No. 13-6790

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD HAROLD SCHAD,
PETITIONER,
-vs-
CHARLES L. RYAN, Warden,
RESPONDENT.

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR STAY.

RESPONSE IN OPPOSITION AND OPPOSITION TO MOTION TO STAY EXECUTION.

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Having failed to explain why he has not properly raised the issues in his petition for an original writ of habeas corpus in the usual course of proceedings under 28 U.S.C. § 2254, has Schad established the exceptional circumstances necessary to warrant this Court's exercise of jurisdiction under 28 U.S.C. §§ 2241 and 2242?

THIS COURT SHOULD DENY THE ORIGINAL WRIT.

I. FACTS.

As this Court is well aware of the facts of this case, having rendered an opinion earlier this year, Respondent will not repeat them here, except to note that in 1978 Schad murdered the victim, Lorimer Grove, a 74-year-old resident of Bisbee, Arizona, who was driving his new Cadillac and a trailer to visit his sister in Everett, Washington.

II. PROCEDURAL HISTORY.

This Court's recent unanimous *per curiam* opinion, which summarily reversed the Ninth Circuit's previously granting Schad relief pursuant to *Martinez*, concisely sets forth the procedural history of this case, and Respondent need not repeat it here. *See Ryan v. Schad*, 133 S. Ct. 2548, 2549-2550 (2013).

REASONS FOR DENYING THE WRIT

At this last minute, Schad presents a grab-bag of reasons why this Court should grant an original writ of habeas corpus and stay the execution. This case has been the subject of decades of state and federal litigation. None of the various arguments Schad now makes justify any relief, including a stay.

In *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996), this Court noted the limitations imposed on successive federal habeas petitions under Section 2254, and stated that "[t]hese restrictions apply without qualification to any 'second or successive habeas corpus application under section 2254.'" *Id.* at 662. In addressing the interplay between Section 2254 and Section 2241, this Court noted that "[w]hether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions." *Id.* at 663. Furthermore, "[t]he added restrictions which [Section 2254] places on second habeas petitions are well within the compass of [the evolving body of equitable principles underlying federal habeas proceedings] and we hold that they do not amount to a 'suspension' of the writ. . . ." *Id.*

This Court further noted that Rule 20.4(a) delineates the standard under which an original writ may be granted:

> A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.

Id.

Schad has not proffered any reason for not making his current claims part of his original federal habeas proceedings. He should not be permitted

to sidestep the restrictions Congress has imposed on successive petitions to raise a claim that could have been pursued years ago. *Cf. Rice v. Lamana*, 451 F.Supp.2d 755, 763 (D.S.C. 2006) ("Congress saw fit to limit the availability of Section 2255 petitions, and the United States Supreme Court determined in *Felker* [ ] that Congress was within its right to do so under the AEDPA. To determine that Congress limited the availability of Section 2255 on the one hand, but intended to allow petitioners the availability of the Writ under Section 2241 on the other hand, would clearly be contrary to the purpose of the AEDPA.").

First, Schad takes this Court to task for barring relief to similarly-situated Arizona capital prisoners in *Summerlin v Schriro*. 542 U.S. 348 (2004). But he has not properly litigated any attempt to get this Court to overrule that opinion, and presents insufficient reason here to overrule it.

Second, he complains that DNA has made juries skeptical of convicting and sentencing a man to death based on circumstantial evidence. But the circumstantial evidence here is strong, the Ninth Circuit stating in its third amended opinion: "This is a case with strong circumstantial evidence pointing to the defendant's guilt and no one else's." *Schad v. Ryan*, 671 F.3d 708, 711 (9th Cir. 2011).

Third, Schad complains that he does not deserve to die because he has behaved well in prison. But his sentencing counsel presented that theory of mitigation, in fact strongly premised his plea for leniency on his prior good behavior in jail and prison, and the sentencing court and Arizona considered that mitigating evidence and found it not sufficiently substantial to warrant leniency. *See State v.*

Schad, 788 P.2d 1162, 1172 (Ariz. 1989) ("Contrary to the defendant's claim, the trial court did find and consider the defendant's potential for rehabilitation. Nevertheless, the trial court found this to be insufficient to overcome any of the aggravating factors."). The Arizona Supreme Court, on independent review held: "Although the defendant has continued to show exemplary behavior while incarcerated, we do not find this sufficiently substantial to call for leniency. The evidence shows that the defendant strangled a 74-year-old man in order to obtain his vehicle and money. At the time the defendant committed this act, he had previously been found criminally responsible for another person's death. The death penalty is appropriate in this case." *Id.* at 1172.

The years have not changed the appropriateness of the death sentence. The Arizona Supreme Court upheld two aggravating factors, pecuniary gain and the prior murder conviction. *Id.*

Schad claims that the Utah murder conviction was for "consensual sodomy." But, this is far from true; the conviction was for murder. The Arizona Supreme Court rejected his argument that the circumstances of the prior murder were mitigating because the victim experienced "a pleasurable erotic experience before he died." *Schad*, 788 P.2d at 1172. That court stated: "While it is clear that the Utah murder did not display the depravity present in the case at bar, the trial court did not find the circumstances of the murder to be mitigating and neither do we." *Id.*

Schad parrots the report of Dr. Sanislow, whose declaration was considered at some length by the district court in its analysis of Schad's habeas claim P. Respondent will simply cite the district court's extensive discussion of Dr. Sanislow's

declaration in its order denying relief on Claim P.[1] *See Schad v. Schriro*, 454 F. Supp.2d 897, 940-941, and 943-944. Particularly, the district court noted that the new mental health evidence would have undermined Schad's mitigation theory, being "contradictory to the portrait of Petitioner that trial counsel presented at sentencing." *Id.* at 944. The district court also noted that evidence of childhood abuse was of limited value in view of the fact that Schad was 36 years old when he murdered Mr. Groves and had been out of his parental home for some 18 years. *Id.* at 943.

THIS COURT SHOULD DENY A STAY.

Schad repeats the argument that he has made in his other stay motion related to the petition for a writ of certiorari to the Ninth Circuit (No. 13A350), that this Court should stay the execution because another capital prisoner has a case pending on this Court's docket. *Sepulvedo v. Cain*, No. 12-10251.

"[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*).

Both the district court and the Ninth Circuit panel majority recounted the history of Claim P, and concluded that Schad's mental health evidence was submitted in support of Claim P, and was not a separate claim of ineffective assistance of counsel that had been defaulted. This fact and procedurally-intensive

[1] The district court referred to the doctor as Dr. "Stanislaw," but that does not affect the analysis here.

issue cannot be affected by any of the many cases pending before this Court, especially at this late date.

Moreover, the key issue in *Sepulvado* is whether *Martinez* applies to Louisiana. *See In Re Sepulvado*, 707 F.3d 550, 555 (5th Cir. 2013). The Fifth Circuit stated that: "Because *Martinez* is of no moment here, Sepulvado's second-in-time habeas petition is an abuse of the writ and is therefore successive." *Id.* at 556. The Fifth Circuit assumed, without deciding, that Sepulvado's claim was procedurally defaulted. *Id.* at 555. Therefore, *Sepulvado* has no bearing on this case and is no reason to grant a stay at the last minute in this long-litigated case.

D. CONCLUSION.

For the above reasons, Respondent respectfully requests that this Court deny Schad's request for an original writ of habeas corpus and his related motion for a stay of execution.

Respectfully submitted,

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NO APPENDIX