LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

L. LaMONT ANDERSON, ISB #3687
Deputy Attorney General
Chief, Criminal Law Division
Capital Litigation Unit
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-4539
Facsimile: (208) 854-8074
E-mail: lamont.anderson@ag.idaho.gov

Attorneys for Respondent

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL EZRA RHOADES, Petitioner, vs. RANDY BLADES, Warden, Idaho Maximum Security Institution. Respondent.	))))))))))))))	CASE NO. 11-80283 RESPONSE TO PETITIONER'S MOTION FOR STAY OF EXECUTION PENDING UNITED STATES SUPREME COURT DECISION IN *MARTINEZ v. RYAN*

COMES NOW, Respondent Randy Blades ("state"), by and through his attorney, L. LaMont Anderson, Chief, Capital Litigation Unit, and hereby responds to Petitioner's ("Rhoades") Motion for Stay of Execution Pending United States Supreme Court Decision in *Martinez v. Ryan* ("Motion"), by objecting to the same.

BACKGROUND

The facts of Rhoades brutally murdering three people and the procedural history of his challenges to his convictions and death sentences are not unknown to this Court and are herein adopted by the state. *See* Rhoades v. Henry (Baldwin), 638 F.3d 1027, 1032-34 (9th Cir. 2010); Rhoades v. Henry (Haddon), 598 F.3d 511, 513-14 (9th Cir. 2010); Rhoades v. Henry (Michelbacher), 598 F.3d 495, 498-500 (9th Cir. 2010).

ARGUMENT

Rhoades is requesting a stay of his scheduled execution on November 16, 2011, at 8:00 a.m., contending he should be permitted to file a successive habeas petition based upon the allegation that his attorneys during his first habeas cases were ineffective. (Motion, p.2.) Rhoades' entire argument is

premised upon Martinez v. Ryan, --- U.S. ---, 131 S.Ct. 2960 (2011), which is pending before the United States Supreme Court. (Id.)

The standards for a stay of execution are not foreign to this Court. To obtain relief, Rhoades "must demonstrate (1) that he is likely to succeed on the merits of such a claim, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." Beaty v. Brewer, 649 F.3d 1071, 1072 (9th Cir 2011) (citing Winter v. Natural Res. Def. Counsel, Inc., 555 U.S. 7, 20 (2008)).

Rhoades' request for a stay fails on several fronts. However, the first prong - success on the merits - is dispositive. Rhoades barely discusses the parameters for filing a successive petition, which are governed by the restrictive rules of the Anti-Terrorism and Effect Death Penalty Act ("AEDPA"), specifically 28 U.S.C. § 2244. Rather, he hypothesizes that he will have "met the threshold" "[i]f 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." (Motion, p.5.) Both of Rhoades' probabilities are doubtful, particularly his contention that, should the Supreme Court rule as

he hypothesizes, that ruling would be made retroactive. Indeed, Rhoades fails to cite any case in which the Supreme Court has made a new rule of law retroactive, presumably because he recognizes retroactive application of new rules of law "has been rare," Allen v. Bunnell, 891 F.2d 736, 738 (9th Cir. 1989), and the likelihood of such a ruling in Martinez is exceptionally doubtful. *See also* Williams v. United States, 401 U.S. 667, 680 (1971) (Harlan, J., concurring in part and dissenting in part) (discussing why new constitutional rules are not generally applied retroactively). Before Rhoades can "likely succeed on the merits" he must first overcome the restrictions of AEDPA, which "greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." Tyler v. Cain, 533 U.S. 656, 661-62 (2001).

Moreover, 28 U.S.C. § 2254(i) expressly states, "The effectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." *See* Ward v. Norris, 577 F.3d 925, 933-34 (8th Cir. 2009); Post v. Bradshaw, 422 F.3d 419, 422-23(6th Cir. 2005). Rhoades does not even mention this prohibition, let alone contend it does not apply or is somehow unconstitutional.

Further, irrespective of the Supreme Court's decision, the question in Martinez involves a state law requiring the raising of ineffective assistance of counsel claims for the first time during post-conviction proceedings. While Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001), in very limited circumstances, permits habeas petitioners to file ineffective assistance of counsel claims for the first time in federal habeas, Rhoades was never prevented by any law from filing ineffective assistance of counsel claims prior to filing his first habeas petition. Moreover, as explained just last week in Brooks v. Bobby, 2011 WL 5395583, *4 (6th Cir. 2011), Martinez and its companion case, Martell v. Clair, --- U.S. ---, 131 S.Ct. 3024 (2011), "deal only with state post-conviction proceedings and likely will say nothing about the duties of federal habeas counsel."

Finally, Rhoades' claim of ineffective assistance of counsel during habeas proceedings is based upon nothing more than mere speculation that he can find new experts who would be more definitive than the experts he retained during his first habeas proceedings. However, "Counsel is not required to shop for an expert who will testify in a particular way." Winfield v. Roper, 460 F.3d 1026, 1041 (8th Cir. 2006); *see also* Lundgren v. Mitchell, 440 F.3d 754, 773 n.6 (6th Cir. 2006) ("even in capital cases, a

defendant is entitled to only one qualified mental health expert at the expense of the state, even if the conclusions of that expert fail to favor the defense"); Dowthitt v. Johnson, 230 F.3d 733, 748 (5th Cir. 2000) ("counsel was not deficient by not canvassing the field to find a more favorable defense expert"); Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) ("The mere fact that [petitioner's] counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance"). As explained in Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998), "The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a partial psychiatric examination was appropriate." The court further explained, "'The ultimate result would be a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis.'" Id. at 402 (quoting Harris v. Vasquez, 949 F.2d 1497, 1517 (9th Cir. 1990)). In fact, Rhoades does not even mention the standards for ineffective assistance under Strickland v.

Washington, 466 U.S. 668, 687 (1984), which requires a showing of both deficient performance and prejudice.

As this Court well knows, Rhoades has failed in all of his attempts to have his convictions and death sentences reversed, with his most recent failure being this Court's decision in Rhoades v. Reinke, #11-35940, wherein this Court affirmed the district court's denial of a stay in relation to his § 1983 civil rights action challenging Idaho's execution protocol. In another desperate attempt to delay his scheduled execution, Rhoades has filed the instant motion, which could have been filed long ago. In McKenzie v. Day, 57 F.3d 1461, 1464 (9th Cir. 1995) (quoting Gomez v. U.S. Dist. Ct. for the N. Dist. of Cal., 503 U.S. 653, 653-54 (1992) (citations omitted)), this Court recognized such delays cannot be tolerated, noting:

> "Whether his claim is framed as a habeas petition or § 1983 action, Harris seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris obvious attempt at manipulation. This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."

Likewise, Rhoades has failed to demonstrate any "good reason for this abusive delay." Irrespective of the Supreme Court's decision in Martinez,

this is certainly a claim that could have been raised prior to thirty-six hours before Rhoades' scheduled execution.

CONCLUSION

The state respectfully submits Rhoades has failed to meet any of the requirements for a stay of execution, particularly likely success on the merits, and requests that his Motion for Stay of Execution Pending United States Supreme Court Decision in *Martinez v. Ryan* be denied.

DATED this 16th day of November, 2011.

/s/

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 16th day of November, 2011, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Oliver W. Loewy	____	U.S. Mail
Teresa Hampton	____	Hand Delivery
Federal Defender Services of Idaho	____	Overnight Mail
702 W. Idaho Street, Suite 900	____	Facsimile
Boise, ID 83702	X	Electronic Court Filing

/s/ LaMont Anderson