

NO. 11-80283

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

PAUL EZRA RHOADES,

Petitioner,

vs.

RANDY BLADES, Warden, Idaho Maximum Security Institution

Respondent.

CAPITAL CASE

**EXECUTION SCHEDULED
FRIDAY, NOVEMBER 16, 2011 8:00 A.M.**

**MOTION FOR STAY OF EXECUTION
PENDING UNITED STATES SUPREME
COURT DECISION IN *MARTINEZ v. RYAN***

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Paul Ezra Rhoades, through counsel and pursuant to 28 U.S.C. §2244(3)(A) and *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), moves for a stay of execution pending the United States Supreme Court decision in *Martinez v. Ryan*, Dkt. No. 10-1001, to allow him to seek leave from this Court to file successive petitions for habeas relief in his two capital cases based on the imminent decision in *Martinez*. If petitioner in *Martinez* prevails, Mr. Rhoades should be afforded an opportunity to file a successive habeas petition in federal district court to challenge as ineffective his federal habeas counsel's representation in challenging that trial counsel rendered ineffective assistance of counsel. As the same attorney represented Rhoades in trial, appellate, and post-conviction proceedings in each of his two capital cases, federal habeas proceedings provided the first opportunity to challenge trial counsel's representation.

Two death warrants order that Mr. Rhoades be executed on November 18, 2011. Exhibits 1 & 2. His execution is scheduled for 8:00 a.m. Mountain Time on that date.

Mr. Rhoades was sentenced to death in two separate cases, one from Bonneville County, Idaho, and the other from Bingham County, Idaho. This Court affirmed the district court's habeas relief in separate actions arising out of each of

those cases. *Rhoades v. Henry* [Baldwin], 596 F.3d 1170 (9th Cir. 2010); *Rhoades v. Henry* [Michelbacher], 611 F.3d 1133, 1142 (9th Cir. 2010).

A stay is required where the applicant “establish[es] that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. The standard for issuance of a preliminary injunction requires consideration of the same factors. *Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 1761 (2009).

I. RHOADES IS LIKELY TO SUCCEED ON THE MERITS

A. Rhoades Seeks Leave To File A Successive Habeas Petition In Each Of His Capital Cases in Light of *Martinez v. Ryan*.

On October 4, 2011, the Supreme Court heard oral argument in *Martinez v. Ryan*, No. 10-1001. The question presented in *Martinez* is:

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first postconviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

Ex. 3 at 1 (*Martinez v. Ryan*, Petition for Writ of Certiorari (date filed)). The Supreme Court has not issued a decision. It is, however, holding at least six cases presenting the same issue as in *Martinez*, and in a number of those it has granted

stays of execution. *Foster v. Texas*, No. 11-6427 (cert. petition filed September 15, 2011) (stay of execution granted September 20, 2011); *Sanders v. Commonwealth of Kentucky*, No. 11-5941 (cert. petition filed August 16, 2011); *Middlebrooks v. Colson*, No. 11-5067 (cert petition filed June 29, 2011); *Balentine v. State of Texas*, No. 10-11036 (cert. petition filed June 14, 2011) (stay of execution granted June 15, 2011); *Marcel Wayne Williams v. Arkansas*, No. 10-10782 (cert. petition filed May 27, 2011); *Cook v. State of Arizona*, No. 10-9742 (cert. petition filed March 28, 2011) (stay of execution granted April 4, 2011). Exhibits 4 -9 (cert petitions & corresponding Supreme Court docket sheets).

B. Rhoades's First Opportunity To Raise Ineffective Assistance of Trial Counsel Was In Federal Habeas Proceedings.

Petitioner's trial counsel represented him in state appellate and post-conviction proceedings. The Federal District Court excused Rhoades's default of his ineffective assistance of counsel claims in both of his cases, allowing him to raise them for the first time in federal habeas proceedings. Exs. 10 & 11 (orders excusing default); *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001). Petitioner's first opportunity to assert his trial counsels' ineffectiveness was in Federal District Court.

C. If the *Martinez* Petitioner Prevails in the Supreme Court, Then Mr. Rhoades Should Be Afforded An Opportunity To Assert That Counsel Failed To Adequately Raise Trial

Counsel's Ineffectiveness.

If the Supreme Court holds that Martinez is entitled to effective assistance of counsel in raising, at his first opportunity, a claim that trial counsel rendered ineffective assistance and that this new rule is made retroactive, then Petitioner should be afforded an opportunity to file a successive habeas petition. Pursuant to 28 U.S.C. §2244, Mr. Rhoades will have met the threshold.

D. Mr. Rhoades Should Be Permitted The Opportunity
To Show That Federal Habeas Counsel Was Ineffective
In Challenging Trial Counsel's Performance.

This Court affirmed the denial of Mr. Rhoades's habeas petitions in both of his capital cases because federal habeas counsel had presented only "[s]peculation about potential brain dysfunction or disorders[.]" *Rhoades v. Henry*, 596 F.3d 1170 at 1193 (9th Cir. 2010) (Baldwin). The Court found that Rhoades had not established prejudice because his experts "talk in terms of conditions that Rhoades 'likely' has or 'may' have rather than "injuries or conditions that the petitioner actually has." *Id.* The Court relied on this reasoning in denying Rhoades's ineffective assistance of penalty counsel claim. *Rhoades v. Henry*, 611 F.3d 1133, 1142 (9th Cir. 2010) (Michelbacher) ("We considered the same proffer and expert submissions in the Baldwin case, and conclude that they have no greater effect here for the same reasons we explained there.").

In federal habeas proceedings, Mr. Rhoades proffered an expert declaration from a neuropsychologist and another from a psychiatrist. Each expert based his opinions in declarations from lay witnesses and hospital, police, school, and other records. The psychologist opined that Mr. Rhoades may be brain damaged, that he grew up in a family which deprived him of normal development by exposing him repeatedly to violence, and drug and alcohol abuse. Ex. 12 at 39 (Craig Beaver, Ph.D., declaration). He concluded that Mr. Rhoades was genetically predisposed to substance abuse *and* born into an environment characterized by physical and psychological violence. *Id.* at 40. In light of this, Mr. Rhoades's "use of drugs was very likely a form of self-medication [and his] chronic use of methamphetamine may well have damaged his brain in areas critical to impulse control and the ability to think clearly in high pressured situations." *Id.*

The psychiatrist, the second expert, concluded that Mr. Rhoades's "[c]hronic high dose use of methamphetamine may [have led] to serious brain damage and psychiatric disorders." Ex. 13 at 8. The evidence showed that from an early age Petitioner struggled with "[s]everal risk factors associated with addictive disease and substance abuse disorders including genetic predisposition to major mental illness and substance abuse disorders, childhood trauma including emotional neglect, the known presence of physical abuse in one's immediate family, []the

known presence of unwanted sexual contact in one's immediate family ... [and the lack of] any form of adequate parental supervision during his developmental years." *Id.* at 6. The psychiatrist concluded, as a working assessment likely to be confirmed with the accumulation of further information, that Petitioner suffers Post-Traumatic Stress Disorder, Mood Disorder Not Otherwise Specified, Cognitive Disorder Not Otherwise Specified, Substance Induced Mood Disorder, and Substance Induced Psychotic Disorder. *Id.* at 5-6, 20.

Mr. Rhoades has been unable to undergo brain damage testing after this Court's decisions. Idaho statutes forbid any such testing absent a court order. Idaho Code §192705. Further, the federal district court was without jurisdiction to consider a motion for an order allowing Mr. Rhoades to be tested.

Mr. Rhoades cannot be expected to establish through his federal habeas counsel that they were ineffective in his initial federal habeas proceedings. *Hoffman* at 531-32. New counsel should be appointed to allow Mr. Rhoades to fully and fairly show that his initial federal habeas counsel was ineffective in challenging his trial counsels' performance.

II. ABSENT A STAY, MR. RHOADES WILL SUFFER IRREPARABLE HARM.

Should Mr. Rhoades's execution move forward, he will suffer irreparable harm because he will be killed without an opportunity to litigate whether counsel

who litigated trial counsel's ineffective assistance of counsel himself was ineffective. It appears very likely that counsel was ineffective in failing to have Mr. Rhoades tested for brain damage.

III. THE BALANCE OF EQUITIES TIPS IN MR. RHOADES'S FAVOR.

Until now, Mr. Rhoades has been unable to litigate whether his penalty phase IAC claim was effectively litigated. Courts have uniformly rejected the claim that there is a constitutional right to effective assistance of counsel in post-conviction proceedings. They have also uniformly rejected the claim that there is any constitutional right to effective assistance of post-conviction counsel in his claiming that trial counsel rendered ineffective assistance of counsel.

IV. A STAY OR INJUNCTION IS IN THE PUBLIC INTEREST

The public has a strong interest in the enforcement of federal Constitutional rights and against state government violation of those rights. It also has a strong interest in not denying federal Constitutional rights on the fortuity that court proceedings have nearly run their course. If Mr. Rhoades were executed before having the opportunity to litigate counsel's ineffectiveness in asserting trial counsels' ineffectiveness, it would not be for any reason beyond the accident of timing.

Conclusion

For all these reasons, Mr. Rhoades respectfully asks that this Court stay his execution pending a decision from the United States Supreme Court in *Martinez v. Ryan*, No. 10-1001, for appointment of new counsel if appropriate in light of the *Martinez* decision, and a reasonable time to file a successive habeas petition in each of his capital cases in district court pursuant to 28 U.S.C. §2244(3)(A).

Dated this 16th day of November, 2011.

Respectfully submitted,

_____/s/_____

Oliver W. Loewy

Teresa A. Hampton

Capital Habeas Unit

Federal Defenders Services of Idaho, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and served the same on the following attorney for Respondent:

LaMont Anderson
lamont.anderson@ag.idaho.gov

_____/s/_____
Heidi Thomas