IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-99005

EDWARD HAROLD SCHAD,

Petitioner-Appellant,

v.

CHARLES L. RYAN, et al.,

Respondents-Appellees.

Response to Emergency Motion to Continue Stay of Mandate Pending *En Banc* Proceedings in *Dickens v. Ryan*

Respondents-Appellees hereby oppose Petitioner-Appellant's Emergency Motion to Continue Stay of Mandate, for the reasons stated in the following Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 9th day of January, 2013.

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MEMORANDUM OF POINTS AND AUTHORITIES

Respondents object to Edward Harold Schad's Motion to Continue Stay of Mandate Pending En Banc Proceedings in *Dickens v. Ryan*, No. 99017. Schad is a death-row inmate who murdered Lorimer Groves in 1978, and has had more than 33 years to advance his claims in state and federal court, including: (1) trial; (2) direct appeal; (3) state post-conviction proceedings; (4) habeas petition in district court; (5) appeal to this Court; and (6) petition for certiorari to the Supreme Court. The Supreme Court denied his petition for certiorari on October 9, 2012, and denied his petition for rehearing on January 7, 2013. This Court stayed issuing the mandate until the Supreme Court denied the petition for rehearing; that stay, by its own terms, does not survive the Supreme Court's denial of rehearing.

Schad asserts a new basis for staying the mandate—this Court's granting *en banc* review in *Dickens v. Ryan.* As explained below, this presents no basis for this Court to further stay its mandate in this case.

A. ARGUMENT.

1. *This Court must issue the mandate.*

Schad seeks a do-over of his final federal habeas proceedings, based on the grant of *en banc* review in *Dickens*, attempting to resurrect at this late date his claim of ineffective assistance of counsel (IAC) at sentencing. However, the panel here rejected Schad's claims, Schad's petition for rehearing was denied without

any active judge of this Court voting for rehearing, and the panel denied other post-decision motions filed with this Court. The Supreme Court rejected Schad's petition for certiorari and petition for rehearing. At this time, this Court must issue its mandate.

In *Bell v. Thompson*, 545 U.S. 794, 800 (2005), the State of Tennessee asserted that federal habeas proceedings ended when the Supreme Court denied certiorari, and requested an execution warrant. Tennessee argued that the Sixth Circuit was required to issue its mandate on the date that a copy of the Supreme Court's order denying certiorari was filed with the Sixth Circuit. 545 U.S. at 802-803. The Sixth Circuit, however, granted the prisoner's motion to stay its mandate until the Supreme Court ruled on his petition for rehearing from the denial of certiorari. *Id.* at 800. The Supreme Court was asked to consider whether Rule 41(b), Federal Rules of Appellate Procedure, supported the Sixth Circuit's decision not to issue its mandate upon denial of certiorari. However, the Court found it unnecessary to decide whether the State's position was correct; assuming *arguendo* that the rule authorized a stay of the mandate following denial of certiorari, it found that the Sixth Circuit *had abused its discretion because it had delayed issuing its mandate even after the Supreme Court denied rehearing.* *Id.* at 804.

Accordingly, pursuant to *Bell*, this Court must now issue the mandate, and so it should deny Schad's motion.

2. *There is no likelihood of success, so a stay is not warranted.*

Even if this Court had discretion to stay the mandate, the requested stay is not warranted, under the general principles applicable to stay requests.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1760 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 1761 (citing cases). While a stay involves the exercise of judicial discretion, it is not unbridled discretion; legal principles govern the exercise of discretion. *Id*. In considering whether to halt progress on a case, four factors are considered in evaluating whether to issue a stay. *Id.*; *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (*per curiam*).

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 129 S. Ct. at 1761; *Leiva-Perez*, 640 F.3d at 964. "The first two factors of the traditional standard are the most critical." *Nken*, 129 S. Ct. at 1761. The success on the merits must be more than a mere "possibility." *Id*. Also the mere "possibility" of irreparable injury fails to satisfy the second factor. *Id*. If an applicant can satisfy "the first two factors, the traditional stay inquiry calls for

assessing the harm to the opposing party and weighing the public interest." *Id*. at 1762.

Although Respondents submit that their interest in finality weigh in their favor on the last three factors of the test, the "likelihood of success" factor is the most significant. Schad has made no strong showing that he is likely to succeed on the merits. Rather, it is apparent that this Court's panel opinion correctly applied the relevant Supreme Court authority in finding that the Arizona courts had reasonably applied clearly established federal caselaw to the record before them in denying, on the merits, Schad's claim of ineffective assistance at sentencing. *See generally Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

That *Pinholster* means what it says was recently reaffirmed by the Supreme Court's unanimous opinion in *Ryan v. Gonzales*, No. 10-930 (U.S. January 8, 2013). The Court reiterated that when a claim is adjudicated on the merits by the state court, federal habeas counsel should be able to determine whether there was a reasonable application of federal law, "without any evidence outside the record." Slip op. at 9 (citing *Pinholster.*)

This Court's last amended opinion faithfully followed *Pinholster.* After the Supreme Court granted certiorari from this Court's second amended opinion, further briefing, and further consideration regarding the application of *Pinholster*, the panel, in its third amended opinion, unanimously affirmed the district court's

denial of relief on the IAC-sentencing claim. *See Schad v. Ryan*, 671 F.3d 708, 722 (9th Cir. 2011). It explained:

> The state habeas court ruled that Schad's claim of ineffective assistance of counsel at sentencing lacked merit because he was unable to present any significant mitigating evidence. Although Schad sought to present such evidence in the district court, the Supreme Court has now ruled that when a state court has decided an issue on the merits, the federal courts may not consider additional evidence. *Cullen v. Pinholster*, ––– U.S. ––––, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). It has vacated and remanded this case to us for reconsideration. *Ryan v. Schad*, ––– U.S. ––––, 131 S.Ct. 2092, 179 L.Ed.2d 886 (2011). Accordingly the district court's denial of this claim must be affirmed.

Thus, even if this Court could reconsider its ruling, Schad has no likelihood of success because the ruling was a proper application of *Pinholster* to an ineffective assistance claim. Moreover, a state court's determination of a federal claim is *not* unreasonable "so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 US. 652, 664 (2004)). The Supreme Court has recently made clear that the deference due state courts is *exceedingly* great:

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was *so lacking in justification* that there was an error well understood and comprehended in existing law *beyond any possibility for fairminded disagreement.*

131 S. Ct. at 786–87 (emphasis added).

Whatever this Court decides in *Dickens*, it cannot undo the relevant Supreme Court authority. To the extent that the panel opinion in *Dickens* conflicted with the panel ruling in this case, the grant of rehearing *en banc* does not implicate this Court's prior rulings in this case.

3. *Dickens v. Ryan, is distinguishable.*

The above aside, a stay is not warranted because *Dickens* is distinguishable. The panel opinion in *Dickens* held that Dickens had procedurally defaulted on his claim of ineffective assistance of counsel at sentencing, but that he may be able to show cause for the default under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). *Dickens v. Ryan*, 688 F.3d 1054, 1067 (9th Cir. 2012), *rehearing en banc ordered by Dickens v. Ryan*, 2013 WL 57802 (9th Cir. Jan. 4, 2013). The panel remanded for the district court to "decide the applicability and impact of *Martinez*." 688 F.3d at 1072.

Dickens is distinguishable from this case, because Schad did not procedurally default on his IAC-sentencing claim; rather it was presented to the state courts and decided *on the merits*. "The state habeas court ruled that Schad's claim of ineffective assistance of counsel at sentencing *lacked merit* because he was unable to present any significant mitigating evidence." *Schad*, 671 F.3d at 722. This Court noted that it could not consider evidence presented in the district court

because "the Supreme Court has now ruled that when a state court has decided an issue on the merits, the federal court may not consider additional evidence." *Id.*

Because in this case there was a state-court merits ruling on IAC-sentencing claim, the Supreme Court's decision in *Martinez* simply is not relevant. *See Brown v. Thaler*, 684 F.3d 482, 489 n.4 (5th Cir. 2012) (reliance on *Martinez* was unavailing when the Texas court considered the claim on the merits). *Martinez* explains that the general procedural default rule of *Coleman v. Thompson*, 501 U.S. 722, 754 (1991), "governs all but the limited circumstances recognized here." 132 S. Ct. at 1320. *Martinez* recognized this "narrow exception" to *Coleman*: "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial, if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 132 S. Ct. at 1320, emphasis added. In other words: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.* at 1315, emphasis added.

Because the *Dickens* panel opinion turned on procedural default, any *en banc* resolution in that case would not undermine the panel ruling in this case.

B. CONCLUSION.

For the above reasons, Respondents respectfully request that this Court deny Schad's motion and issue its mandate.

DATED this 9th day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 9, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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