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**

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

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The State urges this Court to deny Daniel Cook's request for a stay of execution because, it says, his convictions and death sentences "have been carefully reviewed in state and federal court." (Doc. No. 11 at 2.) But this is not accurate, which is the exact point of the argument Cook has made in his Rule 60(b) motion and on appeal. He is seeking review of his ineffective assistance of counsel claim; contrary to the State's assertion and the District Court's erroneous conclusion, this claim has *not* been reviewed on the merits. As this Court found in affirming the District Court's denial of Cook's habeas petition in 2008, the claim was procedurally defaulted and post-conviction counsel's errors could not constitute cause to overcome the default. *Cook v. Schriro*, 538 F.3d 1000, 1027 (9th Cir. 2008) ("There is no constitutional right to counsel . . . in state collateral proceedings after exhaustion of direct review."). And the District Court, by misapplying the rule in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), foreclosed evidentiary development and consideration of the true merits of Cook's ineffectiveness claim.

The State also argues that Cook has not made a strong showing that he is likely to succeed on the merits of his claim. (Doc. No. 11 at 2.) The State's argument ignores controlling precedent relied upon by Cook, which held that a prisoner need not demonstrate a likelihood of success on the

merits where he can show that there are "serious questions going to the merits" of his claim presented in his appeal. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). In the instant appeal, Cook has shown, at minimum, serious questions going to the merits of his claim. Indeed, Cook argued in his Opening Brief that the District Court has misapplied the rule in *Martinez* and reached the merits of the underlying ineffectiveness claim without further proceedings. (Doc. No. 5 at 34-42.) The State's Answering Brief makes no argument rebutting that issue. As such, Cook has shown there are serious questions regarding the merits of his claim and how the District Court resolved it.

Finally, the State claims that its interest in finality supersedes Cook's interest in having federal courts ensure that his constitutional rights were not violated when he was sentenced to death. (Doc. No. 11 at 2-3.) This argument should be rejected by this Court. The Supreme Court has recognized that "the penalty of death is qualitatively different from a sentence of imprisonment." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). As such, the need for reliability in capital sentencing procedures is heightened. *See Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (noting that the need for reliability in death sentences is heightened) (*quoting Woodson*, 428 U.S. at 305); *California v. Ramos*, 463 U.S. 992, 998-99

(1983) (recognizing "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); *Herrera v. Collins*, 506 U.S. 390, 405 (1993) (noting "the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed"); *see also Coleman v. Calderon*, 210 F.3d 1047, 1050 (9th Cir.2000) ("[A] death sentence is qualitatively different from other forms of punishment, there is a greater need for reliability in determining whether it is appropriate in a particular case.").

Here, Cook asked for an expert to assist him in presenting mitigating evidence during his sentencing proceedings, but he was denied. As a result of trial counsel's failure to investigate and prepare a mitigation case, Cook was left without the presentation of mitigating evidence to his sentencer. Thus, Cook was sentenced to death in direct contravention of Supreme Court precedent and the Constitution. *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."). If this Court does not stay Cook's execution and allow his Constitutional claim to be reviewed, then he will be executed in violation of the Constitution and "the Constitution suffers an injury that can never be repaired." *Gomez v. U.S. Dist. Court*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting). Thus, any interest that the State has in finality is outweighed by the need for this Court to protect a capital defendant's constitutional rights.

CONCLUSION

For reasons stated in his Motion and this Reply, 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 23, 2012.

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By s/ Michael J. Meehan
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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 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