

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 07-99005

EDWARD HAROLD SCHAD,
Petitioner-Appellant,
v.
CHARLES L. RYAN,
Respondent-Appellee.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA,
No. CV-97I-02577-PHX-ROS
RESPONSE TO MOTION TO STAY

Respondent hereby opposes Schad's motion for stay of execution, for the reasons stated in the following Memorandum of Points and Authorities,

DATED this 28th day of February, 2013.

Respectfully submitted,

Thomas C. Horne
Attorney General

Kent E. Cattani
Solicitor General

Jeffrey A. Zick
Section Chief Counsel

s/ JON G. ANDERSON
Assistant Attorney General
Attorneys for Respondent

MEMORANDUM OF POINTS AND AUTHORITIES.

1. This Court has previously indicated that it did not intend its consideration of Schad's motions to cause a stay of the execution. In this Court's order of February 1, 2013, it specifically declined to stay the mandate pending any *en banc* decision in *Dickens v. Ryan*, No. 08-99017. (Order at 1.) It stated: "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." (*Id.*) This Court recognized the "need to resolve these issues expeditiously." (*Id.* at p.2) Thus, Petitioner's suggestion that the further *en banc* proceedings in *Dickens* are grounds for an indefinite stay has already been rejected by this Court.

Petitioner also cites the proceedings in *Detrich v. Ryan*, No. 08-99017, as cause for a stay. That oral argument was held on December 10, 2012, and no opinion has issued, so the proceedings in that case do not furnish a reason for an indefinite stay either. Moreover, *Detrich* does not present a substantial *Martinez* claim, for the reasons further discussed in Respondent's opposition to remand, filed August 30, 2012 (*Detrich v. Ryan*, No 08-99017, Docket No. 133.) Particularly, when *Detrich* committed an especially brutal murder, as discussed in the withdrawn panel opinion. See *Detrich v. Ryan*, 677 F.3d 958, 964-965 (9th Cir. 2012), *rehearing granted Detrich v. Ryan*, 696 F.3d 1265 (9th Cir. 2012).

2. This Court appropriately set an expedited briefing schedule on the petition for rehearing to avoid delaying the execution. Respondents will file a reply to the response to the petition for rehearing this same evening.

3. Petitioner faults the State of Arizona for seeking a warrant before this Court issued its mandate. But, as the State has discussed, *Bell v. Thompson*, 545 U.S. 794 (2005), assumed *arguendo* that a court of appeals can stay a mandate following denial of certiorari, but found the Sixth Circuit had abused its discretion by declining to issue the mandate after the Supreme Court denied rehearing. 545 U.S. at 804. Based on this authority, the State appropriately sought an execution warrant from the Arizona Supreme Court, which that court granted after briefing from the parties.

Moreover, issuance of this Court's mandate is not a necessary precedent for execution of a death sentence, much less for the State's requesting a warrant of execution. Indeed, capital prisoner Richard Stokley was executed on December 5, 2012; this Court did not issue its mandate until December 27, 2012. (See *Stokley v. Ryan*, No. 09-99004, Docket Number 113.)

CONCLUSION.

For the above reasons, Respondent respectfully requests that this Court deny Schad's motion for a stay of execution.

DATED this 28th day of February, 2013.

Respectfully submitted,

Thomas C. Horne
Attorney General

Kent E. Cattani
Solicitor General

Jeffrey A. Zick
Section Chief Counsel

s/ JON G. ANDERSON
Assistant Attorney General
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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 February 28, 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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