

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| EDWARD HAROLD SCHAD, |) | |
| |) | No. 07-99005 |
| Petitioner-Appellant, |) | |
| |) | |
| v. |) | CAPITAL CASE |
| |) | EMERGENCY MOTION TO |
| CHARLES RYAN, <i>et al.</i> , |) | CONTINUE STAY OF MANDATE |
| |) | PENDING EN BANC PROCEEDINGS |
| Respondents-Appellees. |) | IN <i>DICKENS V. RYAN</i> |
| |) | |

Recognizing that the panel opinion in *Dickens v. Ryan*, No. 08-99017, is irreconcilable with the panel opinion in this case, on January 4, 2013, the en banc court has granted the Petition for Rehearing En Banc to resolve the conflict. See *Dickens v. Ryan, supra*, Docket Entry No. 73. In his Petition for Rehearing En Banc, Charles Ryan argued that the panel opinion in *Dickens* conflicts with the application of *Cullen v. Pinholster*, 563 U.S. ____ , 131 S.Ct. 1388 (2010), in *Schad*. Docket Entry No. 69-1, Ryan’s Petition for Rehearing En Banc, pp. 1,7,10-12. It does. Consequently, the Court should continue the stay of the mandate in this case pending the decision in *Dickens*. Indeed, the en banc court will now resolve this conflict and may do so in a way that would prove that Mr. Schad is entitled to federal habeas consideration of his defaulted evidence in support of his IAC at sentencing claim because he has cause for the default in that he received ineffective assistance from his court-appointed post-conviction counsel.

Thus a continuation of the stay is warranted.

In earlier proceedings, this Court recognized the importance of the evidence Schad presented in the district court proceedings which linked the abuse and trauma Schad suffered throughout his childhood to his actions at the time of the crime. The Court explained:

In the district court, Schad presented evidence that, we conclude, if it had been presented to the sentencing court, would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigation factors present in this case. The evidence showed how Schad's childhood abuse affected his mental condition as an adult. Had the sentencing court seen this evidence, which was so much more powerful than the cursory discussion of Schad's childhood contained in Bendheim's testimony and the presentence report, it might well have been influenced to impose a more lenient sentence. There was ample evidence presented at sentencing to illustrate Schad's intelligence, good character, many stable friendships, and church involvement, at least while he was in prison. Although Schad had a prior Utah conviction for second-degree murder, that charge arose out of an accidental death. The missing link was what in his past could have prompted him to commit this aberrant violent act of intentionally killing Grove. Without this psychological link, the crime appeared to be nothing but the act of a ruthless and cold blooded killer in the course of a robbery, and Schad was therefore sentenced to death. The extensive evidence of repressed childhood violent experiences could have supplied that link and mitigated his culpability for the crime.

Schad v. Ryan, 595 F.3d 907, 923 (9th Cir. Ariz. 2010).

The Warden has repeatedly asserted that post-conviction counsel was at fault for failing to present this evidence to the state court. *See e.g.*, Respondents' Petition for Rehearing, September 23, 2009, p. 9. But, the Warden has also maintained that post-conviction counsel's professional errors made no difference because *Pinholster* made them irrelevant. In *Dickens*, the Court will now squarely

address the plain and apparent conflict between *Pinholster* and *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), that Schad has pointed out.

Fundamental fairness, due process, and equity, each demand that Mr. Schad not be executed while the en banc Court is considering whether the District Court and panel decisions denying him relief were in error. The State of Arizona intends to execute Mr. Schad sometime between the end of February and early March. The Motion for Warrant of Execution will be taken up the Arizona Supreme Court in its first conference of the year tomorrow, January 8, 2013. This Court should step in to prevent this miscarriage of justice and continue the stay of its mandate pending the resolution of the En Banc proceedings in *Dickens* and thereafter issue such orders as are appropriate under the circumstances.

Respectfully submitted this 7th day of January, 2013.

BY: /s/ Kelley J. Henry

Kelley J. Henry

Denise I. Young

Attorneys for Appellant Edward Schad

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2013, 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 ECF system.

Participants in the case who are registered ECF users will be served by the appellate ECF system.

/s/ Kelley J. Henry

Supervisory Asst. Federal Public Defender
Office of the Federal Public Defender
Capital Habeas Unit
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805