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
PETITION FOR PANEL REHEARING; SUGGESTION FOR REHEARING EN BANC; AND MOTION FOR STAY OF EXECUTION

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I. THIS COURT HAS JURISDICTION TO CONSIDER THE PROCEDURAL QUESTION OF *WHETHER* SCHAD PRESENTS A "TRUE" MOTION PURSUANT TO RULE 60(B)

Appellant's jurisdictional argument is flatly wrong.[1] The Supreme Court shut down this line of argument in his predecessor's case, *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). There the Supreme Court held that §2244(b) did not deprive the Court of jurisdiction to consider the procedural question of whether a filing constituted a second or successive petition. That holding was reinforced by *Gonzalez v. Crosby*, 545 U.S. 524 (2005), where the Supreme Court accepted certiorari to answer the procedural question whether every rule 60(b) motion was a second or successive petition.

The petitioner in *Gonzalez* was in the exact same position as Schad is today. Gonzalez's motion for relief from judgment pursuant to Rule 60(b) was denied by the district court as a second or successive petition under 28 U.S.C. § 2244. The Eleventh Circuit affirmed. The Supreme Court accepted certiorari and held that a motion made pursuant to Rule 60(b) does not present a barred second or successive petition where "[t]he motion here, like some other Rule 60(b) motions in § 2254 cases, confines itself not only to the first federal habeas petition, but to a nonmerits aspect of the first federal habeas proceeding. Nothing in *Calderon* suggests that

[1] The district court dismissed Schad's Rule 60(b) motion, it did not transfer it to the Court as a second or successive petition. The district court's decision was a final appealable order.

entertaining such a filing is 'inconsistent with' AEDPA." *Gonzalez*, 545 U.S. at 534.

If Appellee's position had any merit, the Supreme Court would have been without jurisdiction in both cases. Schad does not challenge the "grant or denial" of authorization to file a successor habeas petition. This Court has jurisdiction. §28 U.S.C. 2244(b)(3)(E) states that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." On its face, the statute does not bar petitions that ask for reconsideration of jurisdictional questions or procedural aspects involving how the panel reached its ultimate conclusion.

Schad does not seek *en banc* review of the panel's decision to grant or deny authorization to file a successor habeas petition. Rather, Schad seeks review of the procedural issue whether the panel was correct that his motion constituted a second or successive petition. This is a distinction that makes a difference. Appellee's spurious and disingenuous argument attempts to mislead the Court on the law and waste this Court's time.

Perhaps the reason Appellee so misleads the Court is to detract attention from the fact that the panel opinion does, in fact, conflict with *Lopez v. Ryan,* 677 F.3d 958 (9th Cir. 2012), and *Cook v. Ryan*, 688 F.3d 598 (9th Cir. 2012), where

each panel of this Court separately acknowledged that a habeas petitioner who files a motion pursuant to Rule 60(b) raising a procedural defense under *Martinez* that was not previously available[2] is not barred by §2244(b)(3). *En banc* review is necessary to secure uniformity of decisions.

II. THE MENTAL ILLNESS CLAIM HAS ALWAYS BEEN PROCEDURALLY DEFAULTED. APPELLEES IGNORE THEIR OWN HISTORY OF RAISING THE DEFENSE OF NON-EXHAUSTION.

Appellee fails to acknowledge, or explain, his vigorous and successful efforts to exclude the evidence that supported the mental illness claim from federal habeas review because the evidence was not exhausted. *See* Petition at 7.[3] It is because of his efforts to exclude the evidence that the mental illness claim was not addressed on appeal. There was no discussion of the mental illness claim by the panel in the third amended opinion. The panel did not decide the claim on initial submission precisely because the evidence was excluded from habeas review for non-exhaustion at the urging of Appellee.[4] The claim only became available for

[2] Appellee claims that the *Martinez* defense was previously available to Schad and that his motion to remand proves the point. He is incorrect. *Martinez* was decided after the Court's third amended opinion and after the petition for rehearing was denied. The first real opportunity for Schad to present his *Martinez* defense was in a Rule 60(b) Motion that was filed **immediately** upon jurisdiction being re-vested with the district court.

[3] In the district court, Appellee admitted that his previous position in this litigation was that the evidence presented by Schad fundamentally altered the claim in such a way that it was an unexhausted, defaulted, new claim. Response, p. 10. In initial proceedings, Appellee argued that Schad's new evidence placed his claim in a different evidentiary posture, "violating the exhaustion requirement." R. 116, p. 4 (Respondent's Opposition To Motion To Expand Record).

[4] **We did not review the claim on appeal…**" *Schad*, 07-99005, 2013 WL 791610, *2 (supplied).

habeas review as a result of the change in procedural law brought by *Martinez*. *Martinez* has turned habeas procedure on its head, which is exactly why Schad presents a proper 60(b) motion and this Court should grant *en banc* review.

Detrich v. Ryan, 2013 WL 4712729, does not support Appellee. *Detrich* rejected the position of the panel majority that a general IATC claim encompasses all claims. *Detrich* instead supports the reasoning of the dissent here that a decision on an IATC claim that is based on different facts, different deficiencies, and different legal theories is a different claim.[5] This issue is at the very core of the dispute between the majority and dissent. If the dissent is correct, and the reasoning of *Detrich* says it is, then the panel majority is incorrect and *en banc* review is necessary to secure uniformity of this Court's decisions.

III. THE SUBSTANCE OF SCHAD'S MARTINEZ ARGUMENT WAS NOT PREVIOUSLY DECIDED BY THE PANEL OR THE SUPREME COURT

A. THE PANEL'S UNREASONED JULY, 2012 ORDER DENYING SCHAD'S MOTION TO REMAND TO THE DISTRICT COURT WAS THE DENIAL OF A PROCEDURAL REQUEST, NOT A RULING ON THE APPLICABILITY OF *MARTINEZ*

Appellee is incorrect when he claims that the panel 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. The panel's 2012 order

[5] Appellee fails to explain the relevance of the fact that *Detrich* was decided after Schad's habeas appeal became final on August 30, 2013. There is no relevance. The plain fact is the panel majority's October 4, 2013 opinion at issue here is in conflict with the September 3, 2013 *en banc* decision of this court.

did not address whether, if at all, *Martinez* applied to Schad's case. The order simply denied a procedural request. Slip op at 19, n. 2.

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.[6] The order is both reasonable and sensible in light of the procedural history in Schad's case. After issuing its opinion in 2011, the panel 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).

[6] 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).

The July, 2012 Order was not a decision on the legal issue of the applicability of *Martinez* to Schad's mental illness claim. The panel majority did not accept Appellee's "law of the case argument." Judge Reinhardt made plain that the panel had denied the motion on procedural grounds. Slip op at 19, n.2. The author of the majority opinion did not disagree.

B. THE SUPREME COURT'S OPINION DID NOT ADDRESS THE MERITS OF THE MARTINEZ ISSUE AND IS NOT LAW OF THE CASE

The applicability of *Martinez* as a defense to Schad's procedurally defaulted claim was not a question before the Supreme Court. The Supreme Court's recent opinion in Schad's case did not comment on the availability of equitable relief under Rule 60(b). The Court's opinion was limited to a question of appellate procedure.

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 cautioned 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.* (supplied). 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 sentencing claim did not present a case of actual innocence.[7]

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 presented a situation where a court of appeals revisited its opinion after the Supreme Court denied certiorari but before issuing its mandate. The Supreme Court held the Court of Appeals had abused its discretion in not issuing the mandate. In *Thompson*, the 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 (supplied). The Court also went on to discuss just how the evidence would not have likely led to relief, going so far as to observe

[7] To be clear, Schad has always maintained innocence and this is a purely circumstantial case.

that Thompson still would have faced an uphill battle in obtaining federal habeas relief. *Id*.

Importantly, the Supreme Court observed 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 (supplied). 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). The Court understood its opinion was relevant only to the procedural question and would not bar relief under 60(b).

So it is here.

IV. A STAY IS WARRANTED

Appellee accuses Schad of delay. Schad has attempted at every step to promptly prepare and present his arguments supporting relief. Appellee admitted in the lower court that the district court did not have jurisdiction over his 60(b) motion until the mandate issued which was not until August 30. Appellee forced the urgent nature of this appeal by seeking a warrant for execution during a time in which a valid stay of execution was still in effect.

V. CONCLUSION

In a matter of days or weeks, this *en banc* court may overturn Schad's case and issue an opinion that makes plain his right to rule 60(b) relief. The panel majority's analysis is mistaken. Rehearing and a stay are in order.

Respectfully submitted this 6th day of October, 2013.

Kelley J. Henry

Denise I. Young

BY: */s/ Kelley J. Henry*

Counsel for Mr. Schad

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Reply to Response to Consolidated Petition for Rehearing and Suggestions for Rehearing *En Banc* and Motion for Stay of Execution contains 2096 words.

/s/ Kelley J. Henry
Counsel for Mr. Schad

CERTIFICATE OF SERVICE

I hereby certify that on the 6th 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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