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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Steve Alan Boggs,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.  
14

No. CV-14-02165-PHX-GMS

DEATH-PENALTY CASE

**ORDER**

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16 Before the Court is Petitioner Steve Alan Boggs's Motion for Temporary Stay and  
17 Abeyance and for Authorization to Appear in Ancillary State-Court Proceedings. (Doc.  
18 41.) Boggs asks the Court to stay and hold his case in abeyance while he pursues state  
19 court relief. He also seeks permission for his federal habeas counsel to appear on his  
20 behalf in state court. Respondents filed a response opposing a stay and Boggs filed a  
21 reply. (Docs. 42, 43.) For the reasons set forth below, the motion is denied.

22 **I. BACKGROUND**

23 In 2002, Boggs and Christopher Hargrave, members of a white supremacist militia  
24 group, shot three fast-food workers to death. In 2005, a jury found Boggs guilty of three  
25 counts of first-degree murder and determined that he should be sentenced to death. The  
26 Arizona Supreme Court affirmed the convictions and sentences. *State v. Boggs*, 218 Ariz.  
27 325, 185 P.3d 111 (2008). After unsuccessfully pursuing post-conviction relief, Boggs  
28 filed a petition for writ of habeas corpus in this Court. (Doc. 15.) Respondents filed an  
answer and Boggs filed a reply. (Docs. 21, 26.) Boggs's brief on evidentiary development

1 was due on November 14, 2016. (Doc. 40.) He filed the pending motion on October 31,  
2 2016. (Doc. 41.)

3 Boggs now seeks a stay so that he can return to state court and present several  
4 claims. He argues that *Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (per curiam), and *Hurst*  
5 *v. Florida*, 136 S. Ct. 616 (2016), are significant changes in the law under Arizona Rule  
6 of Criminal Procedure 32.1(g). He also contends that additional mitigation evidence  
7 constitutes newly discovered material facts that probably would have changed the verdict  
8 or sentence under Arizona Rule of Criminal Procedure 32.1(e). Finally, Boggs argues that  
9 the new mitigation evidence demonstrates by clear and convincing evidence that the court  
10 would not have imposed the death penalty under Arizona Rule of Criminal Procedure  
11 32.1(h).

## 12 II. ANALYSIS

13 Boggs's habeas petition is governed by the Antiterrorism and Effective Death  
14 Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(b)(1)(A). Although AEDPA does not  
15 deprive courts of the authority to stay habeas corpus petitions, it "does circumscribe their  
16 discretion." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). The Supreme Court has  
17 emphasized that the stay and abeyance of federal habeas petitions is available only in  
18 limited circumstances. *Id.* at 277. "Staying a federal habeas petition frustrates AEDPA's  
19 objective of encouraging finality by allowing a petitioner to delay the resolution of the  
20 federal proceedings. It also undermines AEDPA's goal of streamlining federal habeas  
21 proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court  
22 prior to filing his federal petition." *Id.*

23 A writ of habeas corpus may not be granted unless it appears that a petitioner has  
24 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v.*  
25 *Thompson*, 501 U.S. 722, 731 (1991). In Arizona, there are two avenues for petitioners to  
26 exhaust federal constitutional claims: direct appeal and post-conviction relief proceedings  
27 ("PCR"). Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings  
28 and provides that a petitioner is precluded from relief on any claim that could have been  
raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive

1 effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions and  
2 the petitioner can justify why the claim was omitted from a prior petition or not presented  
3 in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)–(h), 32.2(b), 32.4(a).

4 When a petitioner has an available remedy in state court that he has not  
5 procedurally defaulted, it is appropriate for the federal court to stay the habeas  
6 proceedings if (1) there was good cause for the petitioner’s failure to exhaust his claims  
7 first in state court, (2) his unexhausted claims are potentially meritorious, and (3) there is  
8 no indication that he engaged in intentionally dilatory litigation tactics. *See Rhines*, 544  
9 U.S. at 277. As discussed below, courts also have the inherent power to stay cases as a  
10 means of controlling their dockets. *Landis v. North American. Co.*, 299 U.S. 248, 254  
11 (1936)

12 Citing *Hurst*, Boggs seeks a stay under *Rhines* to exhaust his Claim 38 of his  
13 habeas petition.<sup>1</sup> (Doc. 43 at 7.) With respect to the other claims, he seeks a stay to  
14 “present in state court newly available claims without simultaneous and potentially  
15 unnecessary federal proceedings.” (Doc. 43 at 3.)

16 **A. Rule 32.1(g)**

17 Boggs contends that under Rule 32.1(g), the United States Supreme Court’s recent  
18 decisions in *Lynch* and *Hurst* provide an available remedy in state court. Rule 32.1(g)  
19 provides that a defendant may file a petition for post-conviction relief on the ground that  
20 “[t]here has been a significant change in the law that if determined to apply to  
21 defendant’s case would probably overturn the defendant’s conviction or sentence.” Ariz.  
22 R. Crim. P. 32.1(g).

23 Arizona courts have characterized a significant change in the law as a  
24 “transformative event,” *State v. Shrum*, 220 Ariz. 115, 118, 203 P.3d 1175, 1178 (2009),  
25 and a “clear break” or “sharp break” with the past. *State v. Slemmer*, 170 Ariz. 174, 182,  
26 823 P.2d 41, 49 (1991). “The archetype of such a change occurs when an appellate court

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28 <sup>1</sup> Boggs alleges that Arizona’s death penalty statute violates the Sixth Amendment  
because it does not require the jury to find beyond a reasonable doubt that the  
aggravating factors outweigh the mitigating circumstances. (Doc. 15 at 420–21.)

1 overrules previously binding case law.” *Shrum*, 220 Ariz. at 118, 203 P.3d at 1178. A  
2 statutory or constitutional amendment representing a definite break from prior law can  
3 also constitute a significant change in the law. *Id.* at 119, 203 P.3d at 1179; *see State v.*  
4 *Werderman*, 237 Ariz. 342, 343, 350 P.3d 846, 847 (App. 2015).

5 In *Lynch*, 136 S. Ct. 1818, the Supreme Court applied *Simmons v. South Carolina*,  
6 512 U.S. 154 (1994), to a capital sentencing in Arizona. *Simmons* held that when future  
7 dangerousness is an issue in a capital sentencing determination, the defendant has a due  
8 process right to require that his sentencing jury be informed of his ineligibility for parole.  
9 512 U.S. at 171.

10 In *Lynch*, the defendant was convicted of murder and other crimes. 136 S. Ct. at  
11 1818. Before the penalty phase of his trial began, the state successfully moved to prevent  
12 his counsel from informing the jury that, if the defendant did not receive a death  
13 sentence, he would be sentenced to life in prison without possibility of parole. *Id.* at  
14 1819. The jury sentenced him to death. *Id.* On appeal, Lynch argued that, because the  
15 state had made his future dangerousness an issue in arguing for the death penalty, the jury  
16 should have been given a *Simmons* instruction stating that the only non-capital sentence  
17 he could receive under Arizona law was life imprisonment without parole. *Id.* The  
18 Arizona Supreme Court affirmed, holding that the failure to give the *Simmons* instruction  
19 was not error because Lynch could have received a life sentence that would have made  
20 him eligible for release after 25 years—even though any such release would have  
21 required executive clemency. *Id.* at 1820.

22 The United States Supreme Court reversed. *Id.* The Court reiterated that under  
23 *Simmons* and its progeny, “where a capital defendant’s future dangerousness is at issue,  
24 and the only sentencing alternative to death available to the jury is life imprisonment  
25 without possibility of parole,” the Due Process Clause “entitles the defendant to inform  
26 the jury of [his] parole ineligibility, either by a jury instruction or in arguments by  
27 counsel.” *Id.* at 1818 (internal quotations omitted). The Court explained that neither the  
28 possibility of executive clemency nor the possibility that state parole statutes will be  
amended can justify refusing a parole-ineligibility instruction. *Id.* at 1820.

1           *Lynch* does not represent a change in the law. It simply applies existing law to an  
2 Arizona case. It is not a transformative event of the kind described by Arizona courts in  
3 interpreting Rule 32.1(g). In *Shrum*, for example, the Arizona Supreme Court cited *Ring*  
4 *v. Arizona*, 536 U.S. 584 (2002), as a “significant change in the law.” 220 Ariz. at 119,  
5 203 P.3d at 1179. *Ring* “expressly overruled” *Walton v. Arizona*, 497 U.S. 639 (1990). As  
6 the Arizona Supreme Court explained, “before *Ring*, a criminal defendant was foreclosed  
7 by *Walton* from arguing that he had a right to trial by jury on capital aggravating factors;  
8 *Ring* transformed existing Sixth Amendment law to provide for just such a right.” *Shrum*,  
9 220 Ariz. at 119, 203 P.3d at 1179.

10           In contrast to the holding in *Ring*, which expressly overruled precedent and  
11 invalidated Arizona’s capital sentencing scheme, *Lynch* did not transform Arizona law.  
12 The holding does not constitute a significant change in law for purposes of Rule 32.1(g).

13           Respondents also argue, correctly, that *Lynch* would not apply retroactively. *Lynch*  
14 applies *Simmons* to an Arizona capital sentencing. In *O’Dell v. Netherland*, 521 U.S. 151,  
15 167 (1997), the Supreme Court rejected the argument that *Simmons* represented a  
16 “watershed” rule of criminal procedure that would apply retroactively. Like *Simmons*,  
17 *Lynch* is procedural and nonretroactive. Therefore, Boggs is not entitled to retroactive  
18 application of *Lynch*, and his claim fails to meet the exception to preclusion set out in  
19 Rule 32.1(g).

20           Like *Lynch*, *Hurst* did nothing to transform Arizona law. In *Hurst*, 136 S. Ct. 616,  
21 the Supreme Court held that Florida’s capital sentencing scheme violated *Ring*. Under the  
22 Florida scheme, a jury makes an advisory verdict while the judge makes the ultimate  
23 factual determinations necessary to sentence a defendant to death. *Id.* at 621–22. The  
24 Court held that this procedure was invalid because it “does not require the jury to make  
25 the critical findings necessary to impose the death penalty.” *Id.* at 622. The Supreme  
26 Court simply applied *Ring* to Florida’s capital sentencing statutes.

27           *Hurst* does not hold, as Boggs suggests, that a jury is required to find beyond a  
28 reasonable doubt that the aggravating factors outweigh the mitigating circumstances.  
(Doc. 41 at 7; Doc. 45 at 4–5.) *Hurst* held only that Florida’s scheme, in which the jury

1 rendered an advisory sentence but the judge made the findings regarding aggravating and  
2 mitigating factors, violated the Sixth Amendment. *Hurst*, 136 S. Ct. at 620. *Hurst* did not  
3 address the process of weighing the aggravating and mitigating circumstances. Indeed,  
4 the Supreme Court has held that the sentencer may be given “unbridled discretion in  
5 determining whether the death penalty should be imposed after it has found that the  
6 defendant is a member of the class made eligible for that penalty.” *Zant v. Stephens*, 426  
7 U.S. 862, 875 (1983); see *Tuilaepa v. California*, 512 U.S. 967, 979–80 (1994). In *Zant*,  
8 the Court explained that “specific standards for balancing aggravating against mitigating  
9 circumstances are not constitutionally required.” *Id.* at 875 n.13; see *Franklin v. Lynaugh*,  
10 487 U.S. 164, 179 (1988) (“[W]e have never held that a specific method for balancing  
11 mitigating and aggravating factors in a capital sentencing proceeding is constitutionally  
12 required.”).

13 In Arizona, in accordance with *Ring* and *Hurst*, the jury makes factual findings  
14 regarding the aggravating and mitigating factors to determine the appropriate sentence.  
15 *Hurst* did not effect a change in Arizona law for purposes of Rule 32.1(g).

16 Moreover, even if *Hurst* were a significant change in the law, it does not apply  
17 retroactively. The Supreme Court has held that “*Ring* announced a new procedural rule  
18 that does not apply retroactively to cases already final on direct review.” *Schriro v.*  
19 *Summerlin*, 542 U.S. 348, 358 (2004). *Hurst*, which applies *Ring* in Florida, is also  
20 nonretroactive. This claim does meet the Rule 32.1(g) exception to preclusion.

21 **B. Rule 32.1(e) and (h)**

22 Under Rule 32.1(e), a claim is not precluded where “[n]ewly discovered material  
23 facts probably exist and such facts probably would have changed the verdict or  
24 sentence.” Ariz. R. Crim. P. 32.1(e). Rule 32.1(h) provides an exception to preclusion  
25 where “[t]he defendant demonstrates by clear and convincing evidence that the facts  
26 underlying the claim would be sufficient to establish that no reasonable fact-finder  
27 would have found defendant guilty of the underlying offense beyond a reasonable  
28 doubt, or that the court would not have imposed the death penalty.” Ariz. R. Crim. P.  
32.1(h).

1 Boggs asserts that in state court he would offer newly discovered mitigation  
2 information, including evidence of “the extensive abuse, neglect, isolation, and other  
3 causes of trauma endured by Mr. Boggs as a child and adolescent”; “evidence on the  
4 links between trauma and the subsequent adoption of extremist ideology,” “the frequency  
5 with which individuals exaggerate their involvement in extremist militias,” and  
6 “statements from lay witnesses regarding their knowledge of the ‘militia groups’ to which  
7 Mr. Boggs belonged”; and a diagnosis of a Fetal Alcohol Spectrum Disorder. (Doc. 41 at  
8 10–11.)

9 Respondents contend that a stay is inappropriate because Boggs is asserting a  
10 freestanding claim of actual innocence which is not cognizable on federal habeas review.  
11 (Doc. 42 at 14–15.) Respondents are correct. The Supreme Court has not recognized  
12 actual innocence as a stand-alone habeas claim. *See Herrera v. Collins*, 506 U.S. 390,  
13 400 (1993) (“Claims of actual innocence based on newly discovered evidence have never  
14 been held to state a ground for federal habeas relief absent an independent constitutional  
15 violation occurring in the underlying state criminal proceeding.”); *Dist. Attorney’s Office*  
16 *for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009) (“Whether such a federal  
17 right exists is an open question.”) (citing *House v. Bell*, 547 U.S. 518, 554–555 (2006)).

18 Regardless of whether the claim is cognizable, however, this Court may stay the  
19 proceedings as part of its inherent power “to control the disposition of the causes on its  
20 docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis*,  
21 299 U.S. at 254. To evaluate whether to stay an action, the court must weigh  
22 competing interests that will be affected by the grant or denial of a stay, including the  
23 possible damage that may result from the granting of a stay; the hardship or inequity a  
24 party may suffer in being required to go forward; and whether a stay will simplify or  
25 complicate issues, proof, and questions of law. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268  
26 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254–55). “The decision to grant a stay . . . is  
27 ‘generally left to the sound discretion of district courts.’” *Ryan v. Gonzales*, 133 S. Ct.  
28 696, 708 (2013) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)).

If the requested stay may cause “even a fair possibility” of harm, Boggs bears the

1 burden of establishing “a clear case of hardship or inequity in being required to go  
2 forward.” *Landis*, 299 U.S. at 255. The Court finds that the relevant factors do not weigh  
3 in favor of granting Boggs’s motion for a stay.

4 Boggs asserts that “[a] stay would thus promote judicial economy and efficiency,  
5 and it would avoid simultaneous litigation in multiple fora.” (Doc. 43 at 11.) This does  
6 not constitute a “clear case of hardship or inequity” given the Supreme Court’s  
7 admonition that staying a federal habeas petition frustrates AEDPA’s objectives of  
8 encouraging finality and streamlining federal habeas proceedings. *Rhines*, 544 U.S. at  
9 277. In addition, because actual-innocence is not a cognizable claim on federal habeas  
10 review, denying the stay would not result in simultaneous litigation in state and federal  
11 court. Boggs will suffer no prejudice from denial of the stay and judicial economy will be  
12 preserved because the claim will not be litigated twice.

### 13 **III. APPOINTMENT OF COUNSEL**

14 Boggs asks the Court to authorize the Federal Public Defender’s (“FPD”) office to  
15 represent him in state court. The Criminal Justice Act provides for appointed counsel to  
16 represent their client in “other appropriate motions and procedures.” 18 U.S.C. § 3599(e).

17 The Supreme Court interpreted § 3599 in *Harbison v. Bell*, 556 U.S. 180 (2009),  
18 holding that the statute “authorizes federally appointed counsel to represent their clients  
19 in state clemency proceedings and entitles them to compensation for that representation.”  
20 *Id.* at 194. The Court explained that “subsection (a)(2) triggers the appointment of  
21 counsel for habeas petitioners, and subsection (e) governs the scope of appointed  
22 counsel’s duties.” *Id.* at 185. The Court noted, however, that appointed counsel is not  
23 expected to provide each of the services enumerated in section (e) for every client.  
24 Rather, “counsel’s representation includes only those judicial proceedings transpiring  
25 ‘subsequent’ to her appointment.” *Id.* at 188.

26 *Harbison* addressed the concern that under the Court’s interpretation of § 3599,  
27 federally appointed counsel would be required to represent their clients in state retrial or  
28 state habeas proceedings that occur after counsel’s appointment because such  
proceedings are also “available post-conviction process.” *Id.* The Court explained that §

1 3599(e) does not apply to those proceedings because they are not “properly understood as  
2 a ‘subsequent stage’ of judicial proceedings but rather as the commencement of new  
3 judicial proceedings.” *Id.* at 189. As to state post-conviction proceedings, the Court  
4 noted, “State habeas is not a stage ‘subsequent’ to federal habeas. . . . That state  
5 postconviction litigation sometimes follows the initiation of federal habeas because a  
6 petitioner has failed to exhaust does not change the order of proceedings contemplated by  
7 the statute.” *Id.* at 189–90; *see Irick v. Bell*, 636 F.3d 289, 292 (6th Cir. 2011); *Lugo v.*  
8 *Sec’y, Florida Dep’t of Corr.*, 750 F.3d 1198, 1213 (11th Cir. 2014), *cert. denied sub*  
9 *nom. Lugo v. Jones*, 135 S. Ct. 1171 (2015) (explaining “a state prisoner is not entitled, as  
10 a matter of statutory right, to have federally paid counsel assist him in the pursuit and  
11 exhaustion of his state postconviction remedies, including the filings of motions for state  
12 collateral relief . . . ”); *Gary v. Warden, Ga. Diagnostic Prison*, 686 F.3d 1261, 1274  
13 (11th Cir. 2012) (explaining “§ 3599 does not provide for federally-funded counsel to  
14 assist someone standing in Gary’s shoes in pursuing a DNA motion, the results of which  
15 might serve as the basis for an extraordinary motion for a new trial”).

16 Nevertheless, this Court has the discretion to appoint federal counsel to represent  
17 Boggs in state court. In *Harbison* the Supreme Court noted that “a district court may  
18 determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a  
19 claim in the course of her federal habeas representation.” 556 U.S. at 190 n.7.

20 The Court has determined that Boggs is not entitled to a stay, either to exhaust  
21 claims based on *Lynch* and *Hurst* or to raise a claim premised on new evidence. Based on  
22 that determination, together with the *Harbison* Court’s discussion of the parameters of §  
23 3599(e), the Court finds it is not appropriate to authorize the FPD to represent Boggs in  
24 state court in this instance.

#### 25 **IV. CONCLUSION**

26 Boggs is not entitled to a stay. *Lynch* and *Hurst* are not significant changes in the  
27 law for purposes of Rule 32.1(g). The Court will exercise its discretion to deny a stay  
28 with respect to Boggs’s new evidence allegations and to deny the appointment of the  
FPD.

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Accordingly,

**IT IS ORDERED** denying Boggs’s Motion for Temporary Stay and Abeyance and for Authorization to Appear in Ancillary State-Court Proceedings. (Doc. 41.)

**IT IS FURTHER ORDERED** amending the briefing schedule as follows: Boggs shall file his Motion for Evidentiary Development no later than **January 20, 2017**. Respondents shall file their response no later than **February 17, 2017**. Boggs may file a reply no later than **March 3, 2017**.<sup>2</sup>

Dated this 6th day of January, 2017.

  
\_\_\_\_\_  
Honorable G. Murray Snow  
United States District Judge

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<sup>2</sup> As already noted, Boggs’s brief on evidentiary development was due November 14, 2016. The fact that he did not comply with that deadline but chose instead to file the pending order did not stay the briefing on evidentiary development.