No. 12A857

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,
Director, Arizona Department of Corrections, et al.,
Movant,

v.

EDWARD HAROLD SCHAD,
Respondent.

SCHAD'S SUPPLEMENTAL RESPONSE IN OPPOSITION TO APPLICATION TO LIFT STAY

KELLEY J. HENRY*
Supervisory AFPD –Capital Habeas Unit
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, TN 37215
TELEPHONE: (615) 736-5047

DENISE I. YOUNG
Attorney at Law
2930 North Santa Rosa Place
Tucson, Arizona 85712
TELEPHONE: (520) 322-5344

*Counsel of Record

The movant's recent certiorari petition provides a compelling reason to *deny* the movant's motion to vacate the stay of execution, for it underlines the need for deliberate consideration of Schad's ineffectiveness claim whose resolution lies at the intersection of the clashing principles of *Martinez* and *Pinholster*. For indeed, in *Martinez* and *Pinholster*, this Court "has issued two decisions that point in different directions when applied to this case." *Schad*, slip op. at 16 (Schroeder, J., concurring).

As Schad has already noted in original response to the motion (and as the court of appeals concluded) Schad's claim fits squarely within the ambit of *Martinez*: He never received an "adjudication on the merits" of his federal habeas claim (28 U.S.C. §2254(d)), because post-conviction counsel failed to present the evidence, and thus the state court never "heard and evaluated the evidence." *Johnson v. Williams*, 568 U.S. ___ (2013)(slip op. at 12). It thus plainly appears – exactly as Justice Sotomayor explained in her opinion in *Pinholster* – that Schad would be "able to obtain federal-court review of his new evidence if he can show 'cause and prejudice' for his failure to present the 'new'claim to state court," which in this case is application of *Martinez*. *Pinholster*, 562 U.S. at ___ (Sotomayor, J., dissenting)(slip op. at 11). Where the court of appeals has followed this paradigm, it can hardly be said to have abused its discretion.

And indeed, Schad's claim fits squarely within the "new claim" paradigm identified by the majority opinion in *Pinholster*, a paradigm which this Court has yet to flesh out, however. *Id*. at ___ n.10 (slip op. at 14 n.10). In fact, as Schad has already noted, this is the very paradigm employed by all the courts of appeals who have been presented with federal habeas ineffectiveness claims like Schad's that are based upon significant evidence never presented for adjudication to the state courts. *Fairchild v. Workman*, 579 F.3d 1134 (10th Cir. 2009); *Moses v. Branker*, 2007 U.S.App. Lexis 24750 (4th Cir. 2007); *Kunkle v. Dretke*, 352 F.3d 980 (5th Cir. 2003).

To be sure, the movant's new petition for certiorari highlights the significance of the *Martinez/Pinholster* conflict, a conflict that is not going away until this Court definitively resolves it. But given the gravity of this conflict, careful deliberation is of the essence. While Schad understands that the concerns of the dissenters in the courts of appeals have some superficial appeal, ultimately their concerns are misplaced. The reason is this: **The essence of the equitable rule articulated by Justice Kennedy in *Martinez* is that if, as a result of ineffective state counsel, a federal habeas petitioner is denied a full and fair state adjudication of a substantial ineffectiveness claim, *the petitioner is entitled to that full and fair adjudication in federal habeas***. That is precisely what the court of appeals has properly ordered here, because Schad has *never* received a fair adjudication of a sentencing ineffectiveness claim based upon the significant mental health evidence that "Schad was suffering from 'several major mental disorders' at the time of the crime, specifically extremely serious mental conditions such as bipolar disorder, schizoaffective disorder, and dissociative disorders, among others." *Schad*, slip op. at 10.

All of this is to say that: (1) where this Court's recent decision in *Johnson* makes clear that Schad's federal habeas mental-health ineffectiveness claim was not "adjudicated on the merits;" (2) where Justice Sotomayor's opinion in *Pinholster* makes clear that *Martinez* is fully applicable to allow a showing of "cause;" (3) where all the courts of appeals have concluded that such a claim is unexhausted and defaulted; (4) and where by its terms *Martinez* applies to any defaulted claims, the court of appeals did not abuse its discretion in remanding for a *Martinez* hearing to give meaning to the right to counsel identified in *Martinez* as the very bedrock of our adversarial process.

While movant's certiorari petition highlights the tension between *Martinez* and *Pinholster*, there is little question that given the moment of such issues, they are better addressed through the

subtle discourse of the certiorari process rather than in haste on the movant's motion to vacate the stay – which is itself based upon highly dubious jurisdictional grounds, for §1651 does not allow this Court to grant movant's exceptional request. *See* Schad's Opposition, p. 4. Suffice it to say, Schad will comply with Court's Rule 15.3 and respond to movant's new petition so that this Court may, after careful briefing and consideration, consider the appropriateness of granting certiorari in Schad's case.

But in the meantime, where the movant has established neither jurisdiction nor any abusiveness in a careful court of appeals' order that enforces the dictates of *Martinez* and finally gives life to Schad's right to counsel, movant's motion must be denied.

Respectfully submitted this 5th day of March, 2013.

BY: *Kelley J. Henry*
Kelley J. Henry
Denise I. Young

Counsel for Edward H. Schad

CERTIFICATE OF SERVICE

I certify that on this 5th day of March, 2013, I emailed a true and correct copy of the foregoing Opposition to Motion to Lift Stay of Execution to Mr. Danny Bickell, Staff Attorney, United States Supreme Court, and opposing counsel, Mr. Jon Andersen, Assistant Attorney General, 1275 W. Washington, Phoenix, AZ 85007-2997.

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