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17 **IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

18 DANIEL WAYNE COOK,

19 Petitioner,

20 v.

21 CHARLES RYAN, Director of Arizona
22 Department of Corrections, Arizona State
23 Prison – Florence Complex,

24 Respondent.

No. 97-cv-146-PHX-RCB

Motion for Stay of Execution

25 Daniel Cook moves this Court to issue a stay of his execution, pending the Court’s
26 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

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

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

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

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

- 1 • On May 14, 2012 the Supreme Court denied Cook's petition for rehearing in
2 No. 10-9742.
- 3 • On May 29, 2012, the Supreme Court denied Cook's motion for leave to file
4 an out-of-time petition for rehearing.
- 5 • On June 5, 2012, one week later, Cook filed his Rule 60(b) motion in this
6 case.
- 7 • On the same day, June 5, 2012, he filed his petition for habeas corpus, No.
8 3:12-cv-08110-RCB.

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

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

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

1 569 F.3d 1120, 1135 (9th Cir. 2009), says should be weighed in deciding whether Rule
2 60(b) relief should be afforded under cases like this, the Supreme Court said in *Gonzalez*
3 *v. Crosby*, 545 U.S. 524, 532 (2005): “That policy consideration [finality], standing alone,
4 is unpersuasive in the interpretation of a provision [Fed. R. Civ. P. 60(b)] *whose whole*
5 *purpose is to make an exception to finality.*” *Id.* at 529 (emphasis supplied.)

6 This Court is about to decide whether the rule of *Martinez v. Ryan*, 132 S. Ct.
7 1309 (2012), applies to Cook’s habeas claim 3(a). If so, the grant of the pending motion
8 will then bring about the litigation of Claim 3(a) in this Court, just as though “cause” had
9 excused Cook’s failure of state court exhaustion, in the first place. Similarly, if, as Cook
10 argues, his habeas corpus petition in No. 3:12-cv-08110-RCB is well taken, and not barred
11 by the AEDPA as “successive,” he will be entitled to litigate his claim even if this Court
12 denies the Rule 60(b) motion. In either event, litigation of Claim 3(a), with its two-level
13 *Strickland* claims, each with its own “ineffectiveness” and “prejudice” prongs, cannot
14 reasonably be accomplished in the few weeks between now and Cook’s scheduled
15 execution on August 8, 2012. The breadth of the mitigation case involved –encompassing
16 multiple topics, far flung witnesses, and a lengthy span of time – demonstrates all by itself
17 the impossibility of fairly and thoroughly litigating this claim in the short time available
18 before August 8th.

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

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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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By /s/
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COPY of the foregoing mailed this
27th day of June, 2012 to:

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