No. 13-16895

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN, Director, Arizona Department of Corrections,

Respondent-Appellee.

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 PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC, AND MOTION FOR STAY OF EXECUTION.

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I. SUMMARY OF ARGUMENT

Schad argues that this Court's latest opinion erred by upholding the district court's ruling that Schad's Rule 60(b)(6) motion to that court constituted a barred second or successive petition. First, Schad's petition for rehearing is barred by AEDPA's Section 2244(b)(3)(E). Second, the panel majority's ruling was correct and need not be reconsidered. Third, for the reasons stated in Judge Graber's concurrence, besides being a barred second or successive petition, the Rule 60 motion was meritless because the *Martinez* issue had already been decided against Schad, which constituted the law of the case. Finally, this Court should deny Schad's motion for a stay of execution.

II. STATEMENT OF THE CASE

The relevant procedural history of this case been set forth in the Supreme Court's most recent opinion in this case, *Schad v. Ryan*, No. 13-16895, Slip op. at 2-4), and *Ryan v. Schad*, 133 S. Ct. 2548 (2013).

III. ARGUMENTS REGARDING REHEARING.

A. *Section 2244(b)(3)(E) bars the petition for rehearing.*

Preliminarily, this Court lacks jurisdiction to consider the petition, because AEDPA Section 2244(b)(3)(E), which provides that a court of appeals order denying leave to file a second habeas shall not be the subject of a petition for rehearing or a petition for a writ of certiorari. *See Felker v. Turpin*, 518 U.S. 651, 665 (1996) (dismissing petition for writ of certiorari for want of jurisdiction).

This Court has repeatedly followed the section in cases involving second or successive petitions in stating that its denial of relief on a second or successive habeas petition was not to be the subject of a petition for rehearing. *See, e.g., Bible v. Schriro*, 651 F.3d 1060, 1066 (9th Cir. 2011); *King v. Trujillo*, 638 F.3d 726, 733 (9th Cir 2011); *Cook v. Ryan*, 623 F.3d 1253, 1258 fn.7 (9th Cir. 2010).

Schad may argue those cases only apply when the prisoner makes an application for permission to file a second or successive habeas application; he should not benefit from having failed to seek such authorization from this Court, but rather simply filing his Rule 60 motion with the district court. The district court concluded that the Rule 60 motion constituted a "second or successive petition that may not be considered by this Court absent authorization from the Court of Appeals for the Ninth Circuit. *Schad v. Ryan*, 2013 WL 5276407, at *1 (D. Ariz. Sept. 19, 2013). This Court held: "The district court correctly dismissed the Rule 60(b) motion as a second or successive petition." Slip op. at 7. Accordingly, this Court's denial of relief was necessarily a denial of permission to file a second or successive application for habeas relief, and the filing of a petition for rehearing is barred by Section 2244(b)(3)(E).

B. *The panel majority correctly found the Rule 60 motion constituted a barred second or successive petition.*

The panel majority correctly noted that Claim P was Schad's federal habeas claim for ineffective assistance of counsel at sentencing, regarding which he

offered substantial new material, including information from two mental health experts. Slip op. at 6-7. The district court order has an even more extensive discussion of the development of Claim P. 2013 WL 5276407, at **1-2, **5-6. It noted that Respondent did not assert the defense of procedural default with regard to the relevant part of Claim P. *Id.* at *6. It noted that this Court's third amended opinion had affirmed the district court's denial of Claim P on the merits. *Id.* at 6, citing *Schad v. Ryan*, 671 F.3d 708, 721-722 (9th Cir. 2011). Schad does not show these discussions, or conclusions drawn therefrom, are incorrect.

Instead, Schad simply relies on the dissenting opinion. The defect in that opinion is that there was never a theory that Claim P's claim of ineffective assistance of counsel at sentencing by failing to develop and present mitigation evidence did not include a separate claim of IAC-sentencing by failing to develop and present mental health evidence at sentencing. That supposedly separate claim did not rear its head until after this Court failed to promptly issue its mandate, and, in its order of February 26, 2013, for the first time concluded that there had been a previously undiscovered separate claim of IAC-sentencing by failing to present mental health evidence. *See Schad v. Ryan*, 2013 WL 791610. That opinion was, of course, vacated by the Supreme Court in *Ryan v. Schad*. This Court's following mandate issued from the third amended opinion, which upheld the district court's denial of Claim P. The district court ruled as follows on Claim P:

> Petitioner has failed to show that the PCR court's denial *of his claim of IAC at sentencing* was an unreasonable application of federal law. The Court further finds, with respect to Petitioner's attempt to introduce factual information that was not presented to the state court, Petitioner was not diligent in developing these facts. See infra, pp. 82-84. Moreover, the Court finds that even if Petitioner had been diligent *and the new materials were properly before the Court, Claim P is without merit*.

Schad v. Schriro, 454 F.Supp.2d 897, 940 (D. Ariz. 2006) (emphasis added).

Thus, there never was a separate IAC-sentencing-mental health claim, but rather merely Schad's attempt to take advantage of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which, however, could not aid Schad unless there were a procedural default that needed excusing. Accordingly, the district court and the panel majority properly found the Rule 60 motion was a barred second or successive petition.

The recent opinion in *Detrich v. Ryan*, 2013 WL 4712729 (9th Cir. 2013), does not provide cause for rehearing. First, Schad's original habeas proceeding was final before that opinion issued, and the denial of relief under *Martinez* was already the law of the case. Second, *Detrich* does not aid Schad, but rather supports Respondent. Both the plurality and dissenting opinions in *Detrich v. Ryan*, "*Martinez* does not apply to claims that were not procedurally defaulted, but were, rather, adjudicated on the merits in state court." 2013 WL 4712729, at *7 (9th Cir. 2013) (plurality opinion). *See also id.* at *28 (Graber, J., dissenting) (holding of *Martinez*—that procedural default of an IAC claim can be excused if it was due to PCR counsel's ineffectiveness—"has no application when the claim was *not*

defaulted") (emphasis in original). *Martinez* was an issue in *Detrich* because the district court had held that several of the prisoner's claims of ineffective assistance by trial counsel were procedurally defaulted for his failure to raise them in state PCR proceedings. 2013 WL 4712729, at *1.

Nor does any pending ruling in *Dickens v. Ryan*, No. 08-99017, aid Schad. Once again, Schad's first habeas proceeding is final, and denial of *Martinez* relief is the law of the case. Also, this Court rejected the relevancy of any pending ruling in *Dickens*, when Schad, before the previous execution date, filed with this Court an Emergency Motion to Continue Stay of the Mandate Pending En Banc Proceedings in *Dickens v. Ryan*, No. 08-99017. This Court denied the motion, although deciding to reconsider its prior denial of Schad's *Martinez* motion. Regarding the *Dickens* motion, this Court said it was "declin[ing] to issue an indefinite stay of the mandate that would unduly interfere with Arizona's execution process." (2013 order, quoted in *Ryan v. Schad*, 133 S. Ct. at 2550.) That logic applies *a fortiori* at this late date.

Finally, the panel majority's opinion does not conflict with *Lopez v. Ryan*, 677 F.3d 958 (9th Cir. 2012), or *Cook v. Ryan*, 688 F.3d 598 (9th Cir. 2012). The ruling in this case, regarding the scope of Claim P, is very case-specific and does not conflict with any rule of law in those two opinions.

Unlike *Lopez*, where the *Martinez* claim was being presented to the federal

courts for the first time in a Rule 60 motion, Schad presented the *Martinez* issue to this Court after it issued the third amended opinion; this Court summarily rejected it, after which the Supreme Court denied his petition for certiorari review based on *Martinez*. *Cf. Lopez*, 678 F.3d at 1136 ("Until the Supreme Court decided *Martinez* after Lopez's federal proceedings had become final, Lopez had never pursued the theory that he now advances.) In *Cook*, 688 F.3d at 600-01, this Court explained why Cook had not been previously able to raise a *Martinez* claim to this Court, and had rather first presented it to the district court pursuant to Rule 60. 688 F.3d at 600-01.

In this case, not only was the Rule 60 motion not Schad's first opportunity to raise the *Martinez* issue, this Court's 2012 Order rejecting Schad's *Martinez* motion is the law of the case regarding this issue. Schad is not entitled to have this Court re-revisit the already-decided *Martinez* issue under the guise of a Rule 60(b) motion.

C. *The inapplicability of Martinez is the law of the case.*

Moreover, as discussed in Judge Graber's concurrence, the denial of Rule 60 relief was also warranted because of the law of the case. (Graber, J., concurring, at 1.) This Court's third amended opinion affirmed Claim P, and it later denied Schad's *Martinez* motion. Those decisions are the law of the case. Schad is simply asking this Court to "revisit an argument" that this Court "already explicitly

rejected." *Ryan v. Schad*, 133 S. Ct. at 2552. Because this Court denied *Martinez* relief in 2012, and because the Supreme Court recently held that this Court abused its discretion by adopting the same *Martinez* argument it had previously rejected, it is the law of the case that Schad cannot obtain relief under *Martinez.*

"The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Harrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993). *See also United States v. Cade*, 236 F.3d 463, 467 (9th Cir. 2000) (law of the case "requires courts to follow a decision of an appellate court on a legal issue in all later proceedings in the same case"); *Odom v. United States*, 455 F.2d 159, 160 (9th Cir. 1972) ("The law in this circuit is clear that, when a matter has been decided adversely on appeal from a conviction, it cannot be litigated again on a 2255 motion.").

IV. THIS COURT SHOULD DENY A STAY.

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). 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).

"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).

Finally, for the same reasons that denial of Schad's Rule 60 motion as a second or successive petition was proper, this court should deny a stay. *See Towery v. Ryan*, 673 F.3d 933, 947 (9th Cir. 2012).

V. CONCLUSION

Respondent respectfully requests this Court to deny Schad's petition for rehearing and suggestion for rehearing en banc, and his motion for a stay.

DATED this 5th day of October, 2013.

Respectfully submitted,

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s/ Jon G. Anderson
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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 October 5, 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.

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