 F.3d 861, 880 (5th Cir. 2005) (*quoting Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971)). Accordingly, Smith's ineffective assistance of counsel claim is procedurally barred.

Id. The decision in *Smith* was based on well-settled law. Just a few years earlier, the Fifth Circuit surveyed the law of exhaustion in the various circuits writing:

> For example, Morris contends in *Demarest v. Price*, 130 F.3d 922, 938-39 (10th Cir. 1997), the petitioner presented for the first time in federal court such substantial new evidence that his *Strickland* claims effectively became new claims attacking new forms of ineffectiveness. Likewise, in *Caballero v.Keane*, 42 F.3d at 739-41 (2d Cir. 1994), the Second Circuit found the petitioner's claim unexhausted because a new fact concerning trial counsel's being under the influence of drugs during the trial cast the *Strickland* claim in an entirely new light. *See also Cruz v. Warden*, 907 F.2d 665 (7th Cir. 1990) (finding new factual allegations regarding trial counsel's behavior rendered petitioner's Strickland claim unexhausted).

Morris v. Dretke, 413 F.3d 484, 493 n. 7 (5th Cir. 2005).

The dissenting judge here echoes this legal analysis and that of Sixth Circuit Judge Boggs in *D'Ambrosio v. Bagley*, 656 F.3d 379, 395 (6th Cir. 2011)(Boggs, J., dissenting). As Judge Boggs explains, a claim is an "unexhausted, new claim" when it is "based upon different **facts**." *D'Ambrosio v. Bagley*, 656 F.3d 379, 395 (6th Cir. 2011)(Boggs, J., dissenting)(emphasis in original). Such a claim is a new claim, not

the petitioner's "old . . . claim." *Id.* "it does not somehow convert D'Ambrosio's unexhausted, new claim—based upon different facts and legal standards—into his old Brady claim." (emphasis in original). Thus the dissent is in line with established precedent.

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 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.

Id. at 15.

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

The principal 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 principal opinion does not reach the 60(b) question, because it concludes that Schad's claim based on evidence which the principal opinion observed was "barred" by its 2011 opinion.[3]

[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

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 principal opinion, the dissent's reasoning has support in decades-old law.

1. 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. The preliminary petition did not contain an ineffective assistance of counsel at sentencing claim. Schad was appointed a series of counsel who requested multiple continuances and then withdrew. Schad's third appointed counsel finally filed a document titled "Defendant's Supplemental Statement of Grounds for Relief." In that document, Schad's third appointed lawyer alleged a newly-discovered evidence claim that recently discovered omissions and inadequacies in the presentence report ("PSR") were relevant to sentencing. The supplement argued in the alternative that trial counsel was ineffective in failing to correct the inadequate PSR. 07-99005 ER 344. The post-conviction court described

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court under § 2254(e)(2) and, therefore, excluded that evidence." *Schad v. Ryan*, 07-99005, 2013 WL 791610, *2 (emphasis supplied).

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 panel 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.

2. 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 a motions panel 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.

3. 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; and 3) a different legal theory. Slip op at 15-16. *See also Gallow, supra*.

Exhaustion requires that a petitioner fairly present his claim to the state court. *Weaver v. Thompson*, 197 F.3d 359, 365 (9th Cir. 1999). Fair presentation requires the petitioner to present both the operative facts that support his claim as well as his federal legal theory that his claim is based on so that the state court has a fair opportunity to apply the controlling law to the facts which bear upon the constitutional claim. *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008). "[F]or purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a

statement of the facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996). It is hornbook law that new facts which fundamentally alter a claim render that claim unexhausted and thus procedurally defaulted. *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994).

4. SCHAD PRESENTS A PROPER 60(B) MOTION

This 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).

Rule 60(b) is a rule of equity. It operates to allow a petitioner, like Schad, a fair opportunity to present his *Martinez* defense—a defense that—through no fault of his own--Schad was unable to previously present. Thus, Schad's case is a classic 60(b).

> [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 lower court's judgment.

5. SCHAD DOES NOT PRESENT A BARRED SUCCESSIVE APPLICATION

In *Gonzalez*, this 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.

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.[4]

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[4] Schad's appeal is not foreclosed by the "law of the case" doctrine as the concurring judge suggests. The author of the principal 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 addressing an entirely different issues constitutes law of the case that controls this Rule 60(b) appeal.

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

B. PUBLIC POLICY WEIGHS IN FAVOR OF GRANTING CERTIORARI

The whole purpose of the decision in *Martinez* was to vindicate the constitutional right of effective counsel. If the reasoning of the panel majority prevails, *Martinez* is impotent. It cannot be the case that this Court, or Congress, intended to cut off federal review of a valid constitutional claim that goes to the core of the reliability of a capital sentence through the decision in *Pinholster*. If that were true, then the decision in *Martinez* makes no sense. Given the murky waters brought by these two decisions, policy considerations counsel in favor of granting certiorari to dispel the tension. Furthermore, such an approach undermines the exhaustion rule.

CONCLUSION

For the preceding reasons, this Court should grant the petition for certiorari.

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/s/ Kelley J. Henry
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