IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN MICHAEL WEST,	)	
	)	**No. 10-6333**
Petitioner	)	**No. 10-6338**
	)	
v.	)	
	)	**DEATH PENALTY CASE**
RICKY BELL, Warden,	)	**EXECUTION SCHEDULED**
	)	**NOVEMBER 9, 2010**
	)	
Respondent	)	

MOTION FOR STAY OF EXECUTION

Petitioner/Movant, Stephen Michael West, respectfully requests this Court to enter an order staying his execution scheduled for November 9, 2010, so that this Court may consider and grant his motion to transfer the case back to the district court for merits consideration and also review his Application for Certificate of Appealability.

A stay of execution is an equitable remedy and is analyzed under the following test:

> 1) whether there is a likelihood [Mr. West] will succeed on the merits of the appeal; 2) whether there is a likelihood he will suffer irreparable harm absent a stay; 3) whether the stay will cause substantial harm to others; and 4) whether the injunction would serve the public interest.

Hill v. McDonough, 547 U.S. 573, 584 (2006); *Workman v. Bell*, 484 F.3d 837, 839 (6th Cir. 2007). These four factors "are factors to be balanced, not prerequisites that must be met." *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000). As will be explained in more detail below, Mr. West easily meets this test. Further, the stay is warranted where the United States Supreme Court has granted review on a case raising the same issue as Mr. West's. *Cullen v. Pinholster*, No. 09-1088, 130 S.Ct. 3410 (Mem.)(2010). The Supreme Court's disposition of that case will inform this court's proceedings on Mr. West's case and this Court should therefore enter a stay to preserve the issues.

(1) The Execution Should Be Stayed Because Mr. West Will Likely Succeed On The Merits In This Matter.

To satisfy the first factor, Mr. West must show a "significant possibility of success on the merits." *Hill*, 547 U.S. at 584. Significantly, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Thus, it has long been the law of this Court that a stay is appropriate where the movant "at least shows serious questions going to the merits and irreparable harm which decidedly

outweighs any potential harm to the defendant if an injunction is issued." *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982).

Mr. West is likely to succeed on the merits here because he has presented extraordinary circumstances warranting relief under FED. R. CIV. P. RULE 60(b)(6). The pleadings demonstrate that the district court erred in designating Mr. West's petition a "second or successive petition" within the meaning of 28 U.S.C. §2244(b) and further erred by transferring the case to this Court for filing approval. *See* Motion to Retransfer and Application for Certificate of Appealability filed Nov. 1, 2010. Mr. West's 60(b) motion was properly filed and is not a "successive" petition. A substantial body of case law supports this conclusion because Mr. West's motion was brought following a recent change in the law governing the consideration of habeas petitions.

In support of his 60(b) motion, Mr. West has argued that the district court erred when it refused to consider multiple claims of ineffective assistance of counsel in the penalty phase. The court did not consider those claims reasoning they were supported by evidence that was not considered by the Tennessee post-conviction courts. Most of these claims involved the consideration of expert opinions finding that Mr. West suffered from post-traumatic stress disorder

(PTSD) and other psychological defects following years of unrelenting, severe child abuse. Where the critical issue was whether Mr. West suffered prejudice in the penalty phase, the omitted evidence would have made a difference.

In this case, there has been a finding that the state court opinion was unreasonable. *West v. Bell*, 550 F.3d 542, 554, 567 (6th Cir. 2008) (Moore, J, dissenting). All evidence presented should have been reviewed by a habeas court conducting *de novo* review. *See Cullen v. Pinholster*, No. 09-1088, 130 S.Ct. 3410; *see* Petitioner's Brief, 2010 WL 3183845 p. 21-42 (U.S. Aug. 9, 2010). The failure to review this evidence on procedural grounds provides a proper basis for 60(b) review. *Gonzales v. Crosby*, 545 U.S. 524, 532 fn.4 (2005).

What makes this case extraordinary and shows that Mr. West will likely prevail on the merits, is that intervening case law now demonstrates that where a petitioner establishes an unreasonable application of the federal law by the state court, and where the federal court should engages in *de novo* review, the federal court should consider all evidence Mr. West offered as part of his habeas petition. This case law shows that Mr. West was erroneously denied plenary merits review.

In *Thompson v. Bell*, this Court found the state court had unreasonably applied Supreme Court precedent concerning the condemned inmate's right to be competent for execution. 580 F.3d 423 (6th Cir. 2009), *cert. denied*, Oct. 4, 2010.

Upon finding Section 2254(d)(1) had been met, this Court remanded for an evidentiary hearing with no deference to the state court findings. The court stated:

> When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires. Accordingly, this Court will remand the action to the district court to conduct Thompson's incompetency hearing and decide the merits of his incompetency claim *do novo*.

Thompson, 580 F.3d at 436-37.

The Ninth Circuit has also very recently applied this reasoning, explaining:

> because we do not know what the state court would have decided had it applied the law to the correct facts, there is no actual decision to which we can defer. Continuing to apply AEDPA deference even after concluding that the state court had unreasonably determined the facts to which it applied the law would therefore require us to assess the reasonableness of a decision that the state court never actually reached.

Detrick v. Ryan, 619 F.3d 1038, 1060 (9th Cir. 2010).

The court concluded "when a state court adjudication is based on an antecedent unreasonable determination of fact, the requirement set forth in § 2254(d) is satisfied and we may proceed to consider the petitioner's claim *de novo*." *Id.* at 1059.

The United States Supreme Court is poised to address this exact issue. In

Cullen v. Pinholster, No. 09-1088, the Supreme Court of the United States granted certiorari to address whether "[r]esolution of the § 2254(d)(1) 'reasonableness' question should precede any presentation of evidence in federal court." *See* order granting *certiorari* on June 14, 2010, 130 S.Ct. 3410. *See* Petitioner's Brief, 2010 WL 3183845, p. 21-42 (U.S. Aug. 9, 2010).

A stay of execution is warranted where new law from this circuit demonstrates a defect in the integrity of the district court's decision and Mr. West's right to relief, especially where the Supreme Court will soon be addressing the same issue. Where the resolution of similar issues presented in other pending cases will affect the petitioner's case, a stay is warranted. In *Moore v. Texas*, 535 U.S. 1110 (2002), the Court granted a stay in a capital case pending resolution of *Atkins v. Virginia*, 536 U.S. 304 (2002). *See also Mikutaitis v. United States*, 478 U.S. 1306 (1986) (court imposed stay of proceedings where issue is "sufficiently similar" to the question presented by another case); *California v. Hamilton*, 476 U.S. 1301 (1986) (same). This Court has recently applied this rationale in *Hartman v. Bobby*, 319 Fed. Appx. 370 (6th Cir. Mar. 31, 2009) (granting a stay of execution pending resolution of United States Supreme Court case which could determine the outcome).

Beyond question, West has been diligent. After the district court initially

declined to consider the evidence, West filed a RULE 59 motion again asserting the propriety of considering this evidence. FED.R.CIV.P. 59(e), (R.191, Motion to Alter or Amend Memorandum and Order and Judgment of the Court Entered September 30, 2004). West also vigorously argued the relevance of this evidence on appeal to this Court. *See, e.g.*, *West v. Bell*, 550 F.3d at 550-51 (erroneously finding that the district court did not abuse its discretion in failing to grant the Motion to Expand, when, in fact, those motions were granted), (*See* R. 145, 181). Only after this Court denied relief, did case law emerge explaining that when the petitioner satisfies 28 U.S.C. § 2254(d)(1) and is entitled to *de novo* review, the district court may receive the newly proffered evidence. Mr. West filed his 60(b) motion only eleven days after the *Thompson* decision was finalized on October 4, 2010. *Bell v. Thompson*, No. 09-1373, 2010 WL 1922716 (Mem.)(2010). Mr. West has shown diligence and under *Gonzalez*, his claims should be reviewed:

> When a prisoner has shown reasonable diligence in seeking relief based on a change in procedural law, and when that prisoner can show that there is probable merit to his underlying claims, it would be well in keeping with a district court's discretion under RULE 60(b)(6) for that court to reopen the habeas judgment and give the prisoner the one fair shot at habeas review that Congress

intended that he have.

Gonzales, 545 U.S. at 542.

(2) Irreparable Harm to Mr. West

Unless this Court grants a stay of execution, Mr. West stands to lose his life without a full merits review of whether death is the appropriate punishment. Indeed, the courts have recognized in capital habeas cases that the petitioner's right to life carries substantial – if not controlling – weight when a court exercises its equitable powers. *See e.g., Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001) (using equitable powers to allow consideration of petition because "[i]n a capital case such as this, the consequences of error are terminal. ... We will therefore exercise leniency under the facts of this capital case."); *Calderon v. United States District Court*, 128 F.3d 1283, 1288 n.4 (9th Cir. 1997) ("'[O]ccasional' injustices ... are decidedly not an acceptable cost of doing business in death penalty cases.").

(3) Lesser Harm to the State

The State suffers no substantial harm from an order staying execution in order to determine whether Mr. West's execution will violate the constitution. *Ibid.*; *In re: Johnson*, 322 F.3d 881, 883 (5th Cir. 2003) (finding "nothing upon which we could determine that 'the granting of the stay would substantially harm other parties,' including the State of Texas."). This stay motion is not brought

merely for the purpose of delay. To the contrary, Mr. West has been diligent in attempting to obtain merits review of his case. Here, any notion of "delay" has been caused by the State's arguments to deny full merits review of Mr. West's claims. The State has no legitimate interest in executing a tainted federal court judgment.

(4) A Balancing Of All Other Interests Demonstrates That A Stay Must Issue

In cases where a prisoner is scheduled to be executed, irreparable harm is deemed "to be self-evident." *In re: Holladay*, 331 F.3d 1169, 1176-77 (11th Cir. 2003)(granting stay of execution); *In re: Morris*, 328 F.3d 739, 741 (5th Cir. 2003)(same).

Of course, the public interest is served *a fortiori* upon these circumstances. *In re: Holladay*, *supra*; *In re: Morris*, *supra*. Additionally, in considering the public interest, the fact cannot be ignored that one federal court jurist would have granted Mr. West penalty phase relief on the claims already considered by this Court. *West v. Bell*, 550 F.3d 542, 568 (6th Cir. 2008)(Moore, J. dissenting). This underscores the importance of a careful, unhurried review of Mr. West's case. An order staying Mr. West's execution should enter because approving his execution "before his appeal is decided on the merits would clearly be improper." *Barefoot*, 463 U.S. at 889.

CONCLUSION

For all these reasons, this Court should issue an order staying Mr. West's execution.

WHEREFORE Mr. West prays that this Court enter an order staying the execution, (scheduled for November 9, 2010), to maintain its jurisdiction and prevent Mr. West's case from becoming moot before it can be decided.

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2010, the foregoing Motion for Order Staying Execution was filed electronically. Notice was electronically mailed by the Court's electronic filing system to all parties indicated on the electronic filing receipt. Notice was delivered by other means to all other parties via regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

s/Stephen Ferrell