

**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
REPLY TO RESPONSE TO MOTION FOR STAY OF EXECUTION

Denise I. Young
Attorney at Law
2930 North Santa Rosa
Tucson, AZ
(520) 322-5344
Dyoung3@mindspring.com

Kelley J. Henry
Supervisory AFD-Capital Habeas
Federal Public Defender's Office
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, TN 37203
(615) 337-0469
Kelley_henry@fd.org

Counsel for Edward Harold Schad

**REPLY TO RESPONSE TO
MOTION FOR STAY OF EXECUTION
OF OCTOBER 9, 2013 EXECUTION DATE**

As an initial matter, Respondent's response to Schad's Motion for Stay was filed outside the parameters of this Court's scheduling order and without request for leave to file out of time or for a continuance.

Second, Schad's Reply Brief explains that he has not presented a second or successive petition. He presents a valid basis to reopen judgment pursuant to Rule 60(b). He could not file a ripe motion until the mandate issued in this court re-vesting jurisdiction. There has been no abusive delay.

Finally, the state's interest in finality is not strong where the State appointed ineffective counsel for Schad, twice, and seeks a windfall by executing him pursuant to an unconstitutional sentence. Moreover, as the Supreme Court stated in *Gonzalez*, Rule 60(b) is an equitable exception to finality. The whole purpose of rule 60(b) is to provide an exception to finality when justice requires.

Justice requires it here.

CONCLUSION

For all these reasons, and those stated in Schad's opening and reply briefs, this Court should issue of Stay of Execution.

Respectfully submitted this 1st day of October, 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 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:

Jon Anderson
Jeffrey Zick
Assistant Attorney Generals
1275 W. Washington
Phoenix, AZ 85007-2997

/s/ Kelley J. Henry

Attorney for Edward Schad