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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph Rudolph Wood, III,

Petitioner-Appellant,

v.

Charles L. Ryan, et al.,

Respondents-Appellees.

No. 14-16380

District Court No. 4:98-cv-00053-JGZ

Motion to Stay Execution

Death-Penalty Case

**Execution Scheduled for Wednesday,
July 23, 2014, at 10:00 a.m.**

Appellant Joseph Rudolph Wood III asks this Court for an emergency order staying his execution scheduled for Wednesday, July 23, 2014, at 10:00

a.m. Mr. Wood moves for a stay pending the Court's resolution of his appeal of the district court's order denying his motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6).

In his motion before the district court (Dist. Ct. ECF No. 116.), Mr. Wood asked the court to entertain his habeas claims VI (trial court's failure to grant funds for neuromapping as part of the mitigation presentation at sentencing), X.C.2 (trial counsel's failure to impeach the testimony of Officer Anita Sueme to rebut grave risk aggravator), XI (direct appeal counsel's conflict of interest), and X.C.3 (trial counsel's ineffectiveness in investigating, preparing for and presenting mitigating evidence at sentencing). (*See* Dist. Ct. ECF No. 24 at 81-88, 128-36, 148-64, and 136-47.) Mr. Wood also sought a stay of execution. (Dist. Ct. ECF No. 117.)

The district court denied the Rule 60(b) Motion and his Motion for Stay of Execution. (Dist. Ct. ECF No. 124.) Upon a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e), it granted a certificate of appealability ("COA") holding that "reasonable jurists could debate its denial of Petitioner's Rule 60(b)(6) motion." (Dist. Ct. ECF No. 126 at 5.) Accordingly, the district court has ruled that the questions it decided adversely to Mr. Wood, i.e., whether the ineffective assistance of counsel at sentencing claim is a successive habeas petition, whether his claim of trial court error is subject to

Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012), whether his other two defaulted claims are substantial, and whether his Rule 60(b)(6) motion presents extraordinary circumstances, are worthy of appellate review because “the issues are debatable among jurists of reason; . . . a court could resolve the issues [in a different manner]; or the questions are adequate to deserve encouragement to proceed further.” *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (internal quotation marks omitted, bracketed material in original); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The debatable nature of the issues is demonstrated by Mr. Wood’s motion, the response, and the reply. (Dist. Ct. ECF Nos. 116, 122, 123.)

Under *Barefoot*, when the district court grants a COA, a stay of execution pending appeal must be granted so the issues can be given full appellate briefing and full judicial attention. *Barefoot*, 463 U.S. at 893-94 (“[A] circuit court, where necessary to prevent the case from becoming moot by the petitioner’s execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause.”). This Court agrees with the significance of a COA grant, as the presence of a COA places this case in a much different posture than those cases in which a COA has been denied. Compare *Allen v. Ornoski*, 435 F.3d 946, 949 (9th Cir. 2006) (denying petitioner's motion for stay of execution because he had not “demonstrated

substantial grounds upon which relief may be granted”); *Gerlaugh v. Stewart*, 167 F.3d 1222, 1224 (9th Cir. 1999) (denying stay of execution based on *Barefoot* when petitioner's request for COA was denied for failing to reflect “substantial grounds upon which relief might be granted”).

Also, in considering a request for a stay of execution, this Court considers “not only the likelihood of success on the merits and the relative harm 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). As set forth in his brief and supported in large substance by the COA grant, Mr. Wood has demonstrated a likelihood of success on the merits. He has demonstrated defects in the integrity of his federal habeas proceedings. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Claims were procedurally barred because of post-conviction counsel’s ineffectiveness. In addition, the district court prevented him from obtaining the proper resources to pursue relief in this habeas proceeding. The claims he raises are substantial and likely meritorious: the denial of expert neuromapping resources at trial, his counsel’s failure to impeach an important State witness, his direct appeal counsel’s conflict of interest and his counsel’s failure to conduct a professionally adequate mitigation investigation.

Before the district court and this Court, Mr. Wood diligently sought to vindicate his rights. He filed repeated requests for funds with the district court to

enable him to investigate his ineffective assistance of counsel claims. While he received funds from the district court for a consultant, he never received funds for a mitigation investigator or for an expert or experts for an actual evaluation. This Court did not grant his *Martinez* Remand Motion. (9th Cir. ECF No. 74.)

The district court permitted the Federal Public Defender's Office to represent Mr. Wood as co-counsel on April 30, 2014. Assistant Federal Public Defenders Dale Baich and Jennifer Garcia entered their appearances on behalf of Mr. Wood on May 13, 2014 and June 6, 2013, respectively. With the resources of the Federal Public Defender's Office, Mr. Wood's counsel have finally conducted a mitigation investigation and had Mr. Wood evaluated by mental health experts. Just today and yesterday he received reports from clinical psychologist and certified addiction specialist Robert L. Smith, Ph.D. and Dr. Kenneth Benedict, a neuropsychologist, both of whom were retained and conducted their evaluations after the Federal Public Defender's Office joined the case. (Dist. Ct. ECF No. 125, Exs. 1 and 2). Mr. Wood has simply been avoiding piecemeal litigation. *Hill v. McDonough*, 547 U.S. 573, 584-85 (2006).

While Respondents argued that the interest in finality of judgment favors denial of Mr. Wood's motions, they are incorrect. This is a capital case in which Mr. Wood faces the more irreversible finality of death. *Thompson v. Bell*, 580 F.3d 423, 444 (6th Cir. 2009) ("In this case, the finality of the judgment against

Thompson must be balanced against the more irreversible finality of his execution[.]”). *See Gonzalez*, 545 U.S. at 529 (“That policy consideration [finality], standing alone, is unpersuasive in the interpretation of a provision [Rule 60(b)] whose whole purpose is to make an exception to finality.”).

For the reasons stated herein, Mr. Wood respectfully requests that this Court grant him a stay of execution, pending resolution of this appeal involving the COA granted by the district court.

Respectfully submitted this 21st day of July, 2014.

Jon M. Sands
Federal Public Defender
Dale A. Baich
Jennifer Y. Garcia
Julie S. Hall

s/ Jennifer Y. Garcia
Counsel for Petitioner-Appellant

Certificate of Service

I hereby certify that on Filing Date, I electronically filed the foregoing Motion to Stay Execution with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Robin Stoltze
Legal Assistant
Capital Habeas Unit