URGENT MOTION UNDER CIRCUIT RULE 27-3(b)

No. 07-99005

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,
Petitioner-Appellant

v.

CHARLES RYAN, Warden
Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
DISTRICT COURT NO. CIV 97-227-PHX-ROS

MOTION FOR STAY OF EXECUTION

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MOTION FOR STAY OF EXECUTION
OF MARCH 6, 2013 EXECUTION DATE

Pursuant to 28 U.S.C. §1651 & 2251, Appellant Ed Schad respectfully moves this Court for a stay of a March 6, 2013 execution date. In support of this motion, Ed Schad states:

1. Given the intervening decision in *Martinez v. Ryan*, 566 U.S. ___ (2012), this Court has just ordered further District Court proceedings on his ineffectiveness claim. *Schad v. Ryan*, No. 99-77005 (9th Cir. Feb. 26, 2013).

2. In remanding under *Martinez*, this Court balanced the stay equities and concluded that the stay equities clearly favor Schad. *Id*., slip op. at 3-5.

3. This Court also noted the apparent merit of Schad's claim. The Court concluded that "absent the ineffectiveness of sentencing counsel, the picture of Schad that would have been presented to the sentencer would have been far different from the one that was," and counsel's "error in failing to investigate and present evidence of Schad's serious mental illnesses" had a "substantial and injurious effect . . . in determining" Schad's sentence. *Id*., slip op. at 10-11.

4. The state has filed a petition for rehearing, which remains pending before this Court. In his response to the petition for rehearing, Schad has maintained that his case is properly remanded to the District Court under *Martinez*, or he should otherwise be granted habeas relief by this Court.

5. During the pendency of Schad's request for relief under *Martinez*, however, the state secured a March 6, 2013 execution date which threatens Schad's ability to secure the habeas relief to which he is ultimately entitled. The state secured this execution date knowing full well that this Court's mandate had not issued and that the state's interest in finality had not yet attached. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

6. This Court should therefore grant Ed Schad a stay of execution.

7. Indeed, this Court has already concluded that Schad has a likelihood of success of the merits, that he faces irreparable harm, that the public interest favors a stay, and that these factors outweigh any potential harm to state – especially given the weighty "public interest in not executing a man who may have been denied his constitutional right to counsel during the penalty phase of his capital trial." *Id*., slip op. at 5-6.

8. Consequently, Schad meets the requirements for a stay of execution, and this Court should accordingly grant him a stay of execution, pursuant to 28 U.S.C. §2251.

9. Moreover, because the federal courts must undertake further proceedings in these initial federal habeas proceedings in Schad's case, a stay of execution is warranted to allow the courts sufficient time to undertake that task. This Court should

thus issue a stay of execution to prevent the mooting of his claim, especially where this Court has already noted its substantiality. *Barefoot v. Estelle*, 463 U.S. 880, 893-894 (1983)(a court of appeals, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an initial habeas proeeding); *Michael v. Wetzel*, 2012 U.S.App.Lexis 26774 (3d Cir. 2012); *Ford v. Haley*, 179 F.3d 1342 (11th Cir. 1999).

10. Also, in *en banc* proceedings in *Dickens v. Ryan*, 9th Cir. 08-99017, this Court will be deciding whether *Martinez v. Ryan*, 566 U.S. ___ (2012) applies to a procedurally defaulted ineffective assistance of counsel claim nearly identical to Schad's. Likewise, as the panel here has noted, in *Detrich v. Ryan*, 9th Cir. No. 08-99017, this Court has asked counsel to "address the circumstances under which a remand under *Martinez* was warranted." *Schad*, slip op. at 2.

11. "[I]t has become clear that Schad's case raises the same issues our court is currently considering *en banc*" in *Dickens* and *Detrich*. *Schad*, slip op. at 2. Because *Dickens* and/or *Detrich* will likely be dispositive of Schad's ineffectiveness claim in these, his initial habeas proceedings, a stay of execution is also appropriate pending *Dickens* and/or *Detrich*. *See Holland v. Collins*, 950 F.2d 169 (5th Cir. 1992) (in initial habeas appeal, court of appeals granted stay of execution pending Fifth

Circuit *en banc* decision in *Graham v. Collins*, 5th Cir. No. 88-2168).[1]

CONCLUSION

Having already concluded that the stay equities favor Schad, this Court should grant a stay of his March 6, 2013 execution date, and grant a stay of execution under *Barefoot v. Estelle*, 463 U.S. 680 (1983), and pending this Court's *en banc* decisions in *Dickens* and/or *Detrich*.

Respectfully submitted this 28th day of February, 2013.

By: /s/ *Kelley J. Henry*
Kelley J. Henry
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Counsel for Edward H. Schad

[1] Were this Court to grant *en banc* review in Schad's case as well, *a fortiori*, this Court should grant Schad a stay of execution pending the disposition of any such *en banc* proceedings.

CERTIFICATE OF SERVICE

I certify that on this 28th day of February, 2013, I electronically filed the foregoing Motion For Stay Of Execution using the Court's CM/ECF filing system. A true and correct copy of the foregoing will be served via the Court's automated system on opposing counsel, Mr. Jon Anderson, Assistant Attorney General, 1275 W. Washington, Phoenix, AZ 85007-2997, who is a registered user of the system. I also separately emailed a copy of the foregoing supplemental brief to opposing counsel, Mr. Anderson, and to Ms. Margaret Epler, Capital Case Staff Attorney for the Ninth Circuit United States Court of Appeals.

/s/ Kelley J. Henry
Counsel for Mr. Schad