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

REPLY BRIEF OF EDWARD HAROLD SCHAD
(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

Appellee repeats the same incorrect legal arguments throughout his brief. Rather than waste this Court's time in this expedited appeal, Appellant will address the arguments only once. Schad will not repeat arguments he has already made.

I. THE MERITS OF SCHAD'S MENTAL ILLNESS CLAIM WAS NOT FINALLY ADJUDICATED ON THE MERITS BY THIS COURT ON INITIAL SUBMISSION

The only IAC claim that this panel decided on the merits in the habeas appeal was the inadequate PSR claim. We know this, because: a) this Court has said so, "We did not review the claim on appeal…" *Schad*, No. 07-99005, 2013 WL 791610, *2;"[1] b) Appellee agreed to this proposition, ER 187; and c) the history of this courts opinions bear that out. This Court withdrew its opinion respecting the defaulted mental illness claim. That withdrawn opinion was not one on the merits, but a remand for further factual development because the claim had not been presented to the state court.

We also know that the majority of this panel disagreed with the alternative merits *dicta* of the lower court. Appellee would like to pretend that the District Court is *superior* to this Court. He argues that it is a waste of time to send the case

[1] This Court's statement that it did not review Schad's claim on the merits (because it was not available for federal review as it was not presented to the state courts on initial post-conviction review) confirms that the District Court likewise had no power to adjudicate the claim on initial submission. Anything the lower court said in that regard was thus *dicta*.

back to the District Court because we know what she thinks. That argument is lacking in legal support. If Appellee's argument were true, no Court of Appeals would ever remand a case to the district court they reversed. Appellee assumes that the district court will defy this Court's order. Such a proposition is ludicrous.

II. THE LAW OF THE CASE DOES NOT PRECLUDE RELIEF; RESPONDENT'S INTERPRETATION OF THE HOLDING IN *SCHAD v. RYAN*, 133 S.Ct. 2548 (2013) IS MISTAKEN AT BEST, DISINGENUOUS AT WORST

A. This Panel Has Not Already Decided The *Martinez* Issue

Appellee spends the vast majority of his brief repeating his argument that the Ninth Circuit has already decided the question of the applicability of *Martinez* to Schad's claim by its July, 2012, order denying Schad's Motion to Remand his Appeal to the District Court. This courts 2012 order did not address whether, if at all, *Martinez* applied to Schad's case. The order simply denied a procedural request. Schad asked for a remand in a post-rehearing motion. The panel denied the request to remand the case. They did so in an unexplained order. The Order reads: "The petitioner-appellant's Motion to Vacate Judgment and Remand to the District Court is DENIED." *Schad v. Ryan*, No. 07-99005, Docket Enty No. 90.

On its face, the order is one denying a procedural request rather than a ruling on the merits of the application of Martinez to Schad's claim.[2] The order is both

[2] Appellee opposed the motion on procedural grounds. *Schad v. Ryan*, No. 07-99005, Docket Entry No. 90, Response, pp. 2-3 (arguing that the motion to vacate is an unauthorized and untimely second petition for rehearing).

reasonable and sensible in light of the procedural history in Schad's case. After issuing its opinion in 2011, this Court initially refused to entertain a petition for rehearing in Schad's case. "Petitioner-appellant's motion for leave to file petition for rehearing and rehearing en banc is DENIED." *Schad v. Ryan*, No. 07-99005, Docket Entry No. 80. Schad successfully obtained a reversal of that order and an en banc petition was filed. A response to the petition was ordered. The Petition was ultimately denied. In it February 28, 2012, order denying Petitioner's request for rehearing and rehearing en banc, the Court explicitly warned, "Further petitions for rehearing and rehearing en banc **shall not be entertained**." *Schad v. Ryan*, No. 07-99005, Docket Entry No. 86 (supplied).

The order denying Schad's request to vacate the court's opinion and remand the case cannot be fairly construed as law of the case, or *res judicata*.

B. The Supreme Court's Opinion Did Not Address the Merits of the Martinez Issue And Is Not Law of the Case

The Supreme Court's recent opinion in Schad's case cannot be fairly construed as commenting on the availability of equitable relief under Rule 60(b). The Supreme Court was asked to review the panel's deviation from normal mandate procedures. The Court began its analysis of this sole issue by noting that the default rule is "[t]he court of appeals *must issue the mandate immediately* when a copy of the Supreme Court order denying the petition for writ of certiorari is filed." *Ryan v. Schad*, 132 S.Ct. 2548, 2550 (2013), *quoting* Fed. R. App. P. 41

(d)(2)(D)(emphasis added by the Court). The Court went on to emphasize that "[d]eviation from normal mandate procedures is a power of 'last resort, to be held in reserve against grave, unforeseen contingencies.'" *Id.* at 2551, *quoting Calderon v. Thompson*, 523 U.S. 538, 550 (1998). The Court went on to caution that assuming arguendo that the lower appellate courts have the authority to withhold the mandate, it will hold the courts to a standard of "extraordinary circumstances that could **constitute a miscarriage of justice**." *Id.* (emphasis added). A miscarriage of justice standard requires a habeas petitioner to establish actual innocence of the offense. *See House v. Bell*, 547 U.S. 518 (2006); *Schlup v. Delo*, 513 U.S. 298 (1995). Schad's claim did not present a case of actual innocence.

Nowhere in its opinion does the Court pass on the substance of Schad's *Martinez* argument. Nothing in the opinion can fairly be read to apply to the equitable motion under Rule 60(b) presented here.

The subsequent history in the case of *Thompson v. Bell*, 545 U.S. 794 (2005) illustrates the point. Thompson's case also presented a situation where a court of appeals revisited its opinion after the Supreme Court denied certiorari but before issuing its mandate. There the Supreme Court held the Court of Appeals had abused its discretion in not issuing the mandate. In *Thompson*, the Supreme Court noted that the evidence that caused the Court of Appeals to revisit its opinion was

"not of such a character to warrant the Court of Appeals' extraordinary departure from standard appellate practice." *Id.* at 808-809. The Court goes on at some length to discuss just how the evidence would not have likely led to relief, going so far as to observe, "Thompson still would have faced an uphill battle to obtaining federal habeas relief." *Id*.

Importantly, for this Court's purposes, the Supreme Court went on to describe the fact that Thompson had ongoing proceedings in the federal district court and that "the District Court will have an opportunity to address these matters again and in light of the current evidence." *Id.* at 813. Thompson's ongoing proceedings were under a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). *Thompson v. Bell*, No. 4:98-cv-00006, Docket Entry No. 149 (E.D. Tenn. June 4, 2004). Thus, the Court clearly understood that its opinion was relevant only to the procedural question.

So it is here.

III. SCHAD MEETS THE *MARTINEZ* TEST

Here again, Appellee wants to pretend as if this panel has somehow changed its mind. This panel has already determined that Schad has a valid issue under *Martinez* and his underlying claim is substantial. Appellant's Opening Brief supports that conclusion. Relying on the lower court to dispute what the superior court has said is simply disrespectful to this Court. If Appellant has presented a

valid 60(b) motion, i.e. not an unauthorized second or successive petition, then we already know that he has a valid defense to procedural default pursuant to Martinez and he ought to be allowed to present that argument in the district court.

IV. THE *PHELPS* FACTORS

It is unclear why Appellee quarrels with the application of the *Phelps* test. *Phelps v. Alameida*, 569 F.3d 1120, 1141 (9th Cir. Cal. 2009). No matter what test is applied, this case is extraordinary and applying the case-by-case analysis required by Gonzalez, equity favors Schad.

Change in law: Appellee ignores that the law did not change until after Schad had been denied relief and after this Court had made clear it would not tolerate any more petitions to rehear. His position is no different position from the habeas petitioners in Lopez, Cook, and Barnett.

Diligence: Appellee has been diligent in attempting to litigate his underlying IAC claim and answering, to the best of his ability, the procedural road blocks in his path. He cannot be faulted for failing to make futile arguments.

Finality[3] *and Comity*: Appellee simply ignores what the Supreme Court observed in *Gonzalez*, Rule 60(b) is an exception to finality and so does not hold much weight. Here, Appellee's interest is not great where the death sentence is

[3] *The victim's family has never voiced support for the death sentence here.*

unconstitutional and where the opinion in Schad's habeas case may well be overturned in a matter of weeks or a few short months by the en banc court.

Close Connection: Appellee's argument that there is no close connection between *Martinez* and Schad's mental illness claim ignores the fact that two members of this Court saw the connection in February of 2013. The connection is clear. Schad's mental illness claim was not presented to state court. As a result, it was not finally decided by this Court on appeal. Schad did not have a defense to the procedural default on initial submission, but he surely does now as a result of *Martinez*.

Delay: Appellee agrees that Schad did not delay in presenting his claim to the district court. Further delay in the execution of Schad is not undue where he has a substantial constitutional claim that his capital sentence is unreliable due to ineffective assistance of sentencing counsel. This factor weighs in Schad's favor.

V. CONCLUSION

Schad does not present an unauthorized second or successive petition, the law of the case does not preclude his motion, and he presents a solid argument to excuse his procedural default of his mental illness IAC claim under *Martinez*.

Respectfully submitted this 1st day of October, 2013.

Kelley J.Henry

Denise I. Young

BY: /s/ Kelley J.Henry

CERTIFICATE OF COMPLIANCE

I hereby certify that appellant's reply brief contains 1723 words and is in compliance with the Word limits imposed by the Rules of this Court.

/s/ Kelley J. Henry

Attorney for Edward Schad

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 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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