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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DANIEL WAYNE COOK, Petitioner, v. CHARLES RYAN, Director of Arizona Department of Corrections, Arizona State Prison – Florence Complex, Respondent.	No. 97-cv-146-PHX-RCB **Motion for Stay of Execution**

Daniel Cook moves this Court to issue a stay of his execution, pending the Court's resolution of his Motion for Relief from Judgment under Fed. R. Civ. P60(b)(6), Doc. 118; and if necessary, pending resolution of the petition for habeas corpus filed by Cook on June 6, 2005, No. 3:12-cv-08110-RCB, Doc. 1. The reasons for this motion are stated in the following Memorandum.

MEMORANDUM IN SUPPORT OF MOTION FOR STAY

The Court now has before it a motion which, if granted, will bring the Court to entertain Cook's habeas claim 3(a), alleging that Cook's trial counsel was constitutionally ineffective in failing to investigate a mitigation case, prepare it for presentation to the

prosecutor in connection with the latter's decision whether to seek a death penalty, and for presentation to a sentencing court. As explained in greater detail in that motion, this Court had previously held Claim 3(a) barred from merits consideration. This Court held that Cook had procedurally defaulted the claim in state court. That has now changed.

On March 20, 2012, the Supreme Court of the United States held in *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012), that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." That means that as of March 20th of this year there exists "cause" to excuse the procedural default this Court previously invoked to bar review of Claim 3(a) on the merits. That also means that there also exists such cause, to permit consideration of the same claim in the newly filed habeas petition, No. 3:12-cv-08110-RCB. As explained in that petition, it is not a "successive" application, and therefore the AEDPA does not bar this Court from taking up that petition, if it denies Cook Rule 60(b) relief in this case.

Cook has acted diligently to pursue relief to which he is now entitled under *Martinez.* These are the actions he has taken:

- At the time *Martinez* was decided, the United States Supreme Court had stayed Cook's execution, and was holding a petition for certiorari presenting the same issue as was involved in *Martinez* and is involved here. *Cook v. Arizona,* No. 10-9742. The Court denied Cook's petition in No. 10-9742 on March 26, 2012.
- Cook filed a petition for rehearing in No. 10-9742 on April 26, 2012.
- Cook also filed on April 26, 2012, a motion for leave to file a petition for rehearing out of time in *Cook v. Schriro,* No. 08-7229. That case presented the same issue as is involved here, in Cook's appeal from this Court's earlier denial of habeas relief in this case.

- On May 14, 2012 the Supreme Court denied Cook's petition for rehearing in No. 10-9742.
- On May 29, 2012, the Supreme Court denied Cook's motion for leave to file an out-of-time petition for rehearing.
- On June 5, 2012, one week later, Cook filed his Rule 60(b) motion in this case.
- On the same day, June 5, 2012, he filed his petition for habeas corpus, No. 3:12-cv-08110-RCB.

On June 12, 2012, the Arizona Supreme Court issued a Warrant of Execution of Daniel Cook. The Court set the execution date as August 8, 2012. Pursuant to Arizona Department of Corrections Order 710, Cook is scheduled to be placed under death watch procedures and transferred to a death watch cell on July 3, 2012. With the briefing of his Rule 60(b) motion completed on June 25, 2012, Cook now moves for a stay of execution.

An important consideration in ruling on a stay application is whether the application has been promptly sought, or whether the application could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay. *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). As demonstrated above, Cook has acted diligently, and has not delayed. He exhausted his remedies in the Court where his case was pending when *Martinez* was decided, *i.e.* the United States Supreme Court. A week later he brought his Rule 60(b) motion here.

The State of Arizona will doubtless argue that its interest in the finality and implementation of its judgment and sentence should prompt a denial of this application for stay. Weighing against that, of course, is that the balance of hardships tips sharply in Cook's favor. Obviously, allowing the State to execute Cook before this Court can adjudicate a substantial claim weighs strongly in favor of granting a stay. Also important is the fact that, although an "interest in finality" is something that *Phelps v. Alameida*,

569 F.3d 1120, 1135 (9th Cir. 2009), says should be weighed in deciding whether Rule 60(b) relief should be afforded under cases like this, the Supreme Court said in *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005): "That policy consideration [finality], standing alone, is unpersuasive in the interpretation of a provision [Fed. R. Civ. P. 60(b)] *whose whole purpose is to make an exception to finality*." *Id.* at 529 (emphasis supplied.)

This Court is about to decide whether the rule of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), applies to Cook's habeas claim 3(a). If so, the grant of the pending motion will then bring about the litigation of Claim 3(a) in this Court, just as though "cause" had excused Cook's failure of state court exhaustion, in the first place. Similarly, if, as Cook argues, his habeas corpus petition in No. 3:12-cv-08110-RCB is well taken, and not barred by the AEDPA as "successive," he will be entitled to litigate his claim even if this Court denies the Rule 60(b) motion. In either event, litigation of Claim 3(a), with its two-level *Strickland* claims, each with its own "ineffectiveness" and "prejudice" prongs, cannot reasonably be accomplished in the few weeks between now and Cook's scheduled execution on August 8, 2012. The breadth of the mitigation case involved –encompassing multiple topics, far flung witnesses, and a lengthy span of time – demonstrates all by itself the impossibility of fairly and thoroughly litigating this claim in the short time available before August 8th.

It is important to remember that the Supreme Court in *Martinez* held that, in order to claim the right to claim "cause" which the Court had just established, this Court needs only to find that the underlying claim is "substantial," in the sense that it would support a certificate of appealability. It does not require an adjudication of the claim on the merits. And it should not be. If *Martinez* applies, Cook is entitled to appropriate habeas proceedings to give thorough consideration to his claim involving the "bedrock principle" of the right to effective counsel at trial. *Martinez, supra*, 1309 S.Ct. at 1318.

V. **Conclusion**

For all the reasons stated herein, Cook respectfully requests that this Court grant him a stay of execution, pending the Court's ruling on his Rule 60(b) motion, and further, until resolution of Claim 3(a) presented in his habeas proceedings.

RESPECTFULLY SUBMITTED this 27th day of June, 2012.

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COPY of the foregoing mailed this
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