No. 12A857

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,
PETITIONER,
-vs-
EDWARD HAROLD SCHAD,
RESPONDENT.

REPLY TO RESPONSE TO
APPLICATION TO LIFT STAY OF EXECUTION
FOR PRESENTATION TO JUSTICE ANTHONY M. KENNEDY

THOMAS C. HORNE
ATTORNEY GENERAL

KENT E. CATTANI
SOLICITOR GENERAL

JEFFREY A. ZICK
SECTION CHIEF COUNSEL

JON G. ANDERSON
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)

1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONER

JURISDICTION

Schad's response to the State's application to vacate the stay correctly posits that 28 U.S.C. Section 1651(a) is a jurisdictional basis for this Court to consider the application. This Court has the power to vacate a stay granted by a lower court. *See United States v. Ohio*, 291 U.S. 644 (1934). This Court's jurisdiction rests both upon the statute, to the extent that maintenance of the stay without change might impair the effectiveness of this Court's ultimate jurisdiction, and if it "derives from the Court's role as the final forum to render the ultimate answer to the question which was preserved by the stay." E. Gressman et al., *Supreme Court Practice*, 866 (9th Edition 2007) (quoting *Rosenberg v. United States*, 346 U.S. 286 (1953)).

The Ninth Circuit entered the stay to enforce its previous order remanding this matter to the district court for further consideration under *Martinez v. Ryan*, 139 S. Ct. 1309 (2012). The State's application sets forth three reasons why the Ninth Circuit majority panel order, issued after this Court denied certiorari review, constituted an abuse of discretion. All three are substantial questions on which this Court is the final forum to render the ultimate answer, particularly when the majority panel order granted relief on a ground presented to it before this Court's certiorari review. *Cf. Rhoades v. Blades*, 661 F.3d 1202, 1203 (9th Cir. 2012) (*per curiam*) (noting the inequity caused by delaying a *Martinez* claim when it could have been brought at any time after this Court granted certiorari review in *Martinez*).

It is not unusual for this Court to consider a state's request to lift or vacate a circuit court's granting a stay of execution and grant relief. *See, e.g., Donahue v.*

Bieghler, 546 U.S. 1159 (2006); *Johnson v. Reid*, 542 U.S. 959 (2004); *Mullin v. Hain*, 538 U.S. 957 (2003). There is no question that the State has a strong interest in challenging the stay of an execution because "a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments[.]" *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584 (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). And the State's interest is strongest when a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill* , 547 U.S. at 584 (quoting *Nelson*, 541 U.S. at 650).

PETITION FOR REHEARING IN NINTH CIRCUIT

Schad criticizes the State for filing both an application for vacation of the stay order and a petition for rehearing and petition for rehearing en banc in the Ninth Circuit. But the State filed its petition for rehearing before the panel majority issued a stay. At any rate, the Ninth Circuit, on March 4, 2013, denied both the petition for panel rehearing and the petition for rehearing en banc, so the stay is still in effect and properly before this Court. Moreover, the two dissents filed to the denial of the petition for rehearing en banc, authored by Judges Tallman and Callahan, present further reasons for this Court to grant the State's application to vacate the stay of execution.

TEXAS CASES.

Schad cites this Court's granting stay of executions in three Texas capital cases: *Haynes v. Thaler*, No. 12-6760; *Balentine v. Thaler*, No. 12-5906; and *Trevino v. Thaler*, No 10-10189. But the question in those cases is whether *Martinez* applies to Texas in light of that state's different procedures for post-conviction proceedings. *Martinez* was an Arizona case, so the same issue does not exist here.

At any rate, for the reasons discussed in the State's application and in the dissenting opinions from the Ninth Circuit order denying rehearing en banc, *Martinez* does not apply to this case, and the Ninth Circuit panel majority erred by vacating its prior judgment and remanding to the district court, and by granting a stay of execution based on that order.

APPLICATION OF THOMPSON

The State is not alleging the Ninth Circuit had no jurisdiction to stay the mandate, but rather that it abused its discretion under *Bell v. Thompson*, 545 U.S. 794 (2005), by failing to issue the mandate after this Court denied rehearing. See Order Denying Petition for Rehearing En Banc, J. Tallman dissenting, at 8. Particularly when the panel majority simply reconsidered the *Martinez* motion it had denied before this Court's certiorari review.

Schad attempts to distinguish *Thompson* on the basis that the State of Arizona sought a warrant of execution before this Court denied Schad's petition for rehearing. But the State was perfectly justified in doing so based on the apparent finality of the case after this Court denied certiorari review. Moreover, the Arizona

Supreme Court knew about the pending petition for rehearing, and did not issue the execution warrant until *after* this Court denied the petition for rehearing.

Although ruling for the State of Tennessee in *Thompson*, this Court declined to address whether issuing the mandate was mandatory under Rule 41, and assumed *arguendo* that such a stay *might be permitted* under Rule 41. *Thompson*, 545 U.S. at 803-804. This Court noted, however, that the denial of certiorari "*usually signals the end of litigation*." 545 U.S. at 806. Also, Ninth Circuit Rule 41(d)(2)(D), requires the circuit to issue the mandate "immediately" when a copy of the Supreme Court order denying the petition for writ of certiorari is filed. That order was filed in the Ninth Circuit on October 12, 2012. See Ninth Circuit General Docket, Entry No. 96. Thus, it was reasonable for the State to request a warrant when this Court denied certiorari review.

PINHOLSTER AND MARTINEZ.

Schad praises the panel majority order for harmonizing *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) and *Martinez*, but it does nothing of the sort. Rather the panel majority failed to apply *Pinholster* to this case and improperly applied *Martinez.* See Order Denying Petition for Rehearing En Banc, J. Tallman dissenting, at 1-7. As Judge Tallman's dissent states: "The majority's order simply encourages state prisoners to evade *Pinholster* by adding one or more factual allegations when re-pleading an ineffective assistance of counsel claim in federal habeas proceedings." *Id.* at 8-9.

The presentation of new evidence in federal habeas proceedings is just what this Court decried in *Pinholster.* Schad cites footnote 10 of the majority opinion, but

that is a very limited and hypothetical exception that does not apply here: "Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, . . ., Justice SOTOMAYOR'S hypothetical involving *new evidence of withheld exculpatory witness statements*, . . ., may well present a new claim." *Pinholster*, 131 S. Ct. at 1401 fn. 10. Instead, the relevant footnote is footnote 11, which noted that California contended "that some of the evidence adduced in the federal evidentiary hearing *fundamentally changed* Pinholster's claim so as to render it effectively unadjudicated." 131 S. Ct. at 1402 n.11 (emphasis added). Pinholster argued that the additional evidence that had not been part of the claim in state court "simply support[ed]" his alleged claim. *Id.* This Court rejected Pinholster's argument:

> We need not resolve this dispute because, even accepting Pinholster's position, he is not entitled to federal habeas relief. Pinholster has failed to show that the California Supreme Court unreasonably applied clearly established federal law on the record before that court, [citing the opinion], which *brings our analysis to an end*. Even if the evidence adduced in the District Court additionally supports his claim, as Pinholster contends, *we are precluded from considering it.*"

Id. (emphasis added.),

Pinholster and *Martinez* can be harmonized. If the district court finds a procedural default, *Martinez* gives a prisoner the opportunity to show cause to excuse the procedural default. If the district court finds cause for the procedural default under *Martinez*, it addresses the merits of the claim. If the district court has denied a claim on the basis of procedural default, without addressing the merits, the circuit court can remand under *Martinez* to allow the district court to determine

whether the procedural default can be excused. But where, as here, the district court already addressed the merits *and* considered the new evidence, it makes no sense to remand to the district court to excuse a procedural default it did not find and reconsider evidence it already considered. See Order Denying Petition for Rehearing En Banc, J. Tallman dissenting, at 7.

Schad attempts to distinguish *Pinholster* on its procedural history. But, as Judge Tallman's dissent notes: "Pinholster and Schad's claims are, for all relevant purposes, factually indistinguishable." *Id.* at 4. And Schad received the benefit, not required by *Pinholster*, of the district court reviewing the new evidence that PCR counsel allegedly could have presented in state post-conviction proceedings.

PROCEDURAL DEFAULT

Schad attempts to turn the issue from procedural default to exhaustion. But *Martinez* excuses *a procedural default*. 139 S. Ct. at 1315 ("The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding."). The State can waive procedural default at any point because it is an affirmative defense to preserve the State's interest in finality. *See Trest v. Cain*, 522 U.S. 87, 89 (1997) ("[P]rocedural default is normally a defense that the state is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter."). The Ninth Circuit panel majority has allowed procedural default to be used as a sword rather than an affirmative defense, even though Schad received a merits review of his IAC-sentencing claim. And, as Judge Tallman

put it: "The ephemeral default declared is only in the mind of the panel majority. See Order Denying Petition for Rehearing En Banc, J. Tallman dissenting, at 7.

PANEL MAJORITY'S VIEW OF DISTRICT COURT'S ALTERNATE RULING.

Schad argues that the Ninth Circuit panel majority has criticized the reasoning of the district court, which alternatively denied the IAC-sentencing claim on the merits, in view of the evidence first presented in federal court. Schad quotes from the second amended opinion that was vacated by this Court on certiorari review. (Response at 17, quoting *Schad v. Ryan*, 606 F.3d 1022, 1044 (9th Cir. 2010), *vacated by Ryan v. Schad*, 131 S. Ct. 2902 (2011). And because the third amended opinion (*Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011) (per curiam) simply affirmed the district court based on *Pinholster* and the state court record, any criticism of the alternate district court analysis that might be garnered from that opinion is, at best, *dicta.*

The majority panel order of February 26, 2013, does explain why the panel majority thinks the district court analysis was unpersuasive. But it did not make that conclusion when Schad filed his previous *Martinez* motion, which the panel summarily and unanimously denied after briefing by the parties. There is nothing new since the prior rejection of the *Martinez* motion, except that this Court has denied certiorari review and rehearing. See Order Denying Petition for Rehearing En Banc, J. Tallman dissenting, at 2-3.

Furthermore, there was no reason for the panel majority to remand to have the district court reconsider the new evidence that it already considered in its alternative ruling. The district court discussed the new evidence at some length,

and found it showed neither deficient performance nor prejudice by sentencing counsel. *Schad v. Schriro*, 454 F. Supp.2d 897, 940-943 (D. Ariz. 2006). It concluded: "Trial counsel's performance cannot be considered deficient for failing to present these opposing versions of Petitioner—i.e., as both rehabilitated and exemplifying a number of personal strengths and virtues which could be used to benefit others, and as an unstable and disoriented individual incapable of completing a task." *Id.* at 942. The Ninth Circuit's third amended opinion detailed the significant evidence counsel presented at sentencing. *See Schad v. Ryan*, 671 F.3d 708, 718-720 (9th Cir. 2010). The Ninth Circuit has not explained why the mitigation case that sentencing counsel *actually presented* was unreasonable. As Judge Tallman's dissent states: "The problem with the majority's 'new claim' theory is that there is nothing new about Schad's current claim." See Order Denying Petition for Rehearing En Banc, J. Tallman dissenting, at 4-5.

The district court further found "that the information [Schad] now contends should have been presented is not of sufficient weight to create a reasonable probability that, if it had been presented, the trial court would have reached a different sentencing determination." *Schad v. Schiro*, 454 F. Supp.2d at 941. That the new evidence would not have changed the sentence was reiterated by Judge Graber in her dissent from the majority panel order. (Order, J. Graber dissenting, at 17-18.) That new evidence would not have changed the sentence is shown by Schad's previous murder conviction, which is particularly weighty aggravation.

Ultimately, Schad fails to explain how a mitigation case alleging that Schad had serious mental issues would have been more mitigating than the evidence

presented at sentencing that he was a man worth saving because he could be rehabilitated in view of his good conduct in prison. As this Court said in *Pinholster*: "The new evidence relating to Pinholster's family—their more serious substance abuse, mental illness, and criminal problems, . . .—is also by no means clearly mitigating, *as the jury might have concluded that Pinholster was simply beyond rehabilitation."* 131 S. Ct. at 1410.

Finally, as Judge Callahan states in her dissenting opinion from the Ninth Circuit order denying en banc review: "The panel majority's decision here cavalierly disregards [the victims'] rights in favor of a twice-convicted murderer who had already had the benefit of 33 years of legal process." See Order Denying Petition for Rehearing En Banc, J. Callahan dissenting, at 2.

CONCLUSION

For the above reasons, the State requests that this Court grant the State's application to vacate the Ninth Circuit's order granting a stay of the execution, and any other appropriate relief.

Respectfully submitted,

THOMAS C. HORNE
Attorney General

KENT E. CATTANI
Solicitor General

Jeffrey Zick
Section Chief Counsel

/s_____
JON G. ANDERSON
Assistant Attorney General
(Counsel of Record)
Attorneys for Petitioner Ryan

3127727