No. 20-____

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER SPREITZ, Petitioner,

vs.

DAVID SHINN,
Director, Arizona Department of Corrections,
Rehabilitation & Reentry, Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTIONS PRESENTED

In *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court vacated a death sentence on the basis of ineffective assistance of trial counsel where counsel was apprised that the prosecution would admit the defendant's prior conviction and, although counsel had access to material in the prosecution's files that would have mitigated that conviction, failed to taken any action thereon. Here a presentence report was tendered to Spreitz's counsel that showed Spreitz to have ingested cocaine in close temporal proximity to the crime – which was in addition to his alcohol consumption shown by the trial evidence. The cocaine use and the resultant metabolite cocaethylene negatively affected Spreitz's cognitive functioning. This compelling mitigation went uninvestigated by both trial and state post-conviction relief counsel.

The Questions Presented are:

> When must the court of appeals remand to a court of first instance for application of this Court's intervening decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), to determine whether the ineffective assistance of post-conviction relief counsel excuses the procedural default of facts supporting a substantial trial counsel ineffectiveness claim; and,
>
> Whether the Ninth Circuit's denial of Spreitz's request for remand pursuant to *Martinez* deprived Spreitz of the opportunity to demonstrate cause and prejudice to excuse the procedural default of facts supporting a substantial ineffective assistance of trial counsel claim, where counsel failed to present evidence of the effects of cocaine and cocaethylene intoxication at the time of the crime that significantly impaired Spreitz's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law," a statutory mitigating factor under the Arizona death penalty statute.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. The petitioner is not a corporation.

RELATED PROCEEDINGS

Order (denying petition for panel rehearing and rehearing en banc), *Spreitz v. Ryan*, No. 09-99006 (9th Cir. Aug. 3, 2020), ECF No. 129.

Order (denying motion to reconsider denial of motion for remand for application of *Martinez v. Ryan*, 566 U.S. 1 (2012)), *Spreitz v. Ryan*, No. 09-99006 (9th Cir. Aug. 3, 2020), ECF No. 128.

Memorandum (affirming denial of habeas relief on speedy trial claim), *Spreitz v. Ryan*, No. 09-99006 (9th Cir. Mar. 4, 2019), ECF No. 109.

Order (denying motion for remand for application of *Martinez v. Ryan*, 566 U.S. 1 (2012) (9th Cir. Mar. 4, 2019), ECF No. 107.

Opinion (reversing in part district court's judgment filed on May 14, 2009), *Spreitz v. Ryan*, 916 F.3d 1262 (9th Cir. 2019).

Judgment in a Civil Case, *Spreitz v. Ryan*, No. 4:02-cv-00121-JMR (D. Ariz. May 14, 2009), ECF No. 99.

Memorandum of Decision and Order (denying petition for writ of habeas corpus), *Spreitz v. Ryan*, No. 4:02-cv-00121-JMR (D. Ariz. May 12, 2009), ECF No. 97.

Opinion, *State v. Spreitz*, 39 P.3d 525 (Ariz. 2002) (reversing trial court's determination that ineffectiveness claims were waived but affirming the court's findings on the merits); *State v. Spreitz*, No. CR-00-0569-PC (Ariz. Sup. Ct. Jan. 30, 2002), Doc. 17.

Order (granting petition for review on determination that ineffective assistance of counsel claims not raised on direct appeal are deemed waived), *State v. Spreitz*, No. CR-00-0569-PC (Ariz. Sup. Ct. Apr. 26, 2001), Doc. 6.

Order (denying post-conviction relief), *State v. Spreitz*, No. CR-27745 (Pima Cty. Super. Ct. July 20, 2000).

Opinion (convictions and sentences affirmed), *State v. Spreitz*, 945 P.2d 1260 (Ariz. 1997).

Order (sentencing), *State v. Spreitz*, No. CR-27745 (Pima Cty. Super. Ct. Dec. 21, 1994).

Verdicts, *State v. Spreitz*, No. CR-27745 (Pima Cty. Super. Ct. Aug. 18, 1994).

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings ii

Related Proceedings ii

Table of Contents iv

Table of Authorities vii

Opinions and Orders Entered in the Case 1

Statement of Jurisdiction 1

Constitutional Provisions Involved 2

Statement of the Case 3

A. Introduction 3

B. Guilt phase evidence 6

C. Capital sentencing. 7

D. State post-conviction relief proceedings 9

E. Proceedings Pursuant to 28 U.S.C. § 2254. 11

1. Jurisdiction. 11

2. Proceedings in the district court. 11

F. *Martinez* litigation in the Ninth Circuit. 12

1. Spreitz's initial motion for stay and remand. 13

2. Renewed motion for stay and remand, and to supplement with new evidence of physical abuse and cocaine intoxication 14

Reasons For Allowance of the Writ 22

A. The Ninth Circuit failed to identify the test upon which its rejection of the request for remand rested. 22

B. The Ninth Circuit misunderstood *Martinez*'s emphasis on evidentiary development in denying Spreitz's request for remand. 25

Conclusion 29

Appendix A

Opinion, *State v. Spreitz*, 945 P.2d 1260 (Ariz. 1997) A-1

Appendix B

Presentence Report, *State v. Spreitz*, No. CR-27745 (Pima Cty. Super. Ct. Nov. 28, 1994) B-1

Appendix C

Petition for Post-Conviction Relief Pursuant to Rule 32, No. CR-27745 (Pima Cty. Super. Ct. Mar. 28, 2000) C-1

Attachment A to Defendant's Rule 32 Petition C-5

Report of Joseph Geffen, Ph.D. (Mar. 28, 2000) C-71

Appendix D

Order, *State v. Spreitz*, No. CR-27745 (Pima Cty. Super. Ct. July 31, 2000) D-1

Appendix E

Renewed Motion to Stay the Appeal and Remand for Application of *Martinez* and to Supplement the Pending Stay Motion, (9th Cir. Mar. 1, 2017) ECF No. 98-1 ..... E-1

Exhibit 1 Report of Pablo Stewart, M.D. E-24

Exhibit 2 Report of Paula Lundberg-Love, Ph.D. E-35

Appendix F

Order, *Spreitz v. Ryan*, No. 09-99006 (9th Cir. Mar. 4, 2019), ECF No. 107 ..... F-1

Appendix G

Order, *Spreitz v. Ryan*, No. 09-99006 (9th Cir. Aug. 3, 2020), ECF No. 128 ..... G-1

TABLE OF AUTHORITIES

Federal Cases

Cullen v. Pinholster, 563 U.S. 170 (2011) 14, 21
Detrich v. Ryan, 740 F.3d 1237 (9th Cir. 2013) 26
Dickens v. Ryan, 740 F.3d 1302 (9th Cir. 2014) 15, 21, 26, 28
Eddings v. Oklahoma, 455 U.S. 104 (1982) 1, 4, 24
Gallegos v. Ryan, 842 F.3d 1123 (9th Cir. 2016) 25
Martinez (Luis) v. Ryan, 566 U.S. 1 (2012) ..... *passim*
Martinez (Ernesto) v. Ryan, 926 F.3d 1215 (9th Cir. 2019) 26
McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015) 24
Miles v. Ryan, 713 F.3d 477 (9th Cir. 2013) 23
Miller-El v. Cockrell, 537 U.S. 322 (2003) 23
Poyson v. Ryan, 879 P.3d 875 (9th Cir. 2018) 27, 28
Ramirez v. Ryan, 937 F.3d 1230 (9th Cir. 2019) 23, 27
Rompilla v. Beard, 545 U.S. 374 (2005) i
Runningeagle v. Ryan, 825 F.3d 970 (9th Cir. 2016) 26
Sexton v. Cozner, 679 F.3d 1150 (9th Cir. 2012) ..... *passim*
Spreitz v. Ryan, 916 F.3d 1262 (9th Cir. 2019) ..... ii, 1, 4, 24
Strickland v. Washington, 466 U.S. 668 (1984) 6, 22, 23, 25, 28

State Cases

State v. Spreitz, 945 P.2d 1260 (Ariz. 1997) ..... iii, 3, 7, 17
State v. Spreitz, 39 P.3d 525 (Ariz. 2002) ..... ii, 11

Federal Statutes

28 U.S.C. § 1254 2
28 U.S.C. § 1291 12
28 U.S.C. § 2253 12
28 U.S.C. § 2254 ..... 11, 12, 22

State Statutes

A.R.S. § 13-703 ..... *passim*

U.S. Constitution

U.S. Const. amend. VI 2
U.S. Const. amend. XIV 3

United States Supreme Court Rules

Rule 10 23

Federal Rules of Appellate Procedure

Rule 22 12

Arizona Rules of Criminal Procedure

Rule 32 10

PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Spreitz respectfully petitions for a writ of certiorari to review an Order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS ENTERED IN THE CASE

Order (denying petition for panel rehearing and rehearing en banc), *Spreitz v. Ryan*, No. 09-99006 (9th Cir. Aug. 3, 2020), ECF No. 129.

Order (denying motion to reconsider denial of motion for remand for application of *Martinez v. Ryan*, 566 U.S. 1 (2012), *Spreitz v. Ryan*, No. 09-99006 (9th Cir. Aug. 3, 2020), ECF No. 128 (attached as Appendix G).

Memorandum (affirming denial of habeas relief on speedy trial claim), *Spreitz v. Ryan*, No. 09-99006 (9th Cir. Mar. 4, 2019), ECF No. 109.

Order (denying motion for remand for application of *Martinez v. Ryan*, 566 U.S. 1 (2012)) (9th Cir. Mar. 4, 2019), Dkt. 107 (attached as Appendix F).

Opinion (reversing in part district court's judgment filed on May 14, 2009), *Spreitz v. Ryan*, 916 F.3d 1262 (9th Cir. 2019).

Judgment in a Civil Case, *Spreitz v. Ryan*, No. 4:02-cv-00121-JMR (D. Ariz. May 14, 2009), ECF No. 99.

Memorandum of Decision and Order (denying petition for writ of habeas corpus), *Spreitz v. Ryan*, No. 4:02-cv-00121-JMR (D. Ariz. May 12, 2009), ECF No. 97.

STATEMENT OF JURISDICTION

On March 4, 2019, the Ninth Circuit filed both an Opinion in which it granted a conditional writ of habeas corpus on a violation at capital sentencing of the Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *see Spreitz v. Ryan*, 916 F.3d 1262 (9th Cir. 2019), and an Order in which it denied two motions, Petitioner

Christopher Spreitz's Motion to Stay the Appeal and Remand for Application of *Martinez v. Ryan*, 566 U.S. 1, and Spreitz's Renewed Motion to Stay the Appeal and Remand Pursuant to *Martinez* and to Supplement the Pending Stay Motion. *See* Order, *Spreitz v. Ryan*, No. 09-99006 (9th Cir. Mar. 4, 2019), ECF No. 107 (Appx. F.) On August 3, 2020, the Ninth Circuit filed Orders in which it denied Spreitz's Motion to Reconsider Denial of Motion to Remand Pursuant to *Martinez*, ECF No. 128 (Appx. G), and Respondents-Appellees' Petition for Panel Rehearing and Petition for Rehearing En Banc. Orders, *Spreitz v. Ryan*, No. 09-99006 (9th Cir. Aug. 3, 2020), ECF No. 129.

Spreitz seeks certiorari solely on the Ninth Circuit's denials of his motion to remand pursuant to *Martinez*, 566 U.S. 1, and his renewed motion for remand and to supplement with additional evidence. The present Petition for Writ of Certiorari is timely under the Court's COVID-related orders issued on March 19, 2020. The jurisdiction of the Court to review the Orders in question is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. VI, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to... have the assistance of counsel for his defence."

U.S. Const. amend. XIV, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

A. Introduction.

Christopher Spreitz confessed to murdering Ruby Reid, who, evidence showed, was a woman he had picked up after having drunk a substantial amount of beer with a roommate and, later, while alone on May 18, 1989. The sole statutory aggravating factor that rendered him eligible for sentence of death was that the murder was especially cruel, A.R.S. § 13-703(F)(6), a factor based under Arizona state law on how a victim views her circumstance prior to her death. Especial cruelty was weighed by the state trial court solely against non-statutory mitigating evidence that Spreitz was subjected to a sub-normal upbringing, having been exposed to emotional abuse as a child, that he had a history of alcohol and substance abuse that dated to his teenage years, showed remorse for the murder, and possessed good prospects for rehabilitation.

The trial court issued a judgment of death, and the Arizona Supreme Court imposed a sentence of death in its *de novo* review of aggravating and mitigating factors on direct appeal. *See State v. Spreitz*, 945 P.2d 1260, 1278 (Ariz. 1997) (Appx. A). In so doing, the court affirmed the trial court's finding that Spreitz proved his

non-statutory mitigation but then the Arizona Supreme Court applied a test that required Spreitz to show a causal nexus between his mitigation and the crime in violation of *Eddings*, 455 U.S. 104.[1] The state post-conviction relief ("PCR") court denied several claims of ineffective assistance of trial counsel ("IATC"), *see* Appx. C, and the United States District Court for the District of Arizona denied habeas corpus relief on those and additional claims in a Memorandum of Decision and Order. *See Spreitz v. Ryan*, No. 4:02-cv-00121-JMR (D. Ariz. May 12, 2009), ECF No. 97. Spreitz appealed.

While the Ninth Circuit appeal pended, this Court decided *Martinez*, 566 U.S. 1, which allows the federal courts to excuse the procedural default of an IATC claim should the habeas petitioner demonstrate that his state PCR counsel rendered ineffective assistance in failing to exhaust the IATC claim in state court. Spreitz sought to stay his appeal and have the matter remanded to the district court for application of *Martinez* because trial counsel failed to produce evidence at capital sentencing to show that Spreitz, in addition to consuming alcohol prior to the

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[1] The Arizona Supreme Court's failure to credit Spreitz's non-statutory mitigating evidence due to the absence of a causal relationship to the crime was found by the Ninth Circuit to violate *Eddings*. *See Spreitz*, 916 F.3d 1262. The court granted a writ conditioned on the Arizona Supreme Court correcting the causal nexus error. *Id.* at 1281. The Ninth Circuit denied Respondent-Appellee's Petition for Panel Rehearing and Petition for Rehearing En Banc. *See* Order, *Spreitz v. Ryan*, No. 09-99006 (9th Cir. 2020), ECF No. 129. Respondent-Appellee has not sought review in this Court of the Ninth Circuit's conditional writ grant on the *Eddings* claim, and the matter is before the Arizona Supreme Court for correction of the error identified by the Ninth Circuit. *See State v. Spreitz*, No. 94-0454-AP (Ariz. Sup. Ct.).

homicide, ingested cocaine that evening in temporal proximity to the crime — which, when combined with alcohol, formed the cognitively-debilitating metabolite cocaethylene. The evidence of alcohol, cocaine and cocaethylene intoxication would have supported a claim that Spreitz suffered an organic brain impairment, which would have proved the statutory mitigating factor that Spreitz did not have the capacity to appreciate the wrongfulness of his conduct or permit him to conform his conduct to the requirements of law under former A.R.S. § 13-703(G)(1).

That Spreitz ingested cocaine in temporal proximity to the crime was apparent from a Presentence Report prepared by a probation officer and submitted to the trial court and the parties for capital sentencing. *See* Appx. B-5. The claim of IATC premised on trial counsel's inadequate investigation of Spreitz's combined alcohol and cocaine intoxication was not investigated or presented in the state PCR proceeding. Trial counsel also failed to present evidence that the abuse of Spreitz in childhood included physical beatings and exposure to domestic violence that, had it been tendered to an appropriate mental health expert, also would have given rise to a finding by the state courts that Spreitz suffered organic brain damage that significantly impaired his capacity to appreciate the wrongfulness of his conduct and conform his conduct to the requirements of law due to impulsivity and the lack of inhibitions to curb the escalation of aggressive conduct in his altercation with Ms. Reid.

In his request for a stay of the appeal and for remand pursuant to *Martinez*,

and in his renewed motion for remand and to supplement his earlier motion with expert opinions, Spreitz made a meritable showing that PCR counsel's performance was deficient under the first prong of the familiar test for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and that he was prejudiced within the contemplation of *Martinez* because his underlying IATC claims are "substantial," that is, they have "some merit." *Martinez*, 566 U.S. at 14.

B. Guilt phase evidence.

Evidence proffered by the prosecution demonstrated that Spreitz and a roommate consumed large amounts of beer at a Tucson, Arizona, tavern on the evening of May 18, 1989. Appx. A-1. After the roommate became ill and Spreitz dropped him off at their apartment, Spreitz bought and consumed more beer before driving to the residence of his girlfriend, who refused to see him. Appx. A-1. As Spreitz drove back toward his apartment, he encountered Ruby Reid, a woman who had been drinking at a different Tucson establishment that evening and who was walking home. Appx. A-1. Several days later, Reid's decomposing body was found in the desert. Appx. A-2. Her clothing, undergarments and a used tampon were found near her body, and blood was found in the trunk of Spreitz's car. Appx. A-2. The cause of death was blunt force trauma to her head, and a bloody rock was found in the vicinity of her body. Appx. A-2.

A Tucson police officer stopped Spreitz later that evening for having a smoking engine and detected alcohol on his breath but noted that he did not appear

intoxicated, although Spreitz had dirt, blood and feces on him or his clothing. Appx. A-1. The officer ticketed Spreitz for the smoking engine, caused another officer to photograph Spreitz, but then let him proceed. Appx. A-2.

Ultimately, Spreitz confessed to Reid's murder, stating that she agreed to party with him, but reneged on having sex and attacked him in the desert. Appx. A-2. He responded to Reid's attack. Appx. A-2. The jury convicted him of first degree murder, sexual assault and kidnaping. Appx. A-3.

C. Capital sentencing.

In its direct appeal opinion, the Arizona Supreme Court summarized the evidence that informed the trial court's imposition of the death penalty as follows:

> The court conducted defendant's aggravation-mitigation hearing on November 28, 1994, and found aggravation under A.R.S. § 13–703(F)(6), concluding that Ms. Reid's murder was committed in an especially cruel manner. As nonstatutory mitigating factors, the court determined that defendant was raised in a "sub-normal" home environment, that he had been emotionally immature at age twenty-two when the crime was committed but had shown emotional growth while in confinement, that he had no prior felonies, and that he was capable of rehabilitation. After considering the aggravating and mitigating factors, the court imposed the death penalty. The judge concluded that the especially cruel manner in which the victim died substantially outweighed all mitigating factors, whether considered separately or together.

Spreitz, 945 P.2d at 1266; Appx. A-3.

In its *de novo* independent review and weighing of aggravating and mitigating evidence, the Arizona Supreme Court affirmed the trial court's finding of the especially cruelty statutory aggravator. *Id.* at 1278; Appx. A-12. Citing in large

measure the absence of a connection between Spreitz's proffered mitigation and Ms. Reid's death, the Arizona Supreme Court failed to attribute mitigating weight to Spreitz's subnormal upbringing, his inhibited emotional development and humanitarian skills that resulted from his mother's erratic behavior toward him, and his history of drug and alcohol abuse. *Id.* at 1280-81; Appx. A-14-15.

Significantly, the Arizona state courts failed to find that any of Spreitz's evidence rose to the level of the statutory mitigating factor, former A.R.S. § 703(G)(1), that "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."[2] The presentence report prepared for the parties and the sentencing court indicated that, in addition to ingesting alcohol in the hours preceding Ms. Reid's death, Spreitz also "did a couple quick lines" of cocaine. *See* Appx. B-5. It is clear from the list of materials defense psychologist Todd Flynn, Ph.D., listed in his report that counsel failed to apprise Dr. Flynn of Spreitz's cocaine use. Appx. B-15-17. As noted below, the opinions of Pablo Stewart, M.D., a psychiatrist, and Paula Lundberg-Love, Ph.D., a psychopharmacologist, which were attached in support of the motion for stay of the appellate proceedings

[2] It is trial counsel's failure to present at capital sentencing evidence in support of the G(1) statutory mitigating factor that led Spreitz to move to stay his appeal in the Ninth Circuit and request a remand so that he could establish the ineffective assistance of PCR counsel that would excuse the default of the new supporting addiction medicine opinions.

and to supplement found that Spreitz's ingestion of alcohol and cocaine, and the effect of their metabolite cocaethylene, would unquestionably have led to the conclusion that Spreitz could not conform his conduct to the requirements of law under G(1) during his encounter with Ms. Reid. *See* Appx. E-23 (Dr. Stewart), Appx. E-35 (Dr. Lundberg-Love).

D. State post-conviction relief proceedings.

On September 30, 1999, the Arizona Supreme Court appointed Tucson attorney Sean Bruner to represent Spreitz in state PCR proceedings. Order, *State v. Spreitz*, No. CR-94-0454-AP (Sept. 30, 1999), Doc. 23. Later, the United States District Court appointed Bruner to represent Spreitz in the federal habeas corpus proceeding. Order, *Spreitz v. Stewart*, No. CV-02-121-TUC-SMM (May 14, 2002), ECF No. 8.

In the PCR petition, Spreitz raised claims of IATC based on his alcohol intoxication at the time of the crime. Appx. C-34-36 (IATC of trial at the guilt phase), 49-50 (IATC at sentencing, incorporating argument made with respect to guilt phase IATC). Counsel also raised a claim of IATC based on trial counsel's having failed to object to the admission of the presentence report, which, he alleged, was unnecessary and prejudicial in the context of Spreitz's capital sentencing because its contents exceeded the statutory limits on the admissible aggravating evidence, or to be present when it was prepared. Appx. C-50-55. While counsel explicitly referred to the Defendant's Statement with respect to the offense, which was contained in the

Presentence Report, see Appx. C-53, and, thus, should have been aware that Spreitz ingested a "couple quick lines" of cocaine prior to the crime, Appx. B-5, Bruner failed to have his retained psychologist, Dr. Joseph Geffen, analyze the effect of the cocaine ingestion. In his "report of psychological evaluation," Dr. Geffen noted that Spreitz drank beer with an acquaintance "to whom he gave a ride to pick up some cocaine" prior to Ms. Reid's death, but Dr. Geffen failed to inquire whether Spreitz actually used cocaine that evening and Dr. Geffen's reference to Spreitz giving a ride to an acquaintance to acquire cocaine triggered no inquiry from Bruner as to whether Spreitz used cocaine that evening. *See* Appx. C-78.

The state PCR court ruled this and numerous other IATC claims "waived" because Spreitz raised one other IATC claim on direct appeal, to wit, that his counsel "admitted his guilt in opening statement to the jury" and he "effectively waived any further such claims for Rule 32 purposes." D-3. However, the PCR court alternatively ruled that, "to the extent that [Spreitz] is claiming that appellate counsel was ineffective for failing to raise any such claims," the Court agreed to consider the additional IATC claims on the merits, D-3, but denied relief. Appx. D-3-12. The court denied relief on the subject IATC claim because evidence of Spreitz's "drinking and/or intoxication (on the night in question)" was considered at the guilt phase but,

consistent with Arizona's historical causal nexus practice, "such evidence did not qualify as a mitigating factor." Appx. D-11.[3]

E. Proceedings Pursuant to 28 U.S.C. § 2254.

1. Jurisdiction.

The Ninth Circuit possessed jurisdiction over Spreitz's appeal because the case originated with a "Petition for Writ of Habeas Corpus and Motion for Stay of Execution; Application for Appointment of Counsel," filed on March 3, 2002. Appointed counsel filed a Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254, No. CV-02-121-TUC-CKJ (D. Ariz. Feb. 11, 2003), ECF No. 38.

2. Proceedings in the district court.

By the time he was appointed by the district court, Bruner evinced his knowledge of Spreitz's cocaine use on the evening of Reid's death; he obtained an expert whose report addressed the mitigating effect of Spreitz's cocaine ingestion and the effect of cocaethylene on Spreitz's cognitive functioning. Bruner appended the report of Roy Mathew, M.D., a psychiatrist, in support of the IATC claim that was premised on the failure to investigate and present evidence of Spreitz's intoxication

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[3] On PCR appeal, the Arizona Supreme Court ruled that the trial court erred in finding the various IATC claims waived due to Spreitz's having raised a single IATC on direct appeal, and that IARC claims are properly raised in PCR in Arizona but the court affirmed the PCR court's denial of IAC of direct appellate counsel because the underlying IATC claims lacked merit. *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002).

at the guilt phase and at capital sentencing. Dist. Ct. ECF No. 39, Appx. 1 at 4-5.

However, Bruner twice failed to comply with the district court's orders with respect to requests for evidentiary development and, ultimately, the court denied evidentiary development with respect to 12 IATC claims Bruner raised in Spreitz's § 2254 petition. *See* Dist. Ct. ECF No. 56, 89 at 1 ("The Court finds that Petitioner did not diligently seek the development of the factual basis of his claims in state court and that evidentiary development in these habeas proceedings is neither warranted nor required.").

The district court further ruled that the state PCR court's rulings that Spreitz's new evidence of alcohol intoxication was cumulative of the guilt and sentencing phase evidence was not unreasonable under 28 U.S.C. § 2254(d) and that Spreitz failed to state a claim for which evidentiary development would have been appropriate. Dist. Ct. ECF No. 89 at 19-21 (guilt phase IATC); at 35-37 (sentencing IATC). On May 12, 2009, the court denied relief on Spreitz's remaining claims and granted a certificate of appealability on five claims. Dist. Ct. ECF No. 97 at 62-63. Thus, the court of appeals had jurisdiction over the appeal pursuant to 28 U.S.C §§ 1291 and 2253, and FRAP 22(b)(1). Spreitz filed a notice of appeal on May 12, 2009. ECF No. 98.

F. *Martinez* litigation in the Ninth Circuit.

On June 28, 2012, while the appeal of the denial of habeas corpus relief pended, CJA counsel moved in the Ninth Circuit to withdraw and to have the Federal Public Defender substituted on behalf of Spreitz. Motion for Substitution of Counsel, *Spreitz*

v. Ryan, No. 09-99006 (9th Cir. June 28, 2012), ECF No. 38. The court granted that motion on July 3, 2012. Order, *Spreitz*, No. 09-99006 (9th Cir. July 3, 2012), ECF No. 39. On July 13, 2012, the court also granted the motion of CJA co-counsel to withdraw. Amended Order, *Spreitz*, No. 09-99005 (9th Cir. July 13, 2012), ECF No. 45.

1. Spreitz's initial motion for stay and remand.

On March 20, 2013, while the appeal continued to pend, Spreitz moved for a stay of his appeal and for remand based on the Court's intervening decision in *Martinez*, 566 U.S. 1, in order that he might have the district court excuse the technical procedural default, *inter alia*, of facts that would support claims of IATC based on the failure to investigate and present evidence of: 1) the extreme physical abuse suffered by Spreitz in childhood; and, 2) Spreitz's alcohol and cocaine intoxication, and the debilitating effect of the metabolite cocaethylene formed by the near simultaneous ingestion of alcohol and cocaine — all of which supported expert opinions that Spreitz suffered from organic brain impairment at the time of the crime which, in turn, supported proof of the statutory mitigating factor that Spreitz's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution," under A.R.S. § 13-703(G)(1). Ninth Cir. ECF No. 49-1 at 8-14.

In response, Appellees asserted *inter alia* that Spreitz's claims were denied on the merits and that *Martinez* could not be employed to excuse the procedural default of new supporting facts not presented in the state courts, citing *Cullen v. Pinholster*, 563 U.S. 170, 181-82, 185-87 (2011). Ninth Cir. ECF No. 58 at 7-9. The court would not rule on that motion or Spreitz's Renewed Motion to Stay the Appeal and Remand for Application of *Martinez* and to Supplement the Pending Stay Motion, Dist. Ct. ECF No. 98-1, until it filed an order concurrently with its opinion in the appeal on March 3, 2019. *See* Appx. F.

2. Renewed motion for stay and remand, and to supplement with new evidence of physical abuse and cocaine intoxication.

On February 1, 2017, Spreitz filed his Renewed Motion to Stay the Appeal and Remand for Application of *Martinez* and to Supplement the Pending Stay Motion. *See* Ninth Cir. ECF No. 98. To that motion, Spreitz attached the reports of two addiction medicine specialists, Dr. Pablo Stewart, a psychiatrist, and Dr. Paula Lundberg-Love, a psychopharmacologist. Appx. E-24 (report of Dr. Stewart); Appx. E-35 (report of Dr. Lundberg-Love).[4] Spreitz cited the Ninth Circuit's *en banc*

[4] Although Bruner attached to Spreitz's habeas petition Dr. Mathew's report of December 9, 2002, even in the absence of an order authorizing evidentiary development, Dr. Mathew later entered into a public Consent Order on August 6, 2006, in which he agreed to the permanent surrender of medical license in North Carolina for unethical behavior that occurred in 2000 and 2001. He was licensed to practice medicine in Texas in 2002 when he executed the report in Spreitz's case for Bruner, and his license there was unaffected by the disciplinary matter in North Carolina. The record fails to indicate whether Bruner knew of Dr. Mathew's licensing difficulties in North Carolina or the problems Dr. Mathew might face on cross-

decision in *Dickens v. Ryan*, 740 F.3d 1302, 1319-20 (9th Cir. 2014) (*en banc*), for the proposition that *Martinez* applies to excuse procedurally defaulted *facts* where the petitioner's new supporting facts support a "new" or "newly-enhanced" IATC claim. Ninth Cir. ECF No. 98 at 5.

Dr. Stewart reviewed excerpts of trial transcripts, all prior mental health evaluations, and declarations of Spreitz and his mother that detailed the abusive family situation in which Spreitz was raised. *See* Appx. E-26-27. Dr. Stewart also performed a clinical interview of Spreitz. After detailing the substantial physical and emotional abuse suffered by Spreitz and the domestic violence Spreitz personally observed, Dr. Stewart reported that Spreitz met the various criteria under the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) ("DSM-IV") for a diagnosis of PTSD but, due to the "extremely high standard established for this diagnosis," he "was not able to conclusively find that . . . Mr. Spreitz sufficiently met the totality of the criteria required for a diagnosis of PTSD at the time of the encounter with Ms. Reid." Appx. E-32. He did conclude, however, significant childhood trauma "would have impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." Appx. E-32. According to Dr. Stewart, PTSD and Spreitz's exposure to trauma in childhood might

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examination were the matter to have gone to an evidentiary hearing and Dr. Mathew been confronted with the ethical lapses. Undersigned counsel elected to retain and substitute Dr. Stewart and Dr. Lundberg-Love for Dr. Mathew.

have resulted in "an exaggerated startle response or acting impulsively with respect to the encounter with Ms. Reid," behaviors symptomatic of persons suffering from PTSD. Appx. E-32. Dr. Stewart's opinion supported the G(1) statutory mitigating factor.

Dr. Stewart also reviewed the documents describing Spreitz's history of alcoholism and his alcohol intoxication at the time of the offense, as well as Spreitz's cocaine use that night, and the psychopharamacology report of Dr. Lundberg-Love that quantified the alcohol and cocaine ingestion, and discussed the combined effect of alcohol and cocaine intoxication on Spreitz's cognition and behavior. *See* Appx. E-28-30. Dr. Stewart concurred with Dr. Lundberg-Love that Spreitz suffered from alcohol and cocaine intoxication at the time he encountered Ms. Reid, but also from the enhanced psychostimulant effect of the metabolite cocaethylene. Appx. E-31.

Absent from all prior mental health reports in this case is the observation of Dr. Stewart that Spreitz became an alcoholic at a young age due in large measure to a "genetic link" based on the alcoholism of his father and both grandfathers, and possible alcoholism of his mother, whom family members described as "consum[ing] daily quantities of Jack Daniels." Appx. E-28. As Dr. Stewart stated:

> In this case, that genetic loading rendered it more likely that Mr. Spreitz would suffer from alcohol abuse and/or physiological dependence on alcohol. Evidence of that genetic loading would have supported at trial the theory that Mr. Spreitz was a "physiological alcoholic" whose intoxication would not have been noted by the officers who stopped and encountered Mr. Spreitz in the early morning hours of May 19, 1989.

Appx. E-28.

Yet, the evidence as to how Spreitz was perceived when officers stopped him after the offense because his vehicle emitted smoke was extremely important. The sentencing court ruled that Spreitz was not intoxicated and did not meet the (G)(1) statutory mitigating factor because Officers Ramon Batista and Victor Chacon testified repeatedly at the guilt phase that when they stopped Spreitz 30 minutes after the offense, they noted "nothing of any significance" to suggest he was intoxicated. Tr. 12/21/94 at 34. *See Spreitz,* 945 P.2d at 1264-65; Appx. A-2 (summarizing the officer's testimony to the effect that Spreitz smelled of beer but "defendant's actions evidenced no physical or mental impairment"). As Dr. Stewart concluded, however, neither of the officers who stopped Spreitz was able as a matter of medical science to render an opinion with respect to Spreitz's alcohol intoxication at the time of the offense due to their not having provided appropriate testing. Appx. E-29. In addition, they were ignorant of the fact that Spreitz also ingested cocaine just before the offense, which would have "mitigated the depressant symptoms of his alcohol consumption so as not to allow police officers who stopped Mr. Spreitz to be aware of the level of his alcohol intoxication." Appx. E-29.

Dr. Stewart described the physical changes to the brain caused by the ingestion of cocaine, which he termed the "hijacking of the brain chemistry." Appx. E-31. Cocaine alone causes a "euphoria that would have been accompanied by hyperactivity, hypervigilance, anxiety, anger, impaired judgment, impulsivity, and aggression." Appx. E-30. It would have caused deficits in Spreitz's cognitive

functioning that "would have decreased markedly his ability to engage in rational, appropriate and non-aggressive behavior during a confrontation with Ms. Reid." Appx. E-30. When alcohol was combined with cocaine, a metabolite known as "cocaethylene" formed that enhanced the psychostimulant effects of the cocaine and would have "significantly impaired Mr. Spreitz's capacity to conform his conduct to the requirements of law at the time of the incident involving him and Ms. Reid in the early morning hours of May 19, 1989." Appx. E-31. According to Dr. Stewart, the "effects [of cocaethylene] were well established at the time of the incident and Mr. Spreitz's trial." Appx. E-31.

Dr. Lundberg-Love assessed Spreitz's alcohol and cocaine intoxication. In her report of Psychophamacological Consultation, she quantified both the amounts of alcohol and cocaine ingested by Spreitz on May 18 and the early morning hours of May 19, 1989. *See* Appx. E-35. With respect to alcohol consumption, quantity was determined based on the trial testimony of Spreitz's roommate Chris Clark, a prosecution witness, the Presentence Report, and Spreitz's self-report, as disclosed to Dr. Mathew. Appx. E-36. The evidence showed that Spreitz consumed a 12-pack and two additional beers on May 18 before attending nickel beer night with Clark at a Tucson tavern. Spreitz estimated that he drank on the order of 16 cups of beer between 7:30 and 10:30 p.m. Appx. E-36. Spreitz consumed four more beers from a six-pack he bought at a 7-11 after dropping Clark at their residence and prior to the

encounter with Ms. Reid. At 12:30 a.m. on May 19, 1989, Spreitz took three hits of crack cocaine with a man to whom he gave a ride home from the 7-11. Appx. E-36.

Dr. Lundberg-Love applied *Julien's Primer of Drug Action* (13th ed. 2014) to "reliably estimate" Spreitz's "blood alcohol concentration," known by the shorthand "BAC," based on his weight at that time, 170 lbs., gender, the number of drink equivalents imbibed, and the rate at which his body would have metabolized the alcohol. Appx. E-36. She calculated his BAC at the time of the offense to have been approximately .575 grams%, "an extraordinarily high BAC" slightly more than seven times the legal limit of .08 grams% for intoxication. Appx. E-37. Spreitz was not "stuporous" due to his "tolerance to the chronic exposure of large amounts of alcohol," known as "tissue tolerance." Appx. E-37.

She further found that each hit of cocaine administered 250 to 1000 milligrams of cocaine to his blood and brain. Appx. E-37-38. Due to the alcohol consumption in close proximity to the cocaine ingestion, liver enzymes also metabolized the cocaine, forming the compound "cocaethylene." Appx. E-38. Dr. Lundberg-Love explained that the cocaine Spreitz ingested would have had a half-life of four hours beginning when he ingested it at 12:30 a.m. on May 19, 1989, and the cocaethylene's half-life was six hours. Appx. E-38. She reached conclusions as to how the ingestion of alcohol and cocaine affected Spreitz at the time of the offense and in its aftermath.

With respect to alcohol intoxication, Dr. Lundberg-Love concluded that Spreitz's alcohol intoxication would have impaired Spreitz's executive functioning,

memory, and the ability of the inhibitory pathways of the brain to stop inappropriate behavior such as aggression. The brain circuitry that would have mediated Spreitz's ability to make non-aggressive, appropriate choices was hijacked. Thus, he was at the mercy of his emotions, and the neural "brakes" that typically keep those emotions in check, failed to functioning effectively. So a person like Spreitz, who might not have had a history of aggression, could become very angry and aggressive under the influence of alcohol, particularly given the amounts consumed by Mr. Spreitz. Appx. E-40.

Turning to cocaine and cocaethylene, Dr. Lundberg-Love concluded:

> Mr. Spreitz's ingestion of cocaine would have enhanced the activity of dopamine in the brain by blocking the dopamine transporter and likely elicited agitation, impulsivity, anxiety, suspiciousness, paranoia and aggression. Cocaine ingestion makes it more difficult to inhibit aggressive behavior. When cocaine is ingested with alcohol, the metabolite cocaethylene is formed, which exacerbates the toxicity of the cocaine, i.e., it increases the psychostimulant effects of cocaine described above and contributes to the hijacking of the brain circuitry. Once aggression is triggered, an individual may engage in what is known as "stereotypic" behavior which means that the individual may repetitively engage in aggression/injurious behavior even after a person with whom he is in confrontation may be defenseless, incapacitated or deceased. With respect to the initiation of aggression, adding cocaine and cocaethylene to the amount of alcohol ingested by Mr. Spreitz was just like metaphorically adding fuel to the fire.

Appx. E-40-41.

She explained the masking effect of Spreitz's cocaine ingestion on his alcohol intoxication:

> While the dopaminergic stimulant properties of cocaine and cocaethylene (i.e., increased alertness, increased motor activity, racing thoughts, enhanced motor activity) do not reverse the neurochemical depressant effects of alcohol, they can mask the depressant effects of alcohol, such that the level of Mr. Spreitz's inebriation might not have appeared to the police officers to be as significant as it was. In effect, the ingestion of cocaine with alcohol has the effect of rendering one a much more alert and active "drunk."

Appx. E-41. Thus, Dr. Lundberg-Love's psychopharmacological opinion, like the opinion of Dr. Stewart, is contrary to the officers' assessment that Spreitz was not intoxicated and impaired at the time of the encounter with Ms. Reid.

In response, Appellees largely adopted the arguments they made earlier in response to Spreitz's initial motion for a stay and remand, including that the district court had ruled on the merits of the claims and thus they were not defaulted, and *Martinez* could not be invoked to excuse the petitioner's failure to develop supporting facts in the state courts without running into the proscription on new fact development in federal courts under *Pinholster*, 563 U.S. 170. Ninth Cir. ECF No. 99. Appellees also sought to distinguish *Spreitz* from *Dickens*, submitting that new facts and allegations of fetal alcohol syndrome and organic brain damage fundamentally altered Dickens' state court IATC claim that counsel failed to direct the work of the mental health expert and investigate Dickens' background, while Spreitz merely sought to submit additional evidence of abuse and intoxication. ECF No. 99 at 4-5. Appellees conceded that Spreitz presented for the first time in the remand motion that he was physically abused and witnessed his mother being beaten

by his father but those facts did not fundamentally alter the state court claim, nor did the fact that Spreitz "may have also ingested cocaine on the night of the murder . . . fundamentally alter the claim that trial counsel was ineffective for failing to present the claim that Spreitz was extremely intoxicated on the night of the murder and Spreitz could not control his conduct." ECF No. 99 at 5.

The Ninth Circuit denied the motions:

> Spreitz argues that his post-conviction counsel was ineffective for failing to adequately develop the record supporting two claims of ineffective assistance of trial counsel. We have carefully considered all of the briefs and evidence, and we conclude that Spreitz has not made a sufficient showing to warrant a remand to the district court.

Appx. F-1.

REASONS FOR ALLOWANCE OF THE WRIT

Consistent with Rule 10(c) of the Court's Rules, Spreitz respectfully requests that the Court exercise its discretion to grant certiorari because a significant federal question requires decision: when remand is required so that a federal court of first instance may decide whether a federal habeas petitioner has demonstrated cause and prejudice to excuse the procedural default of compelling facts in support of his § 2254 petition.

A. The Ninth Circuit failed to identify the test upon which its rejection of the request for remand rested.

In *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012), the court ruled that a petitioner "is entitled to a [*Martinez*] remand if he can show that PCR counsel was

ineffective under *Strickland* for not raising a claim of ineffective assistance of trial counsel, and also 'that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one . . ..'" As the Court noted in *Martinez*, the underlying IATC claim is substantial if it has "some merit." 566 U.S. at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and analogizing to the standards for certificates of appealability).

Here, the panel simply stated that Spreitz failed to make a "sufficient showing to warrant remand." Appx. F. The panel could have denied those requests on the basis that Spreitz's underlying IATC claims are not "substantial," *see Martinez*, 566 U.S. at 14, or that the record before the court of appeals is "sufficiently complete" so as to allow a decision by the appellate court on the question of cause and prejudice. *See Sexton*, 679 F.3d at 1161. Or, the panel may have denied the remand because it erroneously conflated the test for cause and prejudice to excuse the procedural default under *Martinez* with the proof required for a grant of relief on the underlying IATC claim pursuant to *Strickland*, 466 U.S. 668.

That conflation on the part of the district court led the court of appeals to reverse and remand in another Arizona capital habeas appeal, *Ramirez v. Ryan*, 937 F.3d 1230, 1242 (9th Cir. 2019) ("The district court erred by conducting a full merits review of Ramirez's underlying ineffective assistance of trial counsel claim on an undeveloped record."). The Ninth Circuit decision to deny the mid-appeal request for remand pursuant to *Martinez* in another Arizona capital habeas appeal, *Miles v.*

Ryan, 713 F.3d 477, 494 (9th Cir. 2013), also arguably demonstrated the likelihood that the court conflated the tests of *Martinez* and *Strickland*.

In any event, Spreitz demonstrated that PCR counsel performed an inadequate investigation by failing to investigate Spreitz's cocaine intoxication at the time of the crime and his physical abuse and exposure to domestic violence. Spreitz's IATC claims were fundamentally altered by the addition of evidence of abuse and the ingestion of cocaine – both of which caused organic brain impairment that would have provided conclusive proof of the statutory mitigating factor that Spreitz's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired" under former A.R.S. § 13-703(G)(1). His underlying IATC claim therefore had some merit.

In the absence of that evidence, the state sentencing court and the Arizona Supreme Court failed to find that Spreitz proved *any* statutory mitigating factor. And, the absence of proof of a statutory mitigating factor was fatal to Spreitz because, as the Ninth Circuit held in granting a conditional writ on the *Eddings* violation, the Arizona Supreme Court would fail to weigh against statutory aggravating factors any evidence that bore no causal nexus to the crime. *See Spreitz*, 916 F.3d at 1265 (quoting *McKinney v. Ryan*, 813 F.3d 798, 802 (9th Cir. 2015) (*en banc*)). Given that Spreitz's capital sentencing occurred during the 15-year period in which the Arizona courts employed a causal nexus test to restrict consideration of *non-statutory* mitigation, it was incumbent on trial counsel to investigate and present all available

statutory mitigating evidence. That is particularly true where evidence of Spreitz's ingestion of cocaine was published to counsel in a presentence report distributed to the court and parties prior to sentencing.

B. The Ninth Circuit misunderstood *Martinez*'s emphasis on evidentiary development in denying Spreitz's request for remand.

The Ninth Circuit also ignored *Martinez*'s emphasis on fact development as part of the process of determining whether a petitioner has demonstrated cause and prejudice in the form of IAC of PCR counsel to excuse the procedural default. The Ninth Circuit has ruled that it dispenses with remand only where the record with respect to trial counsel's representation is "sufficiently complete for us to hold without hesitation that [counsel] was not ineffective under *Strickland*." *See Sexton*, 679 F.3d at 1161.

Even where a Ninth Circuit judge dissented from an order staying a capital appeal and remanding for application of *Martinez*, that judge acknowledged that only a "minimal showing" is required for remand, noting that "[i]n *Martinez*, 566 U.S. at 13-15, the Supreme Court indicated that a defendant need only meet the standard for a certificate of appealability." *Gallegos v. Ryan*, 842 F.3d 1123, 1124-25 & n.1 (9th Cir. 2016) (Mem.) (Callahan, J., dissenting). In *Lopez v. Ryan*, No. 09-99028 (9th Cir. Apr. 26, 2012), ECF No. 56, the court applied *Martinez's* low bar, remanding where *Martinez* "appears to affect Lopez's guilt- and penalty-phase ineffective assistance of

counsel claims." A standard that requires only that the intervening decision in *Martinez* "appears to affect" defaulted claims is indeed a low bar.

In *Lopez*, the Ninth Circuit instructed the district court to determine "how *Martinez* applies to claims of ineffective assistance of counsel who failed to develop a factual record during the initial post-conviction relief proceedings." Ninth Cir. No. 09-99028, ECF No. 56. The ruling in *Lopez* presaged the Ninth Circuit's later holding in *Dickens* that a petitioner may fundamentally alter his claim so as to render it unexhausted and susceptible to a finding of cause and prejudice if he were to meet *Martinez*'s requirements. *Dickens*, 740 F.3d at 1318.

An *en banc* plurality of the Ninth Circuit, in remanding a capital habeas appeal to the district court for application of *Martinez*, ruled that it is important for the district court to decide whether a petitioner has met the requirements of *Martinez* "in the first instance." *Detrich v. Ryan*, 740 F.3d 1237, 1254 (9th Cir. 2013) (en banc) (plurality). In *Martinez (Ernesto) v. Ryan*, 926 F.3d 1215, 1231-34 (9th Cir. 2019), the court granted a mid-appeal request for a stay of the appeal and remand for application of *Martinez* in an Arizona capital habeas appeal, only to later affirm the district court's procedural default determination on the basis that Martinez's IATC claims were not substantial. *See Runningeagle v. Ryan*, 825 F.3d 970, 978 (9th Cir. 2016) (same). The Ninth Circuit has also affirmed the denial of relief but remanded for application of *Martinez* to claims the district court ruled procedurally defaulted. *See Dickens*, 740 F.3d at 1320. The salient point in *Ernesto Martinez, Runningeagle,*

and *Dickens* is that those matters were remanded rather than the Ninth Circuit making the *Martinez* determination in the first instance. That has been true in other Arizona capital habeas appeals, where the court has typically summarily granted requests for remand. *See, e.g., Lee, Chad v. Ryan*, No. 09-99002 (9th Cir. Dec. 1, 2014), ECF No. 52 ; *Lee, Darrel v. Ryan*, No. 10-99022 (9th Cir. Dec. 1, 2014), ECF No. 42; *Ramirez v. Ryan*, No. 10-99023 (9th Cir. Dec. 1, 2014), ECF No. 16. In another Arizona capital habeas appeal, the Ninth Circuit remanded for application of *Martinez*, finding the petitioner to have established his underlying IATC claim to be "substantial" but not otherwise offering an opinion on the merits of the underlying IATC claim or whether the petitioner was entitled to evidentiary development or an evidentiary hearing on the claim. *See Jones, Barry v. Ryan*, 08-99033 (9th Cir. Aug. 19, 2014), ECF No. 68.

In Arizona capital habeas corpus appeals in which the Ninth Circuit has denied a request for stay and remand, the court has, in contradistinction to what occurred in *Spreitz*, engaged with the facts and provided analysis for its ruling consistent with the analysis set forth in *Sexton*, 679 F.3d at 1161. In *Poyson v. Ryan*, No. 10-99005 (9th Cir. Mar. 22, 2013), ECF No. 65, the Ninth Circuit denied Poyson's motion for a stay of his appeal and a remand to the district court for application of *Martinez* to the procedural defaults of three IATC claims. The court cited *Sexton*, 679 F.3d at 1161, for the proposition stated above that remand is required only when the record "is devoid of sufficient information" to decide whether the requirements of *Martinez* are

met. *Poyson*, Ninth Cir. ECF No. 65 at 1-2. Poyson claimed *inter alia* that trial counsel rendered ineffective assistance in failing to obtain a neuropsychologist to present at capital sentencing an opinion that Poyson suffered from fetal alcohol spectrum disorder ("FASD"). However, PCR counsel retained Dr. Robert Briggs, a neuropsychologist, to assist with an IATC claim but Dr. Briggs failed to find FASD or a cognitive impairment. Because the record was sufficient for the Ninth Circuit to reject Poyson's IATC and IAC of PCR counsel claims under *Martinez*, remand was not necessary. ECF No. 65 at 2-3.

After the Ninth Circuit's decision in *Dickens*, 740 F.3d 1302, Poyson renewed his request for remand with new facts, to wit, that Dr. Briggs' license had been suspended. *Poyson v. Ryan*, 879 P.3d 875, 896-97 (9th Cir. 2018). However, the Ninth Circuit ruled that *Dickens* did not change its holding in *Sexton* and concluded:

> [T]hat a remand is not required where, as here, the record is sufficiently complete for us to hold that counsel's representation was not ineffective under *Strickland v. Washington*, 466 U.S. 668, (1984). The additional evidence Poyson offers does not show remand was necessary. That Dr. Robert Briggs was placed on and then removed from probation by the Arizona Board of Psychological Examiners does not change our previous conclusion that Poyson's postconviction relief counsel reasonably relied on Dr. Briggs, the retained neuropsychological expert who was aware of Poyson's exposure to drugs and alcohol in utero but did not advise counsel that Poyson suffered from fetal alcohol spectrum disorder.

Id.

In *Spreitz*, in contrast, the Ninth Circuit filed its Order in which it denied the motion for stay and for remand without explanation of the grounds upon which

Spreitz failed to meet the requirements under *Martinez* for relief from the procedural default of his new facts, which derived from the psychiatric report of Dr. Stewart and the psychopharmacology report of Dr. Lundberg-Love – where their opinions of organic brain impairment were distinct from the evidence admitted either at trial or in support of the state PCR proceedings. The record was not "sufficiently complete," *Sexton*, 679 F.3d at 1161, so as to obviate the need to remand to the district court for application of *Martinez*.

Contrary to the findings by the state sentencing court or the Arizona Supreme Court on independent review of aggravation and mitigation on direct appeal, or the state PCR court's findings in denying post-conviction relief, the evidence proffered from Dr. Stewart and Dr. Lundberg-Love was distinct in that it unquestionably gave rise to the conclusion that Spreitz proved an IATC claim because that evidence showed that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired during his encounter with Ms. Reid. *See* A.R.S. § 13-703(G)(1). Remand was necessary for the district court to consider the credibility of Dr. Stewart and Dr. Lundberg-Love, and to assess the weight to be attributed to their opinions as to the existence of the G(1) statutory mitigating factor.

CONCLUSION

Certiorari should be granted to review the ruling of the Ninth Circuit to deny Spreitz a remand to the district court for application of *Martinez* and a determination

of whether he can establish cause and prejudice in the form of IAC of his PCR counsel to excuse the default of the expert opinions with respect to the G(1) statutory mitigating factor. The determination of when a remand to a federal court of first instance is necessary to adjudicate whether the petitioner has demonstrated cause and prejudice under *Martinez* presents an important federal question that requires resolution by this Court.

Respectfully submitted: December 28, 2020.

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