IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12–16562

DANIEL WAYNE COOK,

Petitioner-Appellant,

v.

CHARLES L. RYAN, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV–97–00146–RCB

RESPONSE TO EMERGENCY MOTION UNDER CIRCUIT RULE 27–3 FOR STAY OF EXECUTION

Cook's motion for stay is based on his pending appeal from the denial of his motion for relief from judgment. Because Cook has failed to make a strong showing that he is likely to succeed on the merits of his pending appeal, and because the public interest weighs strongly against a stay, this Court should deny Cook's request for injunctive relief.

"A preliminary injunction is an 'extraordinary and drastic remedy[.]'" *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995). A litigant has no inherent right to such an extraordinary remedy. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008). This rule applies in capital cases and a stay is not available as a matter of right. *See Hill v. McDonough*, 547 U.S. 563, 584 (2006).

A petitioner seeking a preliminary injunction must demonstrate: (1) "he is

likely to succeed on the merits," (2) "he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tip in his favor," and (4) "that an injunction is in the public interest." *Winter*, 555 U.S. at 21. The petitioner must clearly show that he is entitled to relief. *Id.* at 22; *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

As set forth in Respondents' Answering Brief, Cook has not made a strong showing that he is likely to succeed on the merits of his pending claims. His claims of ineffective assistance of counsel are not substantial, and the district court did not abuse its discretion in denying Cook's motion for relief from judgment. Accordingly, he is not entitled to injunctive relief.

A State's interest in finality is compelling, particularly when, as here, a federal court of appeals has issued a mandate denying federal habeas relief. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). "When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension. . . . To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," [citation omitted], an interest shared by the State and the victims of crime alike. *Id.*

Cook's convictions and death sentences have been carefully reviewed in state and federal court dating back to his direct appeal proceedings in 1992. Cook

is responsible for two very brutal, heinous murders. *See State v. Cook*, 821 P.2d 731,752 (Ariz. 1992) ("There is no doubt in our minds that each of these crimes of brutal and senseless torture, sodomy, and murder falls clearly within § 13–703(F)(6), if not at the extreme end of the spectrum."). The State's interest in finality is strong, and additional delay for further review is unwarranted.

RESPECTFULLY SUBMITTED this 20th day of July, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 20, 2012.

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