

No. 12-16562

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL WAYNE COOK, Petitioner/Appellant

v.

CHARLES L. RYAN, Director, Arizona Department of Corrections
Respondent/Appellee

On Appeal from the United States District Court
for the District of Arizona, Phoenix Case No. 2:97-cv-00146-RCB

****CAPITAL CASE EXECUTION SCHEDULED FOR
AUGUST 8, 2012 AT 10:00 A.M. PST****

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR STAY OF EXECUTION**

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CIRCUIT RULE 27-3 CERTIFICATE

1. The contact information for appellant's counsel is listed on the cover of this document. The contact information for appellee's counsel is as follows:

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2. The Arizona Department of Corrections has declared that the 24-hour window for carrying out Daniel Cook's execution, *see* Ariz. R. Crim. P. 31.17(c)(3), will begin at 10:00 a.m. Pacific Standard Time on August 8, 2012, just over three weeks from now. If this Court has not decided this appeal by that date, his appeal will become moot if there is not a stay in place to prevent his scheduled execution from being carried out. *See McKenzie v. Day*, 57 F.3d 1495, 1495 (9th Cir. 1995).

3. Counsel for Respondent-Appellee will be notified via email and ECF notice of this motion.

4. The relief requested in this Motion was requested in the district court (Dist. Ct. Doc. No. 121), and was denied (Dist. Ct. Doc. No. 122). The grounds submitted here were, in large part, submitted to the district court. Arguments that arise from the district court's error in its ruling were not submitted to the district court.

EMERGENCY REQUEST FOR STAY OF EXECUTION

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 27-3, Petitioner-Appellant Daniel Cook asks this Court for an emergency order staying his execution scheduled for Wednesday, August 8, 2012, at 10:00 a.m. PST.

In considering a request for a stay of execution, a court considers “not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim.” *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). Thus, “[g]iven the State’s significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Id.* at 650.

Here, the factors weigh in favor of granting a stay of execution for Cook.

A. In applying the four-factor test, this Court should find a stay is warranted.

In order to obtain a stay of execution, a death-row prisoner must show that four factors, balanced against each other, weigh in his favor: (1) a likelihood of success on the merits; (2) a likelihood of suffering irreparable

harm without a stay; (3) the balance of hardships tips in his favor; and (4) a stay is in the public interest. *See Rhoades v. Blades*, 661 F.3d 1202, 1203 (9th Cir. 2011) (citing *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011)). Instead of showing a likelihood of success on the merits, the prisoner may alternatively demonstrate that “serious questions going to the merits” of his claims are presented in his appeal, and obtain a stay as long as the other three factors weigh in his favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Indeed, “a stronger showing of one element may offset a weaker showing of another.” *Id.* at 1131. Here, because Daniel Cook’s appeal presents serious questions going to the merits of his claim and because the other three factors weigh in his favor, this Court should stay Cook’s upcoming execution.

1. This appeal presents serious questions going to the merits of his procedurally defaulted claim.

Cook contends that he was denied his constitutional right to effective trial counsel and that such claim was never reviewed on the merits because of post-conviction counsel’s ineffectiveness. (*See generally* Opening Br. filed simultaneous with this motion.) To date, no court has reviewed the merits of his ineffective assistance of trial counsel claim, as this Court found the claim defaulted when Cook sought review of it during his federal habeas

proceedings. *See Cook v. Schriro*, 538 F.3d 1000, 1027 (9th Cir. 2008) (finding the claim procedurally defaulted and rejecting argument that post-conviction counsel’s errors constituted cause because “[t]here is no constitutional right to counsel . . . in state collateral proceedings after exhaustion of direct review.”).

Since the conclusion of Cook’s federal habeas proceedings, the Supreme Court issued its opinion in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that certain claims of ineffective assistance of trial counsel could be heard in federal habeas corpus even though a petitioner’s state post-conviction counsel was ineffective and thereby prevented proper presentation of such claims to the state court. *Martinez* limited the scope of its rule to those claims having “some merit,” in order not to provide carte blanche permission to every petitioner having any claim of ineffectiveness of trial counsel. However, the Court in *Martinez* also did not intend for its rule to result in claims being decided on the merits on a bob-tailed record, or no record at all. As Cook explains in his Opening Brief, the district court did just that. It prematurely rejected his ineffective assistance of trial counsel claim on the merits—without any further evidentiary development.

Cook also argued that the district court erred by both denying his request to reopen its judgment for consideration of his claim on the merits

and by incorrectly finding that a motion filed in the state trial court was part of the appellate proceedings and therefore precluded from the rule set forth in *Martinez*. Both of these factors weigh in favor of reversal of the district court's decision, which was clearly erroneous.

Because Cook has demonstrated, in greater detail in his Opening Brief, that he has serious questions going to the merits of his claim and can demonstrate a likelihood of success on his claim, the first factor counsels in favor of a stay.

2. Cook will suffer irreparable harm without a stay.

Cook will suffer irreparable harm without a stay. If he is executed as scheduled without a ruling from this Court in this appeal, then his death sentence will have been carried out despite the merits of his ineffective assistance of trial counsel claim never having been reviewed. As he has argued, because of his trial counsel's failures, the sentencer was deprived of learning about Cook's horrific childhood and resulting mental illnesses and Cook's death sentence is in violation of the Eighth Amendment as. *See Lockett v. Ohio*, 438 U.S. 586,604-05 (1978) (holding that a sentencer must consider "as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *Eddings v. Oklahoma*,

455 U.S. 104, 113-14 (1982) (“Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.”). Thus the second factor also counsels in favor of a stay.

3. The balance of hardships tips in Cook’s favor.

This Court has consistently acknowledged that death-row prisoners have a “strong interest in being executed in a constitutional manner.” *Beatty*, 649 F.3d at 1072. Thus Cook suffers serious injury if denying him his Sixth Amendment right to counsel and his Eighth Amendment right to individualized sentencing leads directly to his execution. Conversely, the State suffers no injury should this Court enter a stay to allow for plenary consideration of this appeal. Should this Court ultimately affirm the district court, the State will be able to carry out Cook’s execution. And if this Court should remand for further proceedings, then the district courts will have the opportunity to cure a constitutional defect that occurred in during Cook’s trial-level proceedings. Insofar as failing to grant a stay imposes a hardship only on Cook and not the State, the third factor favors Cook as well.

4. A stay is in the public interest.

Finally, a stay is in the public interest. This appeal focuses on the ability of a death-sentenced prisoner in Arizona to have true merits review of

his constitutional claim by the federal courts. In general, the public interest is served by enforcing constitutional rights. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Moreover, the appeal is also based on a newly announced equitable rule of law that permits Cook the opportunity to have his constitutional claim reviewed—an opportunity that was foreclosed to him during his prior habeas proceedings. Because a stay of execution is also based in principles of equity, the public interest would be served in allowing this Court the opportunity to adequately, and without a rushed schedule, consider the merits of his claims on appeal.

B. Cook did not delay in bringing his request for relief.

Cook did not delay in bringing his request for relief. *See Nelson*, 541 U.S. at 649-50. 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, and 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. (Dist. Ct. Doc. Nos. 115, 117, 118.) Even though the district court denied Cook his requested relief, it found that he "did not delay seeking relief based on *Martinez*. . . ." (ER 013.) This Court should find, too, that Cook has not delayed in seeking relief.

CONCLUSION

For the foregoing reasons, Cook requests that this Court enter a stay of execution to permit it to give full consider to his appeal without it becoming moot by virtue of his execution.

Respectfully submitted: July 16, 2012.

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By s/ Michael J. Meehan
Michael J. Meehan

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2012, I caused the foregoing document to be filed electronically with the Clerk of the Court through ECF and notice will be sent to the following ECF recipients:

Kent Cattani
Attorney for Respondent-Appellee, Charles L. Ryan, Director

s/ Michael J. Meehan