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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Michael Apelt,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.  
14

No. CV-98-00882-PHX-ROS

DEATH PENALTY CASE

**ORDER**

15  
16 On December 1, 2015, this Court issued an order and judgment granting habeas  
17 relief on Apelt's claim of ineffective assistance of counsel at sentencing. (Docs. 373,  
18 374.) Respondents move for a stay pending final resolution of their appeal to the Ninth  
19 Circuit. (Doc. 375.) Apelt opposes a stay. (Doc. 382.)

20 The determination whether to permit a stay pending the appeal of a decision  
21 granting habeas relief is governed by the standard set forth in *Hilton v. Braunskill*, 481  
22 U.S. 770 (1987). In *Hilton*, the Supreme Court articulated four factors the district court  
23 should consider in determining whether to grant a stay: (1) whether the stay applicant has  
24 made a strong showing that he is likely to succeed on the merits or has a substantial case  
25 on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)  
26 whether issuance of the stay will substantially injure the other parties interested in the  
27 proceedings; and (4) where the public interest lies. *Id.* at 776, 778. These factors militate  
28 in favor of staying execution of the writ of habeas corpus pending appellate review.

1       **1. Likelihood of success on the merits**

2           The likelihood of Respondents’ success on the merits of their appeal depends on  
3 the argument that the Court wrongly granted relief on Apelt’s claim of ineffective  
4 assistance of sentencing counsel. Of course, the Court disagrees that Claim 12 was  
5 wrongly decided. Nonetheless, the Court is persuaded that Respondents have  
6 demonstrated a “substantial case on the merits.” *Hilton*, 481 U.S. at 778. The Court  
7 acknowledges an apparent tension between the Ninth Circuit’s recent decision in  
8 *Clabourne v. Ryan*, 745 F.3d 362, 382 (2014), which held that a state court’s alternative  
9 merits ruling was entitled to deference under 28 U.S.C. § 2254(d), and the principle that  
10 an alternative merits ruling does not vitiate the procedural bar. *See Harris v. Reed*, 489  
11 U.S. 255, 264 n.10 (1989). This factor slightly favors Respondents.

12       **2. Respondents’ irreparable injury**

13           The Court further agrees Respondents will suffer injury absent a stay. Respondents  
14 appeal this Court’s decision that Apelt received constitutionally ineffective assistance of  
15 counsel during sentencing. If the Court does not stay the writ, and the State of Arizona is  
16 forced to conduct a new sentencing hearing, Respondents’ appeal might be rendered  
17 moot. Further, absent a stay, the State will be forced to expend considerable time and  
18 resources preparing for a new mitigation hearing that might not be necessary if the Ninth  
19 Circuit were to reverse this Court’s decision. This factor favors Respondents. *See*  
20 *Johnson v. Bagley*, No. 1:02-cv-220, 2006 WL 2165685, at \*2 (S.D.Ohio July 31, 2006).

21       **3. Apelt’s irreparable injury**

22           Issuance of the stay will not substantially injure Apelt. The Court granted relief  
23 only as to Apelt’s death sentence. If the stay is granted, Apelt will remain in prison while  
24 the appeal is resolved. Apelt asserts that if the stay is granted he will face the “extreme  
25 hardship” of remaining on death row, while if the stay is denied he will be housed in less  
26 onerous conditions. (Doc. 382 at 6.) The Court, having no facts by which it can make a  
27 judgment concerning the conditions in which Apelt will be housed, finds that this factor  
28 is “essentially neutral.” *Crittenden v. Chappell*, No. 2:95-cv-1957-KJM-GGH, 2013 WL

1 6840451, at \*10 (E.D.Cal. December 14, 2013).

2 **4. Public interest**

3 Finally, the Court concludes that the public interest strongly supports granting the  
4 stay. The Court is mindful of the substantial hardship and cost to the State in preparing  
5 for and conducting a new sentencing hearing and must balance the interests of the State  
6 in avoiding that hardship and cost against the possibility that this Court's judgment could  
7 be reversed on appeal. But more importantly, Apelt has cross-appealed the Court's denial  
8 of his habeas conviction-related claims. (*See* Doc. 379.) It would be unwise to require the  
9 State conduct a new sentencing hearing when the constitutional validity of Apelt's  
10 underlying convictions are still subject to appellate review. This factor favors granting  
11 the stay. *See Johnson*, 2006 WL 2165685, at \*3.

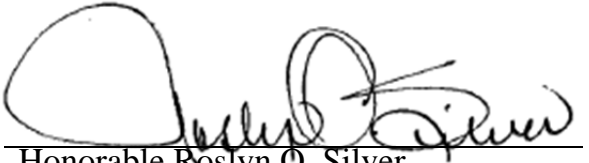
12 For the foregoing reasons, the factors support granting a stay.

13 Accordingly,

14 **IT IS ORDERED** granting Respondents' motion for a stay (Doc. 375).

15 **IT IS FURTHER ORDERED** that the Court's judgment is stayed pending  
16 conclusion of appellate review.

17 Dated this 13th day of January, 2016.

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21 Honorable Roslyn O. Silver  
22 Senior United States District Judge  
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