URGENT MOTION UNDER CIRCUIT RULE 27-3(b)

CAPITAL CASE: EXECUTION SET OCTOBER 9, 2013 at 10:00 A.M

No. 13-16895

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD

Appellant-Petitioner

v.

CHARLES RYAN, ET. AL

Appellee-Respondent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MOTION FOR STAY OF EXECUTION

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MOTION FOR STAY OF EXECUTION OF OCTOBER 9, 2013 EXECUTION DATE

Pursuant to 28 U.S.C. 1651 & 2251, Appellant Ed Schad respectfully moves this Court for a stay of the October 9, 2013 execution date. In support of this motion, Ed Schad states:

1. Today, Schad contemporaneously filed his Opening Brief in support of his appeal of the district court's dismissal of his Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b). Schad incorporates by reference all arguments raised in his brief.

2. As Schad demonstrates in his accompanying brief the district court order dismissing his Motion for Relief from Judgment Pursuant to Rule 60(b) as an unauthorized second or successive habeas petition is an abuse of discretion. The Supreme Court has held that "Rule 60(b) has an unquestionably valid role to play in habeas cases." *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005). Here Schad challenges a "nonmerits aspect of the first federal habeas proceeding", *Gonzalez*, 545 U.S. at 534, and as such is properly brought under Rule 60(b). *See Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. 2007)(Motion which challenged the denial of petitioner's claim for procedural default and failure to exhaust was properly brought under Rule 60(b)).

3. Plainly, Schad's motion is not an application for writ of habeas corpus. It does not present an asserted federal basis for relief from the state court's

judgment but rather asserts that the intervening change in the habeas procedural law brought by *Martinez v. Ryan* constitutes an extraordinary circumstance which warrants Rule 60(b) relief from judgment. Schad does not present a new federal claim for relief nor does he present additional evidence not previously presented to the federal court. Schad is not asking the Court to revisit the merits of the district court's ruling on the narrow claim of ineffective assistance of counsel that was presented to the state court and that the district court adjudicated under the limitation on relief pursuant to 28 U.S.C. §2254(d). The district court acknowledges that her alternative observations respecting the IAC as to Schad's mental illness claim were *dicta*. ER 187. Importantly, this Court's ultimate opinion on initial submission did not decide the mental illness claim. "Schad raised his "new claim" of ineffectiveness of sentencing counsel for the first time before the district court by submitting newly discovered evidence of his 'mental illness' as an adult. **We did not review the claim on appeal…**" *Schad*, 07-99005, 2013 WL 791610, *2 (emphasis added), see also ER 187 (observing that Schad is correct that this Court's final opinion on initial submission was limited to that which was presented in state court.) The district court's alternative *dicta*, which was ultimately not addressed on in the final opinion on appeal,1 was not an

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1 Though it bears mentioning that this Court has twice had the opportunity to express its

adjudication on the merits that can render Schad's otherwise proper motion under Rule 60(b) an unauthorized second or successive habeas petition.

4. Rule 60(b) is a rule of equity. It operates to allow a petitioner, like Schad, a fair opportunity to present his *Martinez* claim—a claim that—through no fault of his own--Schad was unable to previously present. This case presents a classic case that cries out for 60(b) equitable relief.

> [W]hen a prisoner has shown reasonable diligence in seeking relief based on a change in procedural law, and when that prisoner can show that there is probable merit to his underlying claims, it would be well in keeping with a district court's discretion under Rule 60(b)(6) for that court to reopen the habeas judgment and give the prisoner the one fair shot at habeas review that Congress intended that he have. After all, we have consistently recognized that Rule 60(b)(6) provides courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 614- 615 (1949)).

5. Schad has been denied one fair shot at adjudication of his federal constitutional claim—a claim this Court described as "more than substantial." Schad has demonstrated extraordinary circumstances here where *Martinez* changed twenty years of habeas jurisprudence which, when applied to Schad's case, reveals the defect in the integrity of the district court's (and this Court's) judgment.

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disagreement with the district court in its second amended opinion and in the February 26, 2013 opinion.

> *Martinez* is not "an independent basis for overturning [a] conviction" but only an equitable rule that allows a federal habeas court to decide a claim, such as ineffective assistance of (sentencing) counsel, that would have been properly before the state post-conviction court, and thereafter before the federal habeas court, *but for* the ineffectiveness of post-conviction counsel.

Schad v. Ryan, 07-99005, 2013 WL 791610, *5.

6. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), held that a habeas petitioner is entitled to a stay of execution when he presents "substantial grounds upon which relief might be granted" in a *second* habeas petition. *A fortiori*, where Schad's appeal involves the reopening of his *first* habeas petition – this Court should grant a stay given the substantial grounds presented in this appeal. *See e.g.*, *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004)(en banc)(granting stay of execution to allow proper consideration of second habeas petition where petitioner made *prima facie* showing of entitlement to relief on the merits); *Mobley v. Head*, 306 F.3d 1096 (11th Cir. 2002)(granting stay of execution in proceedings under Fed.R.Civ.P. 60(b)).

7. Schad also meets the four-pronged standard for granting preliminary injunctive relief, which requires a movant to show: (1) a likelihood of success on merits; (2) that he is likely to suffer irreparable harm absent relief; (3) the balance of equities tips in his favor; and (4) injunctive relief is in the public interest. *Rhoades v. Reinke*, 671 F.3d 856, 858 (9th Cir. 2011)(per curiam).

8. He certainly will suffer irreparable harm, *i.e.* death, and he "can show a significant possibility of success on the merits." *Moormann v. Schriro*, 672 F.3d 644, 647 (9th Cir. 2012), *citing Hill v. McDonough*, 547 U.S. 573, 584 (2006). Indeed, as shown in his accompanying brief, Schad has established his extreme likelihood of success on appeal where the district court erroneously dismissed his proper 60(b) motion as an unauthorized second or successive petition.

9. On the question of the balance of equities, Schad has shown that *Martinez* itself profoundly changes the habeas equities in this case – relieving Schad from bearing the fault of the ineffectiveness of the post-conviction attorney appointed by the state. Once relieved from the district court's erroneous judgment, Schad has established he will likely succeed on the merits of his underlying ineffective assistance of counsel for failure to present mitigating mental illness evidence. As such, Schad's case presents the uncommon case in which an intervening legal event, when considered with all the equities, provides grounds for reopening a federal habeas judgment. *See e.g.*, *Abdur'Rahman v. Bell*, 392 F.3d 174 (6th Cir. 2004)(en banc), *vacated* 545 U.S. 1151 (2005), *Rule 60(b) relief reinstated on remand*, 2008 U.S.Dist.Lexis 37863 (M.D.Tenn. 2008).

10. The public interest lies in granting a stay of execution. The public has no interest in the execution of a person whose death sentence was

unconstitutionally obtained. Any appeal to the virtues of finality fails where Schad has presented a proper motion pursuant to Rule 60(b). The Court in *Gonzalez*, recognized that interests in finality are not particularly weighty in a 60(b) context since, "[t]hat policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose **whole purpose is to make an exception to finality**." 545 U.S. 529 (emphasis supplied).

11. Further, any interest in finality is diminished by the fact that this is a capital case and the error at issue goes to the heart of the reliability of Schad's sentence. As Judge Weber wrote in *Barnett v. Roper*, ___F.Supp.2d___, 2013 WL 1721205 (E.D.Mo. 2013):

> [C]apital punishment jurisdiction cautions that the death penalty is different, and requires a greater need for reliability, consistency and fairness. See *Sheppard*, 2013 U.S. Dist. LEXIS 5565, 2013 WL 146342, at *12. Lessening any weight the capital nature of the action bestows, is the multiple layers of review that Barnett has received. See *id*. Nevertheless, although the reliability of Barnett's sentence is enhanced by many tiers of review, the claim at issue here, the ineffectiveness of trial counsel, due to failure to investigate and present mitigating evidence in the penalty phase, has never been heard on its merits, and directly implicates the reliability of Barnett's sentence.

Id., at *55-56.

CONCLUSION

For all these reasons, and those stated in his accompanying brief, this Court should issue of Stay of Execution.

Respectfully submitted this 23rd day of September, 2013.

By: /s/ *Kelley J. Henry*
Kelley J. Henry
Denise I. Young

Counsel for Edward H. Schad

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

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