No. 12-1084

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,
Director, Arizona Department of Corrections, et al.,
Movant,

v.

EDWARD HAROLD SCHAD,
Respondent.

SCHAD'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In state post-conviction proceedings, Ed Schad's post-conviction attorney never presented a claim that Schad's trial counsel was ineffective at sentencing for failing to present mitigating mental health evidence showing that Schad's father was mentally ill, that Schad's mother was mentally disturbed and addicted, and that as a result "at the time of the crime Schad was suffering from "several major mental disorders" specifically extremely serious mental conditions such as bipolar disorder, schizoaffective disorder, and dissociative disorders, among others. ER 540." *Schad v. Ryan*, No 07-99005, Slip op, at 10 (9th Cir. Feb. 26, 2013). As petitioner has repeatedly asserted in this litigation, it was the fault of post-conviction counsel that an ineffectiveness claim predicated upon such evidence was never properly presented to the state courts. According to petitioner, there is an "extensive state court record demonstrating [post-conviction counsel's] lack of diligence." *Ryan v. Schad*, U.S. No. 10-305, Petition For Writ Of Certiorari, p. 25.

When Ed Schad finally received effective counsel in federal habeas corpus proceedings, he first presented an ineffectiveness-at-sentencing claim predicated upon sentencing counsel's failure to present this extensive mitigating mental health evidence. Petitioner told the District Court that Schad's presentation of new evidence in federal habeas created a new, previously-unadjudicated claim, because it "places the claim in a significantly different evidentiary posture in federal court, ***violating the exhaustion requirement.***" R. 116, p. 4 (Opposition To Motion To Expand Record). Petitioner reiterated that Schad's federal habeas claim was "in a

significantly different evidentiary posture than it was in before the state court, thereby *violating the fair presentation requirement.*" *Id.*, p. 9. The district court thus refused to consider such evidence, and on appeal, petitioner *again* successfully maintained that Schad's claim could not be adjudicated based upon the unexhausted mental health evidence first presented in federal court.[1] The court of appeals then only considered the ineffectiveness-at-sentencing claim that had been adjudicated by the state court, and denied relief on that claim – not the new claim first presented in federal habeas based on the unexhausted mental health evidence.

That Schad's new ineffectiveness claim is procedurally defaulted should come as no surprise to petitioner, which told the district court that there could be no federal review of the claim because of the exhaustion requirement. The court of appeals here has so held. The vacated panel decision in *Dickens v. Ryan*, 688 F.3d 1054, 1070 (9th Cir. 2012) came to a similar conclusion under identical circumstances. And the Fourth, Fifth, and Tenth Circuits have likewise concluded that when, as here, a federal habeas petitioner presents an ineffectiveness-at-sentencing claim predicated on substantial new evidence never considered by the state court, the petitioner's claim is unexhausted and/or defaulted. *Moses v. Branker*, 2007 U.S.App.Lexis 24750 (4th Cir. 2007); *Kunkle v. Dretke*, 352 F.3d 980, 987-988 (5th Cir. 2003); *Fairchild v. Workman*, 579 F.3d 1134, 1148-1151 (10th Cir.

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[1]On appeal to the Ninth Circuit, petitioner complained that Schad had improperly included the evidence not presented to the State Court in his record excerpts. See Motion to Strike Opening Brief and Excerpts. As a result, Schad was required to file two sets of excerpts with the second (and more voluminous set) being the evidence not presented to the State Court.

2009)(when new evidence changed legal landscape of sentencing ineffectiveness claim, claim was not adjudicated in state court, and new claim was presented in federal court).

After the court of appeals ruled - *but before Ed Schad ever petitioned for certiorari and while the appellate mandate remained stayed pending a petition for writ of certiorari*- this Court decided *Martinez v. Ryan*, 566 U.S. ___ (2012). Schad promptly moved for a remand in the court of appeals in light of *Martinez*, maintaining that he could now receive full consideration of his mental-health-based mitigation claim under *Martinez*, because the ineffectiveness of post-conviction counsel provided "cause" for his failure to exhaust and his default. The court of appeals, apparently misapprehending the significance of *Martinez*, summarily denied Schad's motion to remand, but the appellate mandate remained stayed.

The law regarding *Martinez* then began to evolve. A panel of the Ninth Circuit concluded that when a federal habeas claim of sentencing ineffectiveness is predicated upon substantial new evidence not presented to the state courts (exactly as in Schad's case), it is procedurally defaulted, but subject to the *Martinez* exception. *Dickens v. Ryan*, 688 F.3d 1054, 1070 (9th Cir. 2012). The Ninth Circuit Court of Appeals then granted *en banc* review in *Dickens*, while the mandate in Schad's case remained stayed. Schad promptly sought a continued stay of mandate pending the *en banc* decision in *Dickens*,[2] after which Schad filed (at the

[2]Schad immediately notified the Arizona Supreme Court that he had requested a continuation of the mandate stay in light of the en banc grant in *Dickens*. See Exhibit 1, email correspondence

panel's request) a request for reconsideration of his motion for a *Martinez* remand – a motion that was filed many months earlier, before Schad even filed his certiorari petition.

Though fully aware that the court of appeals had not issued any mandate and that Schad's initial federal habeas proceedings were thus not final, the state of Arizona pressed forward to have Schad executed.

The Arizona Supreme Court – also knowing that the court of appeals had not issued a mandate marking the conclusion of federal habeas proceedings – ordered Schad executed on March 6, 2013. Indeed, when it ordered Schad's execution, the Arizona Supreme Court was well aware that any interest in finality of its judgment had not yet attached. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)(state's interest in finality becomes compelling once court of appeals issues its mandate).

With *Martinez* having been decided during the pendency of Schad's initial habeas proceedings, the court of appeals reconsidered its denial of the pre-certiorari *Martinez* motion and its prior panel opinion. The appellate court faithfully considered the various contentions now made by petitioner and rejected them.

The court appropriately noted that the application of *Martinez* under similar circumstances is being considered by the *en banc* court in *Dickens v. Ryan*, No. 08-99017 and by a panel in *Detrich v. Ryan*, No. 08-99001 and that "Schad's case raises the same issues our court is considering *en banc*." *Schad*, slip op. at 2.

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between Kelley Henry (counsel for Schad) and Donna Hallam (Staff Attorney for the Arizona Supreme Court)(Hallam will inform the Justices of the motion).

The panel carefully balanced the stay equities to determine whether a *Martinez* remand on Schad's initial habeas proceedings is warranted, concluding that the circumstances here are exceptional, even **assuming** a *Martinez* remand based on a *Martinez* motion made before certiorari was filed requires such a showing. *Id.*, slip op. at 3-11.[3]

The court carefully looked at the facts of Schad's case, noting that the change in the legal landscape wrought by *Martinez* and the appellate court's *en banc* review of an identical issue are exceptional. In so doing, the court noted that the aggravation in Schad's case is weak, and that Schad's unpresented evidence of mental illness is very significant, showing that because of mental illness, Schad "did not bear the same level of responsibility for the crime as would someone with normal mental functioning." *Id.*, slip op. at 9-10.

The court of appeals also held – in complete accord with the decisions of the Fourth, Fifth, and Tenth Circuit (*See* p. 2, *supra*) – that Schad's ineffectiveness claim is a new claim that is procedurally defaulted because it is based upon new evidence that was never considered by the state courts, and that it is therefore subject to *Martinez*. *Schad*, slip op. at 11-14.

The court of appeals concluded that *Martinez* applies with full force to Schad's claim because it is a new claim, and rejected the state's argument that *Cullen v. Pinholster*, 563 U.S. ___ (2011) applies to claims never before adjudicated

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[3]Schad does not concede that such a showing is required.

in state court due to the ineffectiveness of post-conviction counsel. *Schad*, slip op. at 13 n. 3.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. Petitioner Misleads The Court By Claiming That The State Court Denied On The Merits Ed Schad's Claim That Counsel Was Ineffective For Failing To Present Mitigating Evidence Of His Serious Mental Disorders

Before getting to the many other reasons why certiorari is not warranted, Ed Schad is compelled to point out that, as to question presented 2, certiorari is not warranted based solely upon the wording of the question itself, because it contains clear misstatement of fact. While claiming that the lower court "erred" in its application of law (which itself provides no grounds for certiorari), petitioner claims that Schad's mental-health mitigation claim is a claim "that the state court had denied on the merits." Petition, p. I, Question Presented 2. That is simply not true, and petitioner knows it's not true.

Indeed, the sentencing ineffectiveness claim presented by Schad in federal habeas is premised upon the significant mitigating evidence of serious mental illness supported by, *inter alia*, extensive declarations of Yale psychologist Charles Sanislow, Ph.D. (Exhibit 2), and Leslie Leibowitz (Exhibit 3). During initial post-conviction proceedings, counsel presented no mental-health mitigating evidence to support *any* constitutional claim. Given this reality, petitioner himself stated below that Schad's federal habeas claim premised on such evidence was not exhausted (and thus defaulted) because Sanislow's compelling mitigating narrative "places the claim in a significantly different evidentiary posture in federal court, *violating the*

exhaustion requirement." R. 116, p. 4 (State's Opposition To Motion To Expand Record)(emphasis supplied).

For petitioner to now come to this Court claiming that Schad's federal habeas claim was adjudicated on the merits by the state courts is thus disingenuous at best and false, at worst. Schad's claim could not have been adjudicated on the merits where, as even petitioner agrees, the state court never "heard and evaluated the evidence" supporting the claim. *Johnson v. Williams*, 568 U.S. ___ , 133 S.Ct. 1088, 1097 (2013) (setting forth standards for an adjudication on the merits). Regardless, because question 2 is based on the unquestionably false premise that Schad's mental-health mitigation claim presented in federal habeas was decided by the state courts, the petition must be denied on that basis alone, for the question posed by petitioner is not actually presented by this case.

II. The Petition Seeks Review Of An Interlocutory Order

Certiorari should also be denied because petitioner "seeks our intervention before the litigation below has come to a final judgment." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993)(Scalia, J., respecting denial of petition for writ of certiorari). As Justice Scalia emphasized in *VMI*: "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Id.* (*citing cases*). This makes eminent sense, because additional lower court proceedings ordered by the court of appeals will clarify both the facts and the law of the case, and may even moot any number of the issues presented by a petition such as this. This Court ought not address issues except when necessary,

and when based upon a complete record. *Cf. Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936)(Brandeis, J., concurring).

Given the uncertainty about the actual contours of a yet-to-be-entered final judgment in this matter, it is thus prudent for the Court to deny certiorari. Only upon entry of a final lower court judgment definitively resolving the case should review be contemplated, if at all. *See e.g.*, *Wrotten v. New York*, 560 U.S. ___ (2010)(Sotomayor, J., respecting denial of certiorari); *DTD Enterprises, Inc. v. Wells*, 558 U.S. 964 (2009) (Kennedy, J., respecting denial of certiorari); *Columbia Union College v. Clark*, 527 U.S. 1013 (1999)(Thomas, J., dissenting)(petition for writ of certiorari to court of appeals presumably denied given "interlocutory posture" of the case); *Jefferson v. City of Tarrant*, 522 U.S. 75, 84 (1997)(dismissing petition for writ of certiorari as improvidently granted where state court had not yet "effectively determined the entire litigation."); *VMI, supra* (Scalia, J.).

III. The Issues Presented Are Factbound, If Not Factually Unique

As an institutional matter, this Court is not an appropriate forum for resolving factual disputes or otherwise resolving legal issues posed in factually distinct cases, for this Court's certiorari jurisdiction is more commonly reserved for exposition of legal principles of general applicability. These considerations also counsel denial of the petition.

The procedural posture of this case is unique. During the course of his initial habeas proceedings, this Court decided *Martinez v. Ryan*, 566 U.S. ___ (2012). In the course of those proceedings, Ed Schad promptly requested application of

Martinez, which was summarily denied. With the appellate mandate stayed, Schad then petitioned for certiorari (which was denied), and he requested and received a continued stay of the mandate, a stay which petitioner never opposed. With that stay of mandate in effect, the court of appeals granted rehearing in another case on the very issue presented in Schad's case (*Dickens v. Ryan*, 704 F.3d 816 (9th Cir. 2013)(en banc), and then Schad promptly requested relief and reconsideration of his *Martinez* motion, which was granted.

Given this unique fact pattern as well as the fact-bound questions presented by petitioner, certiorari should be denied. First, while petitioner complains about the meaning of *Bell v. Thompson*, 545 U.S. 794 (2005), it is apparent that any decision by this Court would only apply to this case. In reality, how many other cases will involve this Court issuing an intervening decision during the pendency of initial federal proceedings, a party promptly seeking its application only to be denied summarily, followed by an *en banc* grant on the same issue, and a request for reconsideration of the intervening decision which is granted in the interests of justice while the mandate has remained stayed – a stay that was granted without objection by the opposing party? To pose the question is to answer it. The unique, factbound nature of this case makes question 1 not worthy of review.[4]

The same thing can be said of question 2. While containing the factual misstatement noted *supra*, petitioner also premises this question upon specific

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[4]Schad has been unable to identify any factually similar situation in any case in the 8 years since *Thompson*, which confirms the impropriety of certiorari here.

factual assertions relating to the decision of the district court. Those considerations, however, are not even relevant to the disposition of this case, because a district court doesn't have a final say on the law. The question also omits at least one other critical fact that must be considered when addressing the propriety of the court of appeals' order, *viz.*, petitioner's own argument in the lower courts emphasizing that Schad's claim was *not* adjudicated on the merits, which, as a factual matter, estops petitioner from making the argument he now presents to this Court.[5] On review, this Court would thus have to sort through the thicket of the facts and consider *all* the facts, not just the facts selected by petitioner to include in his question presented, and would have to decide non-certworthy issues not specifically presented by the petition such as estoppel. All told, therefore, the factbound nature of question 2 (and the facts that it doesn't mention) makes it unworthy of review. *See Fry v. Pliler*, 551 U.S. 112 (2007)(refusing to consider factbound questions).

Question 3 suffers the same fate. Petitioner is asking this Court to review the court of appeals' factbound decision to remand for consideration of Schad's

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[5] In the body of the petition – not in the questions presented – petitioner makes assertions that Schad's claim is not subject to procedural default, because procedural default can be "deliberately waived" and somehow there was a deliberate waiver in this case. Any such issue, however, is not fairly encompassed within question 2, and therefore is simply not before the Court. *Wood v. Allen*, 558 U.S. 290, 304 (2010); U.S. Sup.Ct. R. 14.1(a). Moreover, on certiorari, this Court is not in the business of parsing the facts of a district court and appellate court record to make an extremely factbound assessment regarding the existence of waiver. Nor is such an issue independently certworthy. *See Trest v. Cain*, 522 U.S. 87 (1997).

ineffectiveness claim in light of all the circumstances. While complaining that the district court is not a proper forum for resolving Schad's *Martinez* issue, petitioner's question also overlooks the very foundation of the court of appeals' order, which mandates the district court to assess the effectiveness of post-conviction counsel under *Martinez*. This is an issue that has not been decided by any court and thus requires additional process. *Cf. Martinez*, 566 U.S. at ___ (slip op. at 15)(remanding for further proceedings where lower courts had not yet applied *Martinez* rule). Because such an assessment requires an evaluation of the facts, *only* the district court is in a position to make that assessment in the first instance, and petitioner's complaint about the remand thus rings hollow.

Petitioner thus lacks any reasonable basis to assert that the case ought not be remanded to the district court under *Martinez*, and where this Court's intervention on such a matter would merely require a factbound application of law to the facts, certiorari is simply not warranted.

IV. There Is No Split Among The Circuits That Needs To Be Resolved, Especially Where The Lower Courts Have Not Even Weighed In On The Issues Presented

Petitioner also fails to identify any split among the circuits requiring this Court's intervention. With question 1 requesting a factbound ruling based upon unique facts, it is not surprising that there is no split of authority concerning the application of *Thompson* under the circumstances presented here. Schad's case is unique in this respect, with *Thompson* never having been applied in any situation analogous to the situation here.

Similarly, as to question 2, other than the court of appeals below, the lower courts have simply not spoken about *Martinez*' s applicability to ineffectiveness claims such as Schad's, or whether *Pinholster* categorically prohibits such application, as petitioner would contend. In one case, the Sixth Circuit posed the question about the applicability of *Martinez* but never reached it. *Hanna v. Ishee*, 694 F.3d 596 (6th Cir. 2012). Apart from the court of appeals below, the issue thus remains undecided by the remaining courts of appeals, leaving this Court with very little to work with in the way of appellate discourse on the subject.

Absent a conflict (let alone a mature conflict) in the lower courts about the impact of *Martinez* upon *Pinholster*, review by this Court is premature, just as it is premature given the interlocutory nature of the court of appeals' order. *See* Section II, *supra*. The issue needs to percolate:

> [T]his is exactly the sort of issue that could benefit from further attention in the courts of appeals. We should not rush to answer a novel question about the application of a 1-year-old decision in the absence of a pronounced conflict among the circuits.

Spears v. United States, 555 U.S. 261, 270 (2009)(Roberts, J., dissenting). Under these circumstances, the Court should give the courts of appeals "time to address these precedents before adding new ones." *Id. See also California v. Carney*, 471 U.S. 386, 399-400 (1985)(Stevens, J., dissenting).

Likewise, question 3 regarding the propriety of a remand is not subject to any circuit split, notably because it is so factbound. It, too, is also not worthy of plenary review.

V. Petitioner Merely Seeks Error Correction,And The Court Of Appeals Properly Applied Governing Precedent

Finally, certiorari is not warranted because the petitioner seeks error correction, even as the lower court decision discloses no error worthy of this court's attention.

In granting relief, the court of appeals has applied the very principles of law articulated in *Bell v. Thompson*, 545 U.S. 794 (2005), *viz.* that before issuing its mandate, a court of appeals has inherent power to revise its mandate under extraordinary circumstances. Applying settled exhaustion and procedural default principles (including *Humphrey v. Cady*, 405 U.S. 504, 517 (1972), and *Coleman v. Thompson*, 501 U.S. 722 (1991)), the court of appeals has also concluded that Schad's ineffectiveness claim is unexhausted and procedurally defaulted. *Schad*, slip op. at 12-14. The court of appeals has taken cognizance of *Martinez* and concluded, as in *Martinez*, that given procedural default, Schad may be able to establish "cause." *Schad*, slip op. at 14-15. In doing so, the court of appeals has also fully acknowledged *Pinholster*, and the scope of its holding. *Schad*, slip op. at 13 n.3.

With the court of appeals having cited and applied all the appropriate principles governing the resolution of Schad's claims, petitioner's request for review boils down to a request for error correction. In fact, the petitioner's questions specifically query whether the court of appeals "order err[s]" in the application of law to the facts. *See* Petition, p. i (questions 2 & 3). Such queries, however, are

not certworthy. *See Kyles v. Whitley*, 514 U.S. 419, 458 (1995)(Scalia, J., dissenting).

Even so, there is no plain error warranting review, for the court of appeals has acted appropriately. *Thompson* acknowledges that a court of appeals has discretion to revise its opinion in extraordinary circumstances, having cited cases in which such revision has occurred in the interest of justice. *Thompson* does not say (as petitioner contends), that there is no discretion. For if that were true, this Court would have said so in *Thompson*, rather than issuing an advisory opinion about the "abuse of discretion" which occurred. The court of appeals has carefully considered all the facts, concluded that they are extraordinary (for they are, *See* p. 1-6, *supra*), and appropriately revised its mandate in the interests of justice in this capital case.

In doing so, the court of appeals acknowledges the rule of *Martinez*, which allows the ineffectiveness of post-conviction counsel to provide "cause" for the default of an ineffectiveness claim. And it has fairly and properly applied *Martinez*, which is predicated on the notion that a federal habeas petitioner is entitled to one full and fair consideration of his ineffectiveness claim. If such consideration was not provided in state court because of the ineffectiveness of post-conviction counsel, it *must* be provided in federal court, lest the bedrock right to counsel – the very "foundation for our adversary system" (*Martinez*, 566 U.S. at ___ (slip op. at 9)) – be rendered a nullity. Where no court has ever decided Schad's ineffectiveness claim by considering Dr. Sanislow's and Dr. Leibowitz's substantive declarations, *Martinez* allows Schad to have them heard in federal court, where post-conviction

counsel was ineffective. This conclusion is not only not patently wrong but it is eminently reasonable and correct, and thus certiorari is not warranted.[6]

Finally, where a remand for application of this Court's intervening decision in *Martinez* has occurred in any number of similar situations,[7] it can hardly be said that the court of appeals did anything improper in issuing a similar remand order here, such that this Court is compelled to intervene. The court of appeals' decision is perfectly in line with the decisions in these many other cases. The court of appeals has also noted that the district court's prior consideration of Schad's claim was "fundamentally flawed" in that it mistakenly believed that Schad's new evidence was "merely cumulative" and mistakenly failed to realize that his claim was a new claim and defaulted. *Schad*, slip op. at 14 n.4. The court of appeals' remand is likewise not erroneous, for the court of appeals' assessment of the situation is factually accurate, and giving a district court a chance to reconsider a prior decision once told of its legal error is clearly permissible. *Cone v. Bell*, 556 U.S. 449, 475 & n. 19 (2009)(remanding for proper consideration of habeas claim).

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[6] 28 U.S.C. § 2254(d) does not prohibit relief under *Martinez*, because the claim involving such evidence was never "adjudicated on the merits." Nor does 28 U.S.C. § 2254(e) prohibit relief where the failure to develop such evidence was the fault of ineffective post-conviction counsel, not Schad.

[7] *See e.g.*, *Hairston v. Blades*, No. 11-99012 (9th Cir., Feb. 25, 2013); *Rodriguez v. Padula*, No. 12-6392, 2012 U.S. App. Lexis 20405 (4th Cir, Sept. 28, 2012); *Henderson v. Colson*, No. 06-02050 (6th Cir. July 2, 2012); *Creech v. Hardison*, No. 10-99015 (9th Cir., June 20, 2012); *Cantu v. Thaler*, 682 F.3d 1053 (5th Cir. June 1, 2012); *Middlebrooks v. Colson*, No. 05-5904 (6th Cir., May 17, 2012); *Lindsey v. Cain*, No. 11-30997, 2012 U.S. App. Lexis 7953 (5th Cir., Apr. 19, 2012).

All told, therefore, while petitioner's request for error correction is not well-taken given the nature of this Court's certiorari jurisdiction, there is no patent error even requiring "correction." The petition must be denied.

CONCLUSION

This Court ought not wade into reviewing an interlocutory, factbound order that is not subject of any circuit conflict, and seeks correction of errors that are non-existent, and certainly not patent. This Court should thus deny the petition for writ of certiorari.

Respectfully submitted,

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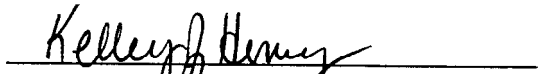

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