

UNITED STATES COURT OF APPEALS

FEB 01 2013

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

<p>EDWARD HAROLD SCHAD,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>CHARLES L. RYAN, Arizona Department of Corrections,</p> <p>Respondent - Appellee.</p>

No. 07-99005

D.C. No. CV-9702577-PHX-ROS
District of Arizona,
Phoenix

ORDER

Before: SCHROEDER, REINHARDT, and GRABER, Circuit Judges.

Schad has filed an Emergency Motion to Continue Stay of the Mandate Pending En Banc Proceedings in *Dickens v. Ryan*, No. 08-99017. Our normal course would be to stay the mandate pending an en banc decision that may affect the outcome of a case in which the mandate has not yet issued. Because our en banc process may take months, however, we decline to issue an indefinite stay of the mandate that would unduly interfere with Arizona’s execution process.

Therefore, Schad’s Emergency Motion to Continue Stay of the Mandate Pending En Banc Proceedings in *Dickens v. Ryan*, No. 08-99017, as such, is denied.

We will construe Schad's motion, however, as a motion to reconsider our prior denial of his Motion to Vacate Judgment and Remand in light of *Martinez v. Ryan*, 139 S.Ct. 1309 (2012), and, in light of the intervening decision, now withdrawn, by the panel in *Dickens v. Ryan*, 688 F.3d 1054 (9th Cir. 2012).

We recognize the need to resolve these issues expeditiously, and therefore order the parties to file simultaneous briefs on the questions below on or before February 11th, 2013, and simultaneous reply briefs on or before February 14th, 2013. The opening briefs shall be no longer than 30 pages or 8,400 words, whichever is greater. The reply briefs shall be no longer than 15 pages or 4,200 words, whichever is greater.

The parties shall brief the following questions:

1. Whether in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), we should independently decide that although Schad procedurally defaulted on his ineffective assistance claim, we should remand to the district court to determine whether there was cause. *Dickens v. Ryan*, 688 F.3d 1054, 1068–70 (9th Cir. 2012) has been vacated by 2013 WL 57802 (9th Cir. Jan. 4, 2013). It cannot be cited as precedent. *See* General Order 5.5(d). Either party may, however, urge that we use or not use reasoning similar to that

adopted by the panel in *Dickens*, so long as we do not cite the now-withdrawn opinion.

2. What effect, if any, the Superior Court of Arizona's decision on January 18, 2013, has on our review of Schad's claim.

IT IS SO ORDERED.