Jon M. Sands
Federal Public Defender
District of Arizona
Dale A. Baich (OH Bar No. 0025070)
Jennifer Y. Garcia (AZ Bar No. 021782)
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
dale_baich@fd.org
jennifer_garcia@fd.org
602.382.2816
602.889.3960 facsimile

Julie Hall
779 Cody Loop Rd.
Oracle, Arizona 85623
Telephone: 520.896.2890
julieshall@hotmail.com

Attorneys for Petitioner-Appellant

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 Reply to Response in Opposition to Emergency Motion to Stay Execution Death-Penalty Case **Execution Scheduled for Wednesday, July 23, 2014, at 10:00 a.m.**

Petitioner-Appellant Joseph Rudolph Wood III hereby replies to Respondents' response in opposition to his motion for stay of execution (9th Cir.

ECF No. 10), and renews his request for an emergency order staying his execution scheduled for Wednesday, July 23, 2014, at 10:00 a.m. (9th Cir. ECF No. 6). 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 their opposition to Mr. Wood's motion for stay of execution, Respondents argue that Mr. Wood has not shown a likelihood of success on the merits of his underlying Rule 60(b) motion, that the interests of justice weigh against the granting of a stay, and that the district court's grant of a certificate of appealability ("COA") does not stay the execution. (9th Cir. ECF No. 10.) Respondents' arguments are not compelling, and this Court should grant the requested stay of execution to allow Mr. Wood's claims to be briefed and fully considered on the merits.

A. Likelihood of Success on the Merits

Respondents argue that Mr. Wood cannot show a likelihood of success on the merits, so his request for stay should be denied. (9th Cir. ECF No. 10 at 2.) However, Respondents ignore this Court's controlling precedent, holding that an appellant 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, Mr. Wood has shown, at minimum, serious questions going to the merits of his claim as indicated by the district court's grant of COA on his claims. And, while Respondents argue in support of the district court's order denying Mr. Wood's motion for relief pursuant to Rule 60(b), as explained at length in Mr. Wood's opening brief, the district court's order was in error and does not foreclose the likelihood of success on the merits of Mr. Wood's claims. (*See* 9th Cir. ECF No. 7-1.)

B. Interests of Justice

In addition, Respondents claim that their interest in timely enforcement of justice supersedes Mr. Wood's interest in having federal courts ensure that his constitutional rights were not violated when he was sentenced to death. (9th Cir. ECF No. 10 at 4.) 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, Mr. Wood asked the trial court for funding to assist him in presenting mitigating evidence during his sentencing proceedings, but the motion was ignored. As a result of trial counsel's failure to investigate and prepare a mitigation case, important mitigating evidence was not presented to the sentencer in Mr. Wood's case. Thus, Mr. Wood 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."). Compounding the error, both the district court and this Court denied Mr. Wood's federal habeas counsel the necessary

funding and opportunity for evidentiary development to investigate and present this claim, in addition to several others that were found procedurally defaulted but should be reconsidered in light of *Martinez*. If this Court does not stay Mr. Wood's execution and allow his constitutional claims 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). Any interest that Respondents have in enforcing Mr. Wood's sentence is outweighed by the need for this Court to protect a capital defendant's constitutional rights.

C. Certificate of Appealability

Respondents argue that the district court's grant of a certificate of appealability does not mandate a stay of execution. (9th Cir. ECF No. 10 at 5.) However, the existence of a COA indicates that a petitioner has made a substantial showing of the denial of a constitutional right. *Miller-El v. Cockrell*, 537 U.S. 322. 336 (2003) (citation omitted). As the United States Supreme Court has made clear, "[t]he COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels. Once a judge has made the determination that a COA is warranted . . . , the COA has fulfilled that gatekeeping function." *Gonzalez v. Thaler*, 132 S. Ct. 641, 650 (2012). When the district court granted Mr. Wood a COA, it found that

reasonable jurists could debate the merits of the issue before it, and that the issues he raised deserved encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (noting that the Antiterrorism and Effective Death Penalty Act codified the standards for a COA announced in *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983)). Thus, the COA was granted so that the issues raised could be given the full appellate briefing, argument, and judicial review that they deserve.

And finally, while Respondents point to language in *Barefoot* cautioning courts to "isolate the exceptional cases where constitutional error requires retrial or resentencing" (9th Cir. ECF No. 10 at 4-5), they ignore the very next sentence mandating that federal courts "need not, and should not, however, fail to give non-frivolous claims of constitutional error the careful consideration that they deserve." *Barefoot*, 463 U.S. at 888. Mr. Wood has presented several non-frivolous claims of constitutional error that the district court has already held deserve encouragement to proceed further. This Court should grant his request for stay of execution to allow full consideration of these claims.

Conclusion

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 22nd 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 July 22, 2014, I electronically filed the foregoing Reply to Response in Opposition to Emergency 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