

No. 13-16895

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EDWARD HAROLD SCHAD,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA,
No. CV-97-02577-PHX-ROS

**RESPONSE TO PETITIONER-APPELLANT SCHAD'S MOTION FOR
A STAY OF EXECUTION**

Thomas C. Horne
Attorney General
(Firm State Bar No. 14000)

Jeffrey A. Zick
Chief Counsel

Jon G. Anderson
Assistant Attorney General
Capital Litigation Section
1275 West Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686
Jon.anderson@azag.gov
CADocket@azag.gov
State Bar Number 005852 Attorneys for
Respondents-Appellees

MEMORANDUM OF POINTS AND AUTHORITIES.

A. A STAY IS NOT WARRANTED.

Schad's motion for stay is based on the alleged merits of his appeal from the district court's denial of Rule 60 relief. This Court appropriately set an expedited briefing schedule on the appeal to expedite a ruling. To obtain a stay of execution, an inmate must make a clear showing, carrying the burden of persuasion, that he has a significant possibility of success on the merits. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). For the reasons discussed in Respondent's Answering Brief, this Court should affirm the district court's ruling, and, for the same reasons, deny a stay. *See Towery v. Ryan*, 673 F.3d 933, 947 (9th Cir. 2012).

There has been a full round of state and federal review of Schad's convictions and sentences for a murder that occurred in 1978. Equity must be sensitive to the State's strong interest in enforcing its criminal judgments[.]” *Hill*, 547 U.S. at 584. “Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.” *Id.* *See also Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Finally, there is no basis to grant the stay because Schad's Rule 60 motion is a barred second or successive petition, as found by the district court, because it presents an issue already decided in the first federal habeas proceedings. Schad's first scheduled execution was stayed by this Court on the same basis as the

currently at-issue denial of the Rule 60 motion. In *Hill*, the Supreme Court held the prisoner had satisfied the requirements for a stay, but that was because it found his claims regarding the method of legal injection stated a cognizable claim under Section 1983, and thus did not constitute a barred second or successive petition. 547 U.S. at 579-583.

“[A] stay of execution is an equitable remedy.” *See Hill*, 547 U.S. at 584; *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). Equity does not tolerate last-minute abusive delays “in an attempt to manipulate the judicial process.” *Nelson*, 541 U.S. at 649 (quoting *Gomez*). “Repetitive or piecemeal litigation presumably raises similar concerns” as litigation that is “speculative or filed too late in the day.” *Hill*, 547 U.S. at 585. *See also Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (*per curiam*) (noting that the “last-minute nature of an application” or an applicant’s “attempt at manipulation” of the judicial process may be grounds for denial of a stay). Because Schad raises claims that were the subject of the first habeas proceedings, this Court should deny his motion to stay the execution.

B. CONCLUSION.

For the above reasons, Respondent respectfully requests that this Court deny Schad's motion for a stay of execution.

DATED this 30th day of September, 2013.

Respectfully submitted,

Thomas C. Horne
Attorney General

Robert Ellman
Solicitor General

Jeffrey A. Zick
Chief Counsel

s/ JON G. ANDERSON
Assistant Attorney General
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 30, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Barbara Lindsay
Legal Secretary
Criminal Appeals/
Capital Litigation Division
1275 West Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686

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