Supreme Court, U.S.
FILED

No. 10- 10-305 AUG 27 2010

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTONS,

Petitioner,

VS.

EDWARD HAROLD SCHAD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TERRY GODDARD
Attorney General of Arizona

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

JON G. ANDERSON
Assistant Attorney General
(Attorney of Record)
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

Blank Page

CAPITAL CASE

QUESTIONS PRESENTED

The majority panel Ninth Circuit opinion vacated the district court's finding that Schad was not diligent in developing a state court record for his claim of ineffective assistance of counsel (IAC) at sentencing, and remanded for an evidentiary hearing on diligence, as well as sanctioning a simultaneous hearing on the merits. Judge Rymer dissented from the panel opinion, and eight judges dissented from the order denying rehearing, because: (1) Schad did not present the state court with any affidavits with specific facts to support his claim, as required by Arizona law and *Williams v. Taylor*, 529 U.S. 420 (2000); (2) Schad had not asked the district court for a hearing on diligence; (3) the existing record was more than sufficient to determine the question of diligence; and (4) if the existing record was insufficient, an evidentiary hearing was prohibited because Schad bore the burden in district court of showing diligence in state court. The dissenters also pointed out that the panel majority opinion conflicts with *Schriro v. Landrigan*, 550 U.S. 465 (2007), by considering whether the district court abused its discretion by denying an evidentiary hearing, when it alternatively addressed the new material Schad presented and concluded it showed neither deficient performance nor prejudice.

1. Does the majority panel opinion conflict with *Williams* and AEDPA, by awarding Schad an evidentiary hearing on diligence and a simultaneous hearing on the merits, despite his lack of diligence?

2. Diligence aside, does the Ninth Circuit's opinion conflict with *Landrigan*, other circuit court opinions, and AEDPA, by remanding for an evidentiary hearing without analyzing—under *Strickland v. Washington*, 466 U.S. 668 (1984), and the deferential AEDPA standards—whether Schad presented a colorable IAC claim, or considering the claim on the merits, when the district court considered the claim in light of the new evidence Schad presented, discussed that evidence at some length, and concluded it showed neither deficient performance nor prejudice?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES.

RULES

OPINIONS BELOW

The Ninth Circuit's opinion (App. A), amending and superseding the previous amended panel opinion, and preceded by an opinion dissenting from the court's order denying rehearing *en banc*, is reported at *Schad v. Ryan*, 606 F.3d 1022 (9th Cir. 2010). The first and second superseded panel opinions are reported at *Schad v. Ryan*, 581 F.3d 1019 (9th Cir. 2009), and *Schad v. Ryan*, 595 F.3d 907 (9th Cir. 2010.) On June 10, 2010, the Ninth Circuit filed an unpublished order granting a motion to stay its mandate pending disposition of this petition.

The district court's decision and order denying Schad habeas relief (App. B) is reported at *Schad v. Schriro*, 454 F.Supp.2d 897 (D. Ariz. 2006). The district court's order denying Schad's motion to alter or amend the judgment (App. C) is reported at *Schad v. Schriro*, 2007 WL 215618 (D. Ariz. 2007) (unpublished).

The Arizona state trial court summarily denied post-conviction relief in an unreported minute entry. (App. D.) The Arizona Supreme Court's summary order denying review of the state trial court's order is also unpublished (App. E.)

The Arizona Supreme Court's opinion affirming Schad's conviction and death sentence on direct appeal is reported at *State v. Schad*, 788 P.2d 1162 (Ariz. 1989). This Court's opinion, affirming on certiorari review, is reported at *Schad v. Arizona*, 501 U.S. 624 (1991).

STATEMENT OF JURISDICTION

A divided panel of the Ninth Circuit granted Schad partial habeas relief in a *per curiam* opinion issued on September 11, 2009. On June 3, 2010, the Ninth Circuit issued a published order/opinion reporting the denial of the petition for rehearing *en banc*, an opinion dissenting from the denial of rehearing, and an amended panel opinion. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES

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. § 2254(e)(2) provides, in relevant part:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing . . .

STATEMENT OF THE CASE

1. *Facts of the crime.*

A summary of the facts regarding the murder for which Schad was convicted is set forth in the Ninth Circuit's final amended majority panel opinion. (App. A). *See also Schad v. Ryan*, 606 F.3d 1022, 1032-1034. (9th Cir. 2010). The Ninth Circuit prefaced its discussion of the facts of the murder by saying: "This is a case with strong circumstantial evidence pointing to the defendant's guilt and to no one else's." (App. A-17.)

The victim, Lorimer Grove, a 74-year-old resident of Bisbee, Arizona, was last seen on August 1, 1978, when he left Bisbee driving his new Cadillac, coupled to a trailer, to visit his sister in Everett, Washington. Grove may have been carrying up to $30,000 in cash. (*Id.*)

On August 9, 1978, Grove's body was discovered in thick underbrush down a steep embankment off the shoulder of U.S. Highway 89, several miles south of Prescott, Arizona. The medical examiner determined that the cause of death was ligature strangulation accomplished by means of a sash-like cord, still knotted around the victim's neck. According to the medical examiner, Grove had been strangled using a significant amount of force, resulting in breaking of the hyoid bone in his neck and the reduction of his neck circumference by approximately four inches. The time of death was estimated to be four to seven days prior to discovery of the body. (*Id.* at A-18.)

No physical evidence at the crime scene implicated Schad in Grove's murder, and there was no evidence of a prior connection between the two men. There was, however, ample evidence establishing Schad's presence in Arizona at the time of the crime and his possession, after the date Grove was last seen, of Grove's property, including his Cadillac, credit cards and jewelry. (*Id.*)

On August 3, 1978, two days after Grove left Bisbee, and six days before his body was discovered, an Arizona highway patrolman found an abandoned Ford Fairmont sedan alongside Highway 89, approximately 135 miles north of where Grove's body was discovered. The Ford was unlocked, except for the trunk, and its license plates were missing. A check of the Fairmont's VIN revealed that Schad had rented the car from a Ford dealership in Utah in December 1977, had failed to return it, and that the dealership had reported it as stolen. (*Id.*).

According to Schad's girlfriend, Wilma Ehrhardt, she and Schad, along with Ehrhardt's children, had driven the car from Utah to New York, Florida, and Ohio between December 1977 and July 1978. In late July, Schad told Ehrhardt he was going to look for work and left Ohio with the Ford. Ehrhardt and the children remained in Ohio, but later returned to Utah. (*Id.* at A-19.)

When police impounded the Ford on August 3, 1978, they found in it, among other things, three Arizona newspapers dated July 31 and August 1, 1978, the days just before the estimated date of Grove's

murder, as well as a special mirror device later identified by witnesses as an object Grove invented to help him couple his trailer to his Cadillac. (*Id.*)

According to credit card records, on August 2, 1978, Schad began driving the Cadillac from Arizona eastward, using Grove's credit cards to make purchases in numerous cities along the way. On August 2, Schad used Grove's credit card to purchase gasoline in Benson, Arizona. On August 3, Schad used the card to purchase gas in Albuquerque, New Mexico. For approximately the next month, Schad continued traveling the country in the Cadillac and using Grove's credit card. Schad also used Grove's checkbook to forge a check to himself from Grove's account, which he cashed on August 7, 1978, in Des Moines, Iowa. (*Id.*)

In New York state on September 3, 1978, Schad, still driving Grove's Cadillac, was stopped for speeding by a New York state highway trooper. Schad told the trooper he was delivering the car to New York on behalf of a "rather elderly" man named Larry Grove. Schad could not produce the car's registration, and instead gave the trooper the registration for Grove's trailer. The trooper issued Schad a citation and let him go. (*Id.* at A-19 to A-20.)

Schad then drove back across the country, reuniting with Ehrhardt in Salt Lake City, Utah, on September 7, 1978. A man who was living with Ehrhardt at the time, John Duncan, contacted Salt Lake City police the same day to report that Schad had told him the Cadillac was stolen. Schad was arrested in Salt Lake City on September 8. (*Id.*)

After Schad's arrest, Salt Lake City police impounded and searched the Cadillac. From the Cadillac's title application, found in the car, the police learned that the vehicle belonged to Grove. Schad told police that he had obtained the Cadillac four weeks before in Norfolk, Virginia, after meeting "an elderly gentleman who was with a young girl" and who asked Schad to trade vehicles temporarily so that he and the girl would not be recognized. Schad also told the Utah police that he "was supposed to leave [the Cadillac] at the New York City port of entry at a later date for the man to pick up." Police found in the Cadillac's trunk a set of Utah license plates issued to Ehrhardt. Schad had previously installed these plates on the stolen Ford. He left the Cadillac's original plates on the car while he was driving it across the country. (*Id.* at A-20.)

After Schad's arrest, Ehrhardt went to the Salt Lake City jail and retrieved Schad's wallet. Duncan then searched the wallet and found the credit card receipts and the New York traffic citation. He again contacted the Salt Lake City police. When Detective Halterman came to Ehrhardt's home to collect the wallet and the documents, Ehrhardt also handed over a diamond ring she said her daughter had found in the glove compartment of the Cadillac. Witnesses later identified the ring as belonging to Grove. Duncan also visited Schad in jail. Duncan testified that during the visit Schad talked about lying about his presence in Arizona at the time of the crime and destroying evidence of the crime. (*Id.* at A-20 to A-21.)

2. *Procedural history of the case.*

a. State court proceedings.

On October 5, 1979, the jury found Schad guilty of first-degree murder and the trial court sentenced him to death. (*Id.* at A-21.) Schad's conviction and sentence were affirmed on his first direct appeal, but he obtained state post-conviction relief on his murder conviction. (*Id.*) *See State v. Schad*, 691 P.2d 710 (Ariz. 1984).

Schad was re-tried in 1985, and again convicted of first-degree murder and sentenced to death. (App. A-21.) The Arizona Supreme Court again affirmed on direct appeal. *Id. See State v. Schad*, 788 P.2d 1162 (Ariz. 1984). This Court granted certiorari review on two issues, and affirmed Schad's conviction and sentence. *See Schad v. Arizona*, 501 U.S. 624 (1991).

Schad initiated another round of state post-conviction proceedings, and after 4 years of seeking and obtaining repeated extensions to file his supplemental petition, the state trial court denied the petition. (App. D.) The Arizona Supreme Court summarily denied review. (App. E.)

b. Federal district court.

Schad filed his federal habeas petition in 1998, raising nearly 30 claims. (App. A-22.) On September 28, 2006, the district court denied habeas relief. (App. B.) *See also Schad v. Schriro*, 454 F.Supp.2d 897 (D. Ariz. 2006). The district court also denied Schad's motion for an evidentiary hearing to develop new mitigating evidence to support his claim of ineffective

assistance at the penalty phase, finding Schad had not been diligent in developing such evidence during his state post-conviction proceedings. (App. B-125 to B-127.) It also alternatively concluded that the new evidence Schad submitted to the district court did not render counsel's performance deficient because it would not have supported the defense strategy at sentencing of presenting the same positive image of Schad that counsel had pursued at trial. (*Id.* at B-80 to B-100.) The district court concluded that Schad had shown neither deficient performance nor prejudice. (*Id.* at B-97.) It ruled that the state trial court's denial of the IAC-sentencing claim was not an unreasonable application of clearly established federal law as set forth in *Strickland.* (*Id.* at B-100.)

c. Ninth Circuit.

The Ninth Circuit panel opinion unanimously upheld Schad's conviction, but in a 2-1 *per curiam* panel opinion expressing the views of Judges Reinhardt and Schroeder, remanded to the district court for further proceedings on the IAC-sentencing claim. (App. A-15.)

The majority opinion vacated the district court's finding that Schad had not been diligent, finding that the district court applied the wrong standard in analyzing Schad's diligence: "The district court, however, focused not on the reasonableness of Schad's efforts in state court to develop mitigating evidence regarding his childhood, but on the fact he did not succeed in doing so." (*Id.* at A-43.) In its analysis of the diligence issue, the majority took a "sneak peek" at the new evidence presented to the district court, and

concluded that, if it had been presented to the sentencing court, "would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating circumstances present in the case." (*Id.* at A-44.)

The majority concluded that: "Neither the state court nor the district court record, however, contains information sufficient for us to determine whether or not those efforts [by state post-conviction counsel] were reasonable and that Schad therefore acted diligently." (*Id.*. at A-45.) The majority opinion, in passing, recognized that the district court, "had stated it had considered the new evidence proffered by Schad in support of his ineffective assistance of sentencing counsel claim and said that, even assuming diligence, this new evidence could not justify relief." (*Id.*) Without any analysis whatever of what the district court had found and concluded, the majority opinion simply stated: "We disagree with that ruling." (*Id.*)

The majority remanded "for further proceedings to determine whether Schad was diligent in attempting to develop the state court record." (*Id.*) It admonished the district court to "apply the proper standard as to the reasonableness of his efforts." (*Id.*) It ordered that, if the district court found "that Schad's efforts to develop the record in state court were reasonable, the district court should hold an evidentiary hearing on the merits of the ineffective assistance of sentencing counsel claim, because the evidence Schad presented to the district court was stronger than the evidence presented at sentencing." (*Id.* at A-46.) Alternatively, if the district court concluded an evidentiary hearing

on diligence is appropriate, it "could hold a single evidentiary hearing at which it receives evidence concerning both diligence and the merits." (*Id.*) The Ninth Circuit further advised the district court that, if it reached the merits of the IAC claim, it was to consider two recent opinions from this Court. (*Id.*)

Judge Rymer filed a lengthy opinion dissenting from the part of the majority opinion ordering a remand. (App. A-55 to A-77.) She believed that the district court had "faithfully construed AEDPA's diligence requirement, . . . " (App at A-55.) Judge Rymer argued that the majority had misapplied *Williams* because the record showed that post-conviction counsel knew of possible evidence that Schad's childhood was abusive, but failed to present such evidence to the state court after nearly four years of state post-conviction proceedings." (*Id.* at A-55 to A-56.) Judge Rymer also disagreed with the majority's remand for an evidentiary hearing on diligence when Schad had not requested one, "simply because the record seems to indicate to two of us to contain information that is inadequate to determine whether Schad's efforts were reasonable," when it was Schad's burden to show diligence. (*Id.* at A-57.)

The dissent also took the majority to task for remanding "without taking into account the district court's alternative explanation why no hearing is required, without mentioning AEDPA, and without tethering the order to *Strickland*." (*Id.*) It faulted the majority for disregarding the "district court's extensive and reasoned holding in the alternative that, even considering the newly developed information, Schad

was nevertheless not entitled to an evidentiary hearing on his ineffectiveness claim." (*Id.* at A-75.) It noted the Ninth Circuit's dismissal of the alternative ruling did not reference AEDPA, *Strickland*, or other authority from this Court regarding evidentiary hearings in federal court on IAC claims. (*Id.* at A-75 to A-76.)

Respondents filed a petition for rehearing en banc, which was denied on June 3, 2010. (App. at A-1 to A-2.) However, eight judges dissented from the denial of rehearing, and their views are expressed in the dissenting opinion authored by Judge Callahan (hereafter "Callahan dissent"). (*Id.* at A-3 to A-15.)

This dissenting opinion was written to protest: "the gravity of the majority's departure from settled Supreme Court law, and [to] emphasize how it effectively eviscerates AEDPA's diligence requirement as well as the preliminary showing the Supreme Court has held a state prisoner must make in order to obtain an evidentiary hearing in federal court." (*Id.* at A-3.) Judge Callahan agreed with Judge Rymer's dissent that the "majority decision to remand for 'further proceedings' and an evidentiary hearing on 'diligence' and the merits of Schad's ineffective assistance of counsel claim conflicts with AEDPA's diligence requirement, 28 U.S.C. § 2254(e)(2), and the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 420 (2000)." (*Id.* at A-3.)

Judge Callahan's dissent made three major points. First: "The majority opinion substantially erodes AEDPA's requirement that a person challenging the constitutionality of his state conviction diligently

pursue his claim in state court in order to obtain an evidentiary hearing in federal court. 28 U.S.C. § 2254(e)(2)." (*Id.* at A-3.) Second, "it effectively eviscerates the diligence requirement altogether by endorsing a simultaneous hearing on both the petitioner's 'diligence' and the merits of his claim of ineffective assistance of counsel (IAC)." (*Id.* at A-4.) Third, it found "the majority's decision effectively eliminates the requirement that a petitioner present a colorable claim for federal habeas relief before a federal court may grant an evidentiary hearing." (*Id.*) The dissenters would have granted rehearing *en banc* to "rectify these departures from Supreme Court precedent and to correct what district courts in our circuit are likely to perceive as a confusing directive to hold evidentiary hearings where Congress and the Supreme Court have determined that none are permitted." (*Id.*)

After listing the defects of the majority opinion, Judge Callahan concluded:

> In sum, the majority's seemingly innocuous decision to remand for "further proceedings," including a possible evidentiary hearing concerning both the issue of Schad's diligence and the merits of his IAC claim is, in reality, a substantial revision of § 2254(e)(2) and governing Supreme Court authority.
>
> It effectively eviscerates AEDPA's diligence requirement by (1) eliminating the threshold showing of diligence

> required to obtain an evidentiary hearing, (2) permitting an evidentiary hearing on the issue of diligence itself, and (3) endorsing simultaneous hearings on both the issue of "diligence" and the merits of a petitioner's underlying claim.
>
> By endorsing evidentiary hearings on the issue of "diligence," even when the record clearly shows that the evidence was readily available in state court, the majority's holding directly contradicts *Williams*."
>
> . . .
>
> This represents a breathtaking departure from settled Supreme Court precedent and effectively eliminates all of the benchmarks set by AEDPA and the Court for a prisoner to obtain an evidentiary hearing in federal court.

(*Id.* at A-14 to A-15.)

REASONS FOR GRANTING REVIEW

As pointed out in the dissenting opinions of Judges Rymer and Callahan, the majority opinion conflicts with this Court's opinions in *Williams* and *Landrigan* regarding when a state prisoner may obtain an evidentiary hearing in federal court to present evidence never presented or considered by the state court that decided a federal claim. The majority opinion eviscerates AEDPA's diligence requirement, and portends routine evidentiary hearings in federal district courts on the questions of diligence and the substantive claim, contrary to the intent of AEDPA to limit such hearings.

First, the majority opinion conflicts with *Williams*, and the diligence provision of AEDPA, because Schad did not make a reasonable attempt, in light of information that was available to him, to investigate and pursue his IAC claim in state post-conviction proceedings. The state trial court dismissed the IAC-sentencing claim without an evidentiary hearing because Schad failed to file affidavits with facts supporting the claim. Moreover, Schad did not ask the district court for an evidentiary hearing on the issue of diligence, or otherwise ask for further factual development of the state court record to show his diligence. The existing state record, consisting of numerous motions for extensions of time and status conferences, was more than sufficient for the district court, and the Ninth Circuit, to determine whether post-conviction counsel was diligent. The Ninth Circuit should not have considered evidence never presented to the state courts in analyzing the diligence question. Finally, to any extent the existing record was

insufficient, the Ninth Circuit should have affirmed the district court's diligence ruling because *Williams* puts the burden of showing diligence on the prisoner.

Second, diligence aside, the majority opinion conflicts with *Landrigan* by granting an evidentiary hearing without either analyzing whether Schad presented a colorable IAC claim to the district court or the district court's alterative ruling on the merits of the claim. The district court, in a commendably thorough opinion, alternatively considered all of the new evidence Schad presented to the district court in support of the IAC-sentencing claim, but found it failed to show either deficient performance or prejudice. Rather than analyzing the district court's rulings under *Strickland v. Washington*, 466 U.S. 668 (1984), and the applicable AEDPA standards, the Ninth Circuit curtly stated it disagreed, without further explanation.

This Court should not wait to review this case several years in the future after the district court has complied with the Ninth Circuit mandate and holds one or more evidentiary hearings. This Court granted review in *Landrigan* when the Ninth Circuit erroneously ordered an evidentiary hearing. Obviously, this Court understands the damage done to the States' interests by unwarranted evidentiary hearings on federal habeas review. To allow the district court to proceed in this already protracted capital case would be to sanction the very type of delay AEDPA was enacted to prevent. Moreover, the opinion will likely result in widespread confusion in the district courts of the Ninth Circuit, and routine evidentiary hearings in

both capital and non-capital cases. Finally, this Court should grant review now because of the increasingly long list of opinions from the Ninth Circuit failing to follow this Court's opinions and flouting the provisions of AEDPA, especially in capital cases.

I. THE NINTH CIRCUIT'S MAJORITY OPINION CONFLICTS WITH BOTH *WILLIAMS* AND *LANDRIGAN.*

A. *The opinion conflicts with Williams.*

The panel opinion should be reversed because it ignores or misapplies *Williams* and the provisions of the AEDPA, specifically 28 U.S.C. Section 2254(e)(2), regarding the diligence that a state prisoner must show before being allowed to present newly-developed evidence to federal courts in federal habeas proceedings.

1. Failure to comply with state law.

First, Schad failed to comply with *Williams* because he did not develop the factual basis for his claim in accordance with state law. This Court said in *Williams*:

> Diligence will require in the usual case that the prisoner, *at a minimum*, seek an evidentiary hearing in state court *in the manner prescribed* by state law. . . . For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the

> record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. *Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.*

529 U.S. at 437 (emphasis added).

Schad failed to show even minimal diligence under *Williams* because he did not file affidavits with the state court to support his claim of ineffective assistance at sentencing, when such information was readily available. *See also Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999) ("State law not only permitted but required Baja to come forward with affidavits or other evidence, to the extent that his claim relied on evidence outside the trial record."). Instead, he only presented affidavits from a defense investigator/expert about what she had done and what she could do in the future. (App. A-39 to A-40.) The majority opinion concedes: "The record is clear that Schad did not succeed in bringing out relevant mitigating evidence during state habeas proceedings." (*Id.* at A-45.) That a more diligent effort could have yielded results is shown by the fact that habeas counsel obtained several declarations from the family,

and the family spoke to habeas counsel's investigator and experts. (App. A-41.)

Arizona law provides that, to obtain an evidentiary hearing, a post-conviction petition must be supported by "[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition." *See* Rule 32.5, Ariz. R. Crim. P.; *State v. Borbon*, 706 P.2d 718, 725 (Ariz. 1985). The summary dismissal by the state court explicitly recognized Schad's failure to support his claim with specific evidence, as required by Arizona law:

> [D]efendant contends that counsel was ineffective for failing to uncover mitigating evidence that might exist. If the mitigation then turns out to be favorable to the defendant, resentencing might be appropriate. Defendant is simply suggesting that it would be a good thing now to delve further into defendant's prior convictions and to try once again to talk to family members, etc., etc. Defendant is simply asking to go on a fishing expedition with *no showing* of what would be turned up that the court did not already know at sentencing time and how that might affect sentencing. The claim has not [sic] merit.

(App. D-4, emphasis added.)

The majority panel opinion completely ignores the fact that Schad could have filed affidavits, with the

readily available evidence that would have provided a basis for requesting an evidentiary hearing in state court. As Judge Callahan's dissent noted, regarding the post-conviction proceedings: "Despite this wealth of time and resources, he failed to marshal any evidence regarding his own family background, and he further admitted in district court that the evidence was '*readily available.*'" (App. at A-8, emphasis in dissenting opinion). Judge Rymer's dissent notes: "This information [regarding family background] was available at the time. He had nearly four years in state post-conviction proceedings to ferret out the affidavits and evidence presented for the first time in federal court." (*Id.* at A-56.) *See Lewis v. Horn*, 581 F.3d 92, 105-06 (3rd Cir. 2009) (counsel not diligent because he failed to present any affidavits from jurors, or other evidence to substantiate his *Batson* allegations in state court). *See also Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2005) ("Diligence," for this purpose, "'depends upon whether [the petitioner] made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court[.]'")

Rather than focusing on Schad's failure to file relevant affidavits, the majority opinion simply speculates why post-conviction counsel did not file any. (App. A-43.) The opinion's failure to acknowledge Arizona law as to what is necessary to obtain an evidentiary hearing presages an evidentiary hearing in all federal habeas proceedings brought by an Arizona prisoner seeking to present new evidence to the district court. An Arizona judge does not hold a hearing on diligence in post-conviction proceedings. Instead, the

judge simply determines whether a defendant has presented affidavits such as to establish a colorable claim requiring an evidentiary hearing on the claim. The court must summarily dismiss the proceeding if the claim is not colorable. *See* Rule 32.6(c), Ariz. R. Crim. P. Because there is no state court evidentiary hearing on diligence, the majority opinion here would require an evidentiary hearing and a *de novo* factual determination of diligence in every habeas case in which newly-developed evidence is offered.

One caveat in *Williams* is that the prisoner's diligence in pursuing a claim depends on whether he has notice of the claim. This Court found counsel was not diligent regarding a *Brady* claim because he was on notice of possible exculpatory evidence. 529 U.S. at 437-44. Similarly, Schad's post-conviction counsel was on notice of the IAC sentencing claim because that was one of the claims raised in his petition. Moreover, as Judge Rymer states:

> Given that Schad had notice during post-conviction proceedings of the need to develop facts about his family background to support his claim of ineffective assistance of sentencing counsel, and the information available at the time, together with the opportunity afforded to develop that information in four years, with thirty-four extensions and with all the funding requested, I agree with the district court that Schad failed to show he was diligent in efforts to

> investigate and present those facts in state court.

(*Id.* at A-76.). *Cf. Williams v. Norris*, 576 F.3d 850, 862 (8th Cir. 2009) ("Attorney McLean was aware that trial counsel could have presented testimony by a social history expert at the penalty phase, and that he could have presented such testimony at the Rule 37 hearing to establish prejudice, . . . ").

2. Schad did not ask for an evidentiary hearing on diligence.

Second, without citing any authority, the Ninth Circuit remands for an evidentiary hearing on the diligence issue even though Schad did not ask the district court for a hearing to present further evidence on the diligence question. The majority opinion compounds this error by providing that the evidentiary hearing on diligence can be held simultaneously with an evidentiary hearing on the merits of the IAC-sentencing claim. (*Id.* at A-46.)

The majority avoids the issue completely by not even acknowledging that Schad never requested an evidentiary hearing on diligence. (*Id.* at A-22 & A-40 to A-46.) However, Judge Rymer points out that Schad did not ask the district court for an evidentiary hearing on diligence. (*Id.* at A-57.) The majority opinion does not even attempt to explain why Schad's failure to request a diligence hearing does not prevent a remand for a hearing that Schad never requested.

A district court's decision denying an evidentiary hearing is reviewed for an abuse of discretion. *See Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000). However, the district court could not have abused its discretion by failing to *sua sponte* grant a hearing that Schad never requested.

Moreover, the majority opinion completely eviscerates AEDPA's diligence requirement by sanctioning simultaneous hearings on diligence and the substantive IAC claim. As Judge Callahan argues, diligence is what a petitioner must show *before* he gets an evidentiary hearing. (App. at A-11.) *Williams* makes clear that a state prisoner cannot receive an evidentiary hearing unless he first shows diligence. 529 U.S. at 437 ("§ 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met.").

3. The record was sufficient.

Third, there is no need for a remand for a hearing on diligence because the state record is more than adequate to show a lack of diligence. The Ninth Circuit has itself noted that "an evidentiary hearing is not required on issues that can be resolved by reference to the state court record." *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) (emphasis deleted). The state court record in this case is more than adequate to determine diligence. Indeed, the state court record clearly establishes a lack of diligence, and if the Ninth Circuit panel majority opinion is not reversed, it is unlikely that any state court record will be deemed

sufficient and an evidentiary hearing would be required in almost every federal habeas proceeding.

The record of state post-conviction proceedings in this case was summarized by Judge Rymer:

> After a trip to the United States Supreme Court, Schad filed a post-conviction petition in state court on December 16, 1991. John Williams took over as counsel after the petition was filed, and was ordered to file a supplemental petition by February 18, 1992. That deadline was extended five times (February 14, March 18, April 17, August 6, and October 14, 1992). On November 3, 1992, Williams was replaced by Michael Chezem. Chezem successfully sought appointment of an investigator and funds (July 30, 1993), and also obtained twelve extensions (January 5, 1993, February 2, April 14, May 14, June 28, July 30, August 19, September 27, October 25, November 29, December 27, 1993, and February 1, 1994). On January 31, 1994, Chezem withdrew and was succeeded by Rhonda Repp. She obtained authorization for further investigative services in February 1994; on March 28, 1995, she asked for the services of a mitigation expert, which the court approved on July 6, 1995. Meanwhile, she asked for and received a series of extensions on the ground that she and the investigator had not completed their investigation and located all potential witnesses (February 16,

> 1994, March 18, April 22, May 24, June 23, July 22, August 30, September 27, October 31, November 21, December 28, 1994, January 18, 1995, February 21, April 20, May 22, June 20, July 21, August 22, and September 20, 1995). On September 20, 1995 the court ruled that no further continuances would be granted. A supplemental post-conviction petition was filed on October 19, 1995, together with a request for an evidentiary hearing on the basis of "newly discovered evidence." The newly discovered evidence consisted of an affidavit by the mitigation expert, Holly Wake, expressing her opinion that the presentence report failed adequately to address the seriousness of Schad's abuse; it contained no new facts and identified no witnesses. The state court denied the ineffectiveness claim in July 1996 for lack of any specifics.

(App. at A-59.)

Thus, it is very clear from this record what post-conviction counsel did and did not do. The majority opinion simply cites various obstacles post-conviction counsel faced, and then makes a great leap in logic:

> As a result, Schad was unsuccessful in bringing out any significant mitigation evidence during his state habeas proceedings, leading to the denial of his ineffective assistance of sentencing claim

> without an evidentiary hearing in state court."

(App. at A-43.) The Ninth Circuit's statement about the cause for post-conviction counsel's failure to comply with Arizona law is factually incorrect; what led to dismissal without an evidentiary hearing was counsel's failure to file any affidavits supporting his claim, which cannot be explained by the routine obstacles that post-conviction counsel face in such proceedings.

Despite the extensive state court record demonstrating counsel's lack of diligence, the majority opinion concludes: that "neither the state court nor the district court record, however, contains information sufficient to determine whether those efforts were reasonable and that Schad therefore acted diligently." (*Id.* at A-45.)

In addition to finding the state court record insufficient, the Ninth Circuit decided that new evidence never presented to the state court was relevant in determining whether counsel was diligent. (*Id.* at A-44 to A-45.) The majority stated: "In the district court, Schad presented evidence that, we conclude, if it had been presented to the sentencing court, would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating factors present in this case." (*Id.* at A-44.) Judge Rymer laments: "We are not supposed to start with the evidence newly developed for federal court, then determine whether that evidence has 'some likelihood of altering the sentencing court's evaluation, then decide that the

petitioner made a threshold showing of reasonably attempting to develop it in state court." (*Id.* at A-73.) "Rather, we are to start with diligence—asking whether the factual basis was developed in state court and if not, whether there was a lack of diligence or some greater fault attributable to the petitioner—and never get to the weight of the newly developed evidence *unless* the petitioner bears no responsibility for failure to develop and present that evidence in state court." (*Id.*, emphasis in original.)

4. The burden was on Schad to show diligence.

Finally, if the state court record before the district court and the Ninth Circuit was insufficient to determine diligence, an evidentiary hearing was barred because Schad had the burden of showing diligence. *See Williams*, 429 U.S. at 440 (concluding petitioner "has met the burden of showing he was diligent in his efforts to develop the facts" supporting two claims). Nevertheless, the majority opinion remanded for an evidentiary hearing on diligence because "[n]either the state court nor the district court record, however, contains information sufficient for us to determine whether or not those efforts [by counsel] were reasonable and whether Schad therefore acted diligently." (App. at A-45.)

Judge Rymer's dissent follows *Williams* and AEDPA: "However, lack of evidence of diligence in the state and federal record does not compel an evidentiary hearing, but rather, compels denial of Schad's request for an evidentiary hearing on the merits . . . because he

had the burden of showing he was diligent, didn't meet it, and § 2254(e)(2) accordingly bars an evidentiary hearing on the merits of his claim." (App. A-74.) Judge Callahan and her dissenting colleagues agreed: "The Supreme Court has made clear in *Williams* that the petitioner has the burden of establishing he was diligent of developing the evidence in the state court." (*Id.* at A-6 to A-7.)

Opinions from other circuit courts have reiterated that *Williams* puts the burden on the petitioner to demonstrate that he was diligent in attempting to develop the facts supporting his claims in state court *See Wolfe v. Johnson*, 565 F.3d 140, 167 (4th Cir. 2009); *Wilson v. Sirmons*, 536 F.3d 1064, 1079 (10th Cir. 2008); *Hutchinson v. Bell*, 303 F.3d 720, 747 (6th Cir. 2002).

Therefore, despite Schad's failure to develop the record in state court and his subsequent failure in district court to bear his burden of showing diligence in state court, the Ninth Circuit has awarded Schad a second chance to show his diligence—possibly coupled with a simultaneous evidentiary hearing on the merits of a claim for which he has yet to show diligence.

B. ***The opinion conflicts with Landrigan.***

As pointed out by Judge Callahan's dissent, the Ninth Circuit majority panel opinion also conflicts with *Landrigan*. (App. A, at A-4 & A-11 to A-14.) That dissent concludes that: "The majority's endorsement of an evidentiary hearing on the merits of Schad's IAC claim without any consideration of whether he presents

a colorable claim under Strickland or AEDPA represents a troubling departure from settled law." (*Id.* at A-13.) After considering the new evidence Schad proffered in district court, that court concluded that trial counsel presented a strategically sound case in mitigation, and that the newly developed information is not of sufficient weight to create a reasonable probability that, if it had been presented, the trial court would have reached a different determination. (App. B-87 to B-100.)

Judge Rymer's dissent noted that the majority panel opinion was without regard to "the district court's extensive and reasoned holding in the alternative that, even considering the newly developed information, Schad was nevertheless not entitled to an evidentiary hearing on his ineffective assistance claim," "without regard to the state court's ruling that denied Schad's ineffective assistance claim on the merits," and "without reference to AEDPA, *Strickland*, or the double deference owed to state court adjudications under *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009); *Schriro v. Landrigan*, 550 U.S. 465, 470 (2007)." (App. at A-75.) Judge Rymer found it "inappropriate to order an evidentiary hearing on ineffective assistance of counsel without touching these bases." (*Id.* at A-76.)

This Court has instructed that: "In cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254 (e)(2), the decision to grant such a hearing rests in the discretion of the district court." *Landrigan,* 550 U.S. at 468. When there is no § 2254 (e)(2) bar, "[i]n deciding

whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474. A district court is not required to hold an evidentiary hearing "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief," *Id.* And, "the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." *Landrigan*, 550 U.S. at 474.

The Ninth Circuit opinion fails to apply *Landrigan.* Indeed, it does not even cite *Landrigan.* (App. A, at 45.) Rather than analyzing whether the district court abused its discretion under *Landrigan* by denying an evidentiary hearing, the majority opinion tersely states:

> [W]e recognize the district court stated it had considered the new evidence proffered by Schad in support of his ineffective assistance of counsel claim and said that, even assuming diligence, this new evidence could not justify relief. *We disagree with that ruling.*

(*Id.*, emphasis added.)

Thus, the majority opinion failed to analyze whether Schad presented a colorable IAC claim. In its opinion in *Landrigan,* the Ninth Circuit at least

examined the record for whether there was a colorable claim, and found that there was. *Landrigan v. Schriro*, 441 F.3d 638 (9th Cir. 2006). In this AEDPA case, the Ninth Circuit ignored *Landrigan's* mandate, finding it sufficient analysis to simply say it disagreed with the district court's extensive alternative findings. In this case, as in *Landrigan*: "[T]he District Court was well within its discretion to determine that, even with the benefit of an evidentiary hearing, [the prisoner] could not develop a factual record that would entitle him to habeas relief." 550 U.S. at 475.

Landrigan sets forth a two-step analysis regarding review of the district court's denial of an evidentiary hearing: (1) whether there was diligence; (2) if there was diligence, whether the prisoner had raised a colorable claim such that the district court abused its discretion by denying an evidentiary hearing. Other opinions from the Ninth Circuit have followed this two-step analysis. *See West v. Ryan*, 608 F.3d 477, 484-489 (9th Cir. 2010) (assuming diligence, district court did not abuse its discretion by denying evidentiary hearing on *Strickland* claim); *Horton v. Mayle*, 408 F.3d 570, 582 n. 6 (9th Cir. 2005) ("here we assess the availability of an evidentiary hearing under pre-AEDPA law because Horton exercised sufficient diligence in seeking to develop the factual basis of his claim in the state court proceedings."). Other circuits have followed the two-step analysis *See Alverson v. Workman*, 595 F.3d 1142, 1163 (10th Cir. 2010) (assuming prisoner was diligent in developing the factual basis of his claims in state court, he did not show evidentiary hearing would have aided his cause); *Palmer v. Hendricks*, 592 F.3d 386, 392-394 & 399-400

(3rd Cir. 2010) (no *prime facie* showing of ineffective assistance of counsel); *Abdus-Samad v. Bell*, 420 F.3d 614, 626 (6th Cir. 2005) (regardless of diligence, no abuse in denying evidentiary hearing when he did not show no reasonable fact-finder would have found him guilty); *Turner v. Crosby*, 339 F.3d 1247, 1274 (11th Cir. 2003) (even if allegations in prisoner's appendix were taken as true, no error in denying hearing where new information did not show ineffective assistance of counsel at penalty phase of capital trial); *Channer v. Brooks*, 320 F.3d 188, 199-200 (2nd Cir. 2003) (even if prisoner was diligent, no need for hearing new information not material to issue); *Clark v. Johnson*, 227 F.3d 273, 284 (5th Cir. 2000) (even if AEDPA diligence standard was met, no abuse of discretion in denying hearing when no significant factual dispute and no showing how IAC claim would be advanced by a hearing).

Nor did the Ninth Circuit explain why the district court abused its discretion by considering the new evidence and denying the claim on the merits, in lieu of having an evidentiary hearing. Other circuit opinions have held that that the district court did not abuse its discretion in considering new material by expanding the record in lieu of holding an evidentiary hearing. *See Boyko v. Parke*, 259 F.3d 781 (7th Cir. 2001); *Brown v. Johnson*, 224 F.3d 461, 469 (5th Cir. 2000); *Cardwell v. Greene*, 152 F.3d 331, 338-39 (4th Cir. 1998), *overruled on other grounds by Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000). *See also* Rule 8, Rules Applicable to § 2254 Proceedings.

The district court alternatively considered the extensive new evidence presented by Schad, and discussed why Schad had not shown either deficient performance or prejudice. (App. B-87 to B-100.) In another recent Ninth Circuit opinion, a different panel reviewed the IAC-sentencing claim in light of the new evidence presented and considered by the district court, and agreed with the district court that the prisoner's *Strickland* claim failed. *Rhoades v. Henry*, ___ F.3d ___, 2010 WL 2778693, *7 (9th Cir. July 15, 2010).

The Ninth Circuit failed to evaluate the IAC claim under *Bobby v. Van Hook*, 130 S. Ct. 13, 15 (2009) (pre-AEDPA); *Wong v. Belmontes*, 130 S. Ct. 383, 386 (2009), or *Porter v. McCollum*, 130 S. Ct. 447 (2009). Instead, it merely lectured the district court to reconsider the IAC claim in light of *Wong* and *Porter*. (App. A, at A-46.)

The Ninth Circuit, without explaining why the district court abused its discretion, merely said that the new evidence presented in district court "demonstrated at least some likelihood of altering the sentencing court's evaluation" because "the evidence Schad presented to the district court was stronger than the evidence presented at sentencing." (*Id.* at A-44 & A-46.) Of course the new evidence was "stronger" regarding Schad's family history than that presented at sentencing, and that is why the district court considered the new evidence before determining it would not have made a difference in the sentence.

Neither Schad nor the Ninth Circuit have indicated what additional evidence would be presented

at an evidentiary hearing that would alter the district court's analysis of the merits. *See Rhoades*, at *8. The new evidence considered by the district court included: "an extremely detailed discussion of the psychological impact of Schad's abusive childhood" from psychologist Charles Sanislow; another declaration from psychologist Leslie Lebowitz discussing the mental health of Schad's parents, declarations from family members and statements from family members as told to an investigator, and extensive mental health records of his mother, father, and brother. (App. A-41.)

This Court in *Landrigan* endorsed the utility of a "paper hearing." *Landrigan*, 550 U.S. at 474. This Court, based on the existing record, reversed the Ninth Circuit's ordering an evidentiary hearing on ineffective assistance of counsel at sentencing. Even though the district court in *Strickland* had granted an evidentiary hearing, this Court decided the ineffective assistance claim "without regard to the evidence presented at the District Court hearing." 466 U.S. at 700.

This Court has long recognized that discovery and expansion of the record can be used to avoid the need for an evidentiary hearing. *See Blackledge v. Allison*, 431 U.S. 63, 81-82 (1977). The Ninth Circuit itself has previously stated that expansion of the record is a permissible alternative to avoid the necessity of an "expensive and time-consuming hearing." *See Williams v. Woodford*, 384 F.3d 567, 590-91 (9th Cir. 2004). The Ninth Circuit here remands for an unnecessary, expensive, and time-consuming hearing in an already much delayed case.

II. THIS COURT SHOULD GRANT REVIEW NOW, RATHER THAN CONSIDERING REVIEW AFTER DISTRICT COURT PROCEEDINGS ON REMAND AND SUBSEQUENT NINTH CIRCUIT REVIEW.

This Court could wait to consider review until the conclusion of district court proceedings or remand, and subsequent Ninth Circuit review of those proceedings. However, that would sanction the very delay in this case that this Court's opinions and AEDPA proscribe. As Justice Callahan noted in the dissent from the denial of rehearing:

> After more than thirty years of litigation, this case has not come to rest. Schad was convicted of first-degree murder in 1979, and was sentenced to death in 1985 following a retrial. The majority's order remanding for 'further proceedings' and a possible evidentiary hearing ensures that the litigation will continue for several more years despite every indication that it should end.

(App. A-4 to A-5.) *See also Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, . . . and to further the principles of comity, finality, and federalism." (internal quotes omitted)); *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (Stevens, J.) ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law.").

To allow further, unwarranted delay in this AEDPA case would make a mockery of AEDPA provisions and this Court's opinions limiting evidentiary hearings in federal courts. The Ninth Circuit opinion portends the routine evidentiary hearings that this Court has found contrary to AEDPA:

> *Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.*

Williams, at 437 (emphasis added).

As Judge Callahan and her fellow dissenters warn:

> The practical consequences of this holding are substantial. The majority opinion creates a precedent for future habeas petitions demanding further proceedings and evidentiary hearings on whether they were diligent in developing evidence in state court. Moreover, if on this record an appeals court can find the evidence of diligence to be insufficient, "further proceedings" and "hearings" will almost always be necessary before a district court can deny an evidentiary hearing for lack of diligence in state court, Such a result is clearly contrary [to 2254 and *Williams*], and the majority's revision of the law is

> likely to engender confusion among the district courts as well as disparate outcomes in their rulings on state prisoners' requests for evidentiary hearings.

(App. at A-10.)

In *Landrigan*, this Court considered and reversed the Ninth Circuit's improperly granting an evidentiary hearing. This Court reminded the Ninth Circuit that an evidentiary hearing is not required in every federal capital habeas review. "If district courts were required to allow federal habeas applicants to develop even the most insubstantial factual allegations in evidentiary hearings, district courts would be forced to reopen factual disputes that were conclusively resolved in the state courts." 550 U.S. at 475.

But things have gotten worse in the Ninth Circuit since *Landrigan*, not better. *See, e.g., Pinholster v. Ayers*, 590 F.3d 651, 692 (9th Cir. 2009) (C.J. Kozinski, dissenting) ("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."), *cert. granted sub nom. Cullen v. Pinholster*, ___ U.S. ___, 2010 WL 887427 (June 14, 2010).

A footnote in Judge Callahan's dissent lists numerous opinions from this Court reversing the Ninth Circuit for failing to follow AEDPA's provisions. (App. at A-13, fn. 2.) *See also Doody v. Schriro*, 596 F.3d 620, 659-660 (9th Cir. 2010) (J. Tallman, dissenting) (listing Ninth Circuit opinions found not to comply with AEDPA).

The Ninth Circuit's failure to follow the AEDPA has been most damaging to the States in capital cases: "The majority's methodology, which reflects the perceived wisdom in this court, has become an unstoppable engine for setting aside death sentences." *Pinholster*, 590 F.3d at 692 (C.J. Kozinski dissenting).

Another member of the Ninth Circuit has complained that there is "an unspoken rule in our circuit that anyone sentenced to death had ineffective assistance of counsel during the sentencing phase of his trial or at least needs an evidentiary hearing decades after sentencing to find out." *Stanley v. Schriro*, 598 F.3d 612, at 628 & fn. 3 (9th Cir. 2010) (J. Kleinfeld, concurring in part and dissenting in part). The "unspoken rule" is shown by the number of Arizona capital cases in which the Ninth Circuit has granted relief either by remanding for an evidentiary hearing or ordering the state courts to re-sentence the prisoner, based on perceived ineffective assistance of counsel at sentencing. In just the last two years, the Ninth Circuit has remanded or reversed this case and six other Arizona capital cases after finding ineffective assistance at sentencing: *Detrich v. Ryan*, 2010 WL 3274500 (9th Cir. Aug. 20, 2010) (re-sentencing); *Stanley* (remanded to district court for evidentiary hearing); *Robinson v.*

Schriro, 595 F.3d 1086 (9th Cir. 2010) (re-sentencing); *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009) (re-sentencing after rejecting district court's findings and conclusions following federal district court evidentiary hearing); *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009) (re-sentencing); *Scott v. Schriro*, 567 F.3d 573 (9th Cir. 2009) (remanded for evidentiary hearing). The same pattern is seen in earlier cases. *See Lambright v. Stewart*, 241 F.3d 1201 (9th Cir. 2001) (remanded for evidentiary hearing)—*subsequent opinion Lambright v. Schriro*, 490 F.3d 1103, 1128 (9th Cir. 2007) (re-sentencing after rejecting district court's findings and conclusions following federal district court evidentiary hearing); *Smith (Joe Clarence) v. Stewart*, 189 F.3d 1004 (9th Cir. 1999) (re-sentencing); *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999) (re-sentencing); *Smith (Bernard) v. Stewart*, 140 F.3d 1263 (9th Cir. 1998) (re-sentencing); *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998) (remanded for an evidentiary hearing), *subsequent opinion in Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008) (re-sentencing, rejecting district court's findings and conclusions following evidentiary hearing); *Summerlin v. Schriro*, 427 F.3d 623 (2005) (re-sentencing), *cert. granted and reversed by Schriro v. Summerlin*, 542 U.S. 348 (2004).

The Ninth Circuit's opinion is contrary to, and misapplies, *Williams*. It is contrary to, and ignores, *Landrigan*. It eviscerates AEDPA's limits on evidentiary hearings in federal court that prevent prisoners from presenting evidence never presented to the state courts. It allows district courts to hold evidentiary hearings on substantive claims before determining whether prisoners diligently developed the

facts concerning the claims in the state courts. This Court should grant review to insure that the Ninth Circuit follows *Williams*, *Landrigan*, and AEDPA, and forestall unwarranted federal court re-trials on issues not properly presented to the state courts.

CONCLUSION

This Court should grant the petition for writ of certiorari, and reverse that part of the Ninth Circuit opinion remanding to the district court for additional proceedings.

Respectfully submitted

TERRY GODDARD
Attorney General of Arizona

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

JON G. ANDERSON
Assistant Attorney General
(Attorney of Record)
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

858698

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT.

Edward Harold Schad, *Petitioner-Appellant*, v. Charles L. Ryan,* Arizona Department of Corrections, *Respondent-Appellee.*	)	No. 07-99005
	)	D.C. No. CV-9702577-PHX ROS
	)	ORDER AND AMENDED OPINION

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

Argued and Submitted
May 14, 2009—San Francisco, California

Filed Sept. 11, 2009.
Amended Jan. 12, 2010.
Second Amendment June 3, 2010.

Before: Mary M. Schroeder, Stephen Reinhardt and Pamela Ann Rymer, Circuit Judges

*Charles L. Ryan is substituted for his predecessor Dora B. Schriro as Director of the Arizona Department of Corrections. See Fed. R. App. P. 43(c)(2).