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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DANIEL WAYNE COOK, Petitioner, v. CHARLES RYAN, et al., Respondent.	No. 97-cv-146-PHX-RCB **Motion for Relief from Judgment Pursuant to Rule 60(b)(6)**

Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, Petitioner Daniel Wayne Cook, by and through counsel, respectfully requests that this Court grant him relief from its judgment entered on Claim 3 of his Petition for Habeas Corpus. (Doc. No. 39 at 13-15.) The reasons for this motion are supported in the attached Memorandum.

MEMORANDUM IN SUPPORT

On March 20, 2012, the Supreme Court of the United States held in *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012), that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a

claim of ineffective assistance at trial." As the Ninth Circuit has recognized, "*Martinez* forges a new path for habeas counsel to use ineffectiveness of state PCR counsel as a way to overcome procedural default in federal habeas proceedings." *Lopez v. Ryan*, ___ F.3d. ___, 2012 WL 1676696, at *1 (9th Cir. May 15, 2012). Because the Supreme Court has now announced an equitable rule that was not available during Cook's habeas proceedings but is directly applicable to the resolution of Claim 3, this Court should reopen its final judgment, review the merits of the claim, and ultimately grant relief.

I. The Courts' Determination That Cook's Ineffective Assistance of Trial Counsel Was Procedurally Barred Is Defective

In Claim 3 of his Amended Federal Habeas Petition, Cook argued that his court-appointed trial counsel was ineffective for failing to investigate and prepare his case for trial and sentencing in violation of the Sixth, Eighth, and Fourteenth Amendments. (Doc. No. 18 at 38-40.) When this Court reviewed Claim 3 of Cook's habeas petition, it found the claim procedurally defaulted. (Doc. No. 39 at 13-15.)[1] Likewise, the Ninth Circuit also found the claim procedurally defaulted and specifically rejected the argument that post-conviction counsel's errors could constitute cause to overcome the default. *Cook v. Schriro*, 538 F.3d 1000, 1027 (9th Cir. 2008) ("There is no constitutional right to counsel . . . in state collateral proceedings after exhaustion of direct review.").[2] The United States Supreme Court denied Cook's petition for writ of certiorari, which asked the Court to

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[1] Cook also asked the district court to grant him funding for experts to examine his mental functioning. He claimed that the record revealed evidence of possible brain damage and that he needed an expert to assist him. (Doc. Nos. 46, 56.) He asked for neuropsychological testing and a mitigation investigator to obtain his mental and social history. (Doc. No. 46.) The district court denied him funding and the opportunity to develop facts. (Doc. No. 72).

[2] On appeal, trial counsel's failure to investigate and prepare the case for trial and sentencing was labeled as Claim 3(a), which is how this Court labeled the claim in its procedural order. (Doc. No. 39 at 13.)

consider whether post-conviction counsel's actions could, in limited circumstances, serve as cause. *Cook v. Schriro*, 555 U.S. 1141 (Mem.) (2009).

Since his federal habeas proceedings concluded, the United States Supreme Court decided *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). There, the Court held that post-conviction counsel's ineffectiveness can, in fact, constitute cause for failure to present a claim of ineffective assistance of trial counsel. *Id.* at 1315. This decision is in direct contravention to the decision of the Ninth Circuit in Cook's case. Cook was denied the ability to present the merits of Claim 3 during his habeas proceedings because this Court found the claim defaulted. In light of *Martinez*, this Court should reopen his case to consider the merits of his claim.

II. Rule 60(b)(6) is applicable in the instant case

A district court may "relieve a party . . . from a final judgment" for any "reason that justifies relief" if the terms for doing so are just. Fed. R. Civ. P. 60(b)(6). A motion made pursuant to Rule 60(b) will not be construed as a successive habeas petition where it "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005); *see also Lopez v. Ryan*, No. 98-cv-00072-SMM, Order at 5 (D. Ariz. April 30, 2012) ("Petitioner is correct that under *Gonzalez* a district court has jurisdiction to consider a Rule 60(b) motion challenging a procedural default ruling."). Here, Cook is not attacking the substance of this Court's resolution of Claim 3, but rather arguing that its "previous ruling which precluded a merits determination was in error." *Gonzalez*, 545 U.S. at 532, n.4. Relief under Rule 60(b)(6) will be available if the moving party points to "extraordinary circumstances justifying the reopening of a final judgment." *Id.* at 535. Because Cook can demonstrate extraordinary circumstances in his case, he is entitled to relief.

Since *Martinez* was decided, the Ninth Circuit has had one occasion to determine

whether *Martinez* applies to a federal habeas petitioner who seeks relief under Rule 60(b). *See Lopez v. Ryan*, ___ F.3d ___, 2012 W L 1676696 (9th Cir. May 15, 2012). As the *Lopez* Court noted, there are "six factors that may be considered, among others, to evaluate whether extraordinary circumstances exist." *Id.* at *3 (9th Cir. May 15, 2012) (*citing Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009)). In considering those factors, this Court should find that extraordinary circumstances exist to reopen its judgment.

1. Intervening change in law

In *Lopez*, the Ninth Circuit found that the "circumstances weigh slightly in favor of reopening Lopez's habeas case." *Lopez*, 2012 WL 1676696, at *4. In the instant case, the Court should find that the intervening change in law weighs slightly in Cook's favor.

2. Exercise of diligence in pursuing the issue during the federal habeas proceedings

The Ninth Circuit faulted Lopez for not pursuing a claim that his post-conviction counsel was ineffective with the Supreme Court; instead, Lopez continued to point to the State's conduct rather than post-conviction counsel's conduct. *Lopez*, 2012 WL 1676696, at *5. Cook, on the other hand, presented the argument that it was because of counsel's failures that any default should be excused. *See Cook v. Schriro*, No. 06-99005, Opening Br. at 74-77, 70-73 (9th Cir.); *Cook v. Schriro*, 555 U.S. 1141 (Mem.) (2009). Unlike Lopez, Cook is not presenting an entirely new argument to the federal courts in his motion.

3. Interest in finality

While the *Lopez* court determined that "[t]he State's and the victim's interests in finality, especially after a warrant of execution has been obtained and an execution date set, weigh against granting post-judgment relief," *Lopez v. Ryan*, 2012 WL 1676696, at *5, such a finding seems to ignore the Supreme Court's language in *Gonzalez*. When

discussing finality, the Supreme Court explicitly explained: "That policy consideration, standing alone, is unpersuasive in the interpretation of a provision *whose whole purpose is to make an exception to finality*." *Gonzalez*, 545 U.S. at 529 (emphasis added). Moreover, Cook has been attempting to present this claim since he was in district court on his federal habeas proceedings. Finally, unlike Lopez, a warrant of execution has not yet issued.[3]

4. Delay between the finality of the judgment and the motion for Rule 60(b)(6)

The court in *Lopez* agreed with the district court that there was no delay in bringing the request for Rule 60(b) relief, and therefore this factor weighed in favor of reopening the proceedings. *Lopez*, 2012 WL 1676696, at *5. In the instant case, Cook first requested that the Supreme Court take the extraordinary remedy of granting a motion for rehearing out-of-time to reconsider the denial of his petition for certiorari, which raised the exact issue decided in *Martinez*. *See Cook v. Schriro*, No. 08-7229, Motion for Leave to File Out-of-Time Petition for Rehearing of Petition for Certiorari (U.S. April 16, 2012). Cook prepared and filed his motion approximately three weeks after *Martinez* was decided. This was the same amount of time that Lopez took to file his motion for relief. *See Lopez v. Ryan*, No. 98-cv-00072-SMM, Order at 15 (D. Ariz. April 30, 2012). The Supreme Court distributed Cook's motion for conference on three separate days before ultimately denying it on May 29, 2012. Cook has filed this motion only one week after the Supreme Court denied his motion. As a result, he has not caused delay, and this factor should weigh in favor of reopening his proceedings.

5. Degree of connection between Cook's case and *Martinez*

In *Lopez*, the Ninth Circuit found significant that its decision denying Lopez

[3] The State's Motion for a Warrant of Execution is currently scheduled to be conferenced by the Arizona Supreme Court on June 12, 2012. *State v. Cook*, No. CR-88-0301-AP.

habeas relief was *not* based on procedural default. *Lopez*, 2012 WL 1676696, at *5. In this case, however, the Ninth Circuit found that Claim 3(a) was procedurally defaulted. *Cook*, 538 F.3d at 1026. More importantly, the court also found that Cook's argument that his post-conviction counsel was ineffective could not overcome default because "[t]here is no constitutional right to counsel . . . in state collateral proceedings after exhaustion of direct review." *Cook*, 538 F.3d at 1027. Here, the procedural finding by the Ninth Circuit is directly connected to the issue squarely decided in *Martinez*.

6. Comity

The *Lopez* court found, "In light of our previous opinion and those of the various other courts that have addressed the merits of several of Lopez's claims, and the determination regarding Lopez's lack of diligence, the comity factor does not favor reconsideration." *Lopez*, 2012 WL 1676696, at *6. None of these factors are present here. There has been no federal court who has reviewed the merits of Cook's claim. Indeed, no federal court has considered the evidence that was developed *after* he was denied his requests for expert and investigative funds in federal court.

Because Cook has shown that the factors to reopen his habeas proceedings weigh in his favor, this Court should find that he has shown extraordinary circumstances to justify reopening this Court's prior judgment.

III. Cook Can Demonstrate Cause to Overcome His Defaulted Claim

Upon reopening its judgment, this Court should find that Cook can demonstrate cause to overcome Claim 3(a), which this Court previously found was procedurally defaulted. The *Martinez* Court explained that to demonstrate cause for a default, a petitioner is required to establish (1) that his initial-review post-conviction lawyer was ineffective under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."

Martinez, 132 S. Ct. at 1318. Cook can do both.

A. State Court Proceedings

i. Cook's Prosecution and Sentencing

Cook was arrested and charged with two counts of murder.[4] The Mohave County Superior Court appointed attorney Claude Keller to represent Cook. As was established in Cook's state post-conviction proceeding, Keller was incompetent and did virtually nothing to prepare either a guilt defense or a mitigation case for a possible sentencing. The specific facts demonstrating Keller's incompetency and complete constitutional ineffectiveness are pleaded in more detail *infra*, in describing the post-conviction proceedings.

It was apparent to the court (and therefore was or should have been obvious to Keller) that there was a serious issue of Cook's past mental and psychiatric history. Cook's pre-trial motion for a Rule 11 determination of competency apprised the court that Cook had previously been inpatient at the Wyoming State Mental Hospital in Evanston, Wyoming; had been inpatient at the Idaho State Mental Hospital in Blackfood, Idaho; had a history of treatment at the Mohave Mental Health Clinic, in Kingman (the site of the trial); and had a history with the Arizona Department of Economic Security indicating some psychological difficulties. (RA 36)[5] Cook had also filed a pre-trial motion for evaluation by a neurology expert, Dr. Benjamin A. Dvorak, because, the motion said, Cook's head had been run over by an auto, and had an epileptic condition. (RA 60). Cook also filed a motion for an EEG and for a CAT scan. (RA 77.)

Although, as pleaded more fully below, constitutionally competent representation

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[4] The facts related to the crime are described in this Court's Memorandum of Decision and Order denying habeas relief. (Doc. No. 90 at 2-3.)

[5] "RA" refers to record on appeal in state court; "RT" refers to the trial transcript from state court; "ME" refers to the minute entries from the state trial court.

in a capital case requires *every* defense lawyer to *immediately* begin an investigation into the character, record, family background, mental health and life of an accused, the information disclosed by the Rule 11 motion left no doubt that Keller should have done so. He did not. He remained Cook's counsel until two weeks before a firm trial date, and throughout that time did nothing whatsoever related to mitigation.

Shortly before trial, Cook sought to replace his counsel by representing himself. (RA 56.) He did so for reasons more fully explained by his testimony at post-conviction proceedings, detailed *infra.*

After Cook was convicted, he filed a motion for a mental health evaluation. He told the court that he wanted every aspect of his life, past history, illnesses and similar topics reviewed by the court through expert testimony. (RT 4 August 1988.) Cook told the Court that he was manic depressive, and that the conviction was "traumatic" and "screwed up my head considerably." (*Id.*) The court indicated it thought that "two rule 11 examinations would be more in-depth than one done under Rule 26.5." Although Cook pointed out the difference between Rule 11's purpose of determining competence to stand trial, and Rule 26.5 determinations that relate to mental condition for guilt or sentencing purposes, the court denied the motion. Moreover, notwithstanding Cook's indication that the conviction had been traumatic and had significantly affected his mental processes, the court did nothing to determine whether Cook remained competent to decide to, or to proceed in the sentencing phase without benefit of counsel. Thus it became impossible for Cook, admittedly suffering from mental illness, and incarcerated after conviction of murder and under a potential sentence of death, to carry out himself, or to have any agents undertake, the kind of mitigation case investigation and preparation constitutionally required.

On August 8, 1988, the court conducted the aggravation and mitigation hearing. It consumed 41 minutes. At the hearing the State asked the court to consider for the Cruz-Ramos murder "pecuniary gain" and "heinous, cruel or depraved." (RT 8 August 1988 at

6). For the Swaney murder it claimed only the "heinous, cruel or depraved" aggravator. (*Id.*) The sentencing court *sua sponte* considered the aggravator of "one or more homicides during the commission of the offense." (*Id.* at 7.)

The court found the existence of all the aggravators requested by the State. (*Id.* at 14, 15). The court found no evidence of the statutory mitigating factor related to impaired capacity to appreciate the wrongfulness of the conduct; and found no other statutory mitigating factors. It recognized that Cook had no prior felony, but found that not to be a mitigating factor because of what it concluded was an extensive misdemeanor record. It refused to find Cook's mental history to be a mitigating factor, commenting that there was "no connection" to the crime. The court concluded that Cook's performance in the courtroom belied any continuing connection. (*Id.* at 19, 20.)

ii. Cook's State Post-Conviction Proceedings

Cook's first post-conviction counsel, John Williams, prepared a supplement to Cook's *pro se* post-conviction petition, which included allegations that trial counsel was ineffective. However, he only alleged that counsel was ineffective for sentencing purposes in not preparing a "mitigation plan." (RA 179, Supplement to Post-Conviction Petition September 1, 1993.) He did not allege trial counsel's failure to promptly, thoroughly investigate and prepare a mitigation case. Nor did he allege that Cook had been prejudiced by such trial counsel ineffectiveness. He did not allege any facts about the mitigation case which could have been presented at sentencing.

Counsel Williams filed a motion for appointment of investigator. (RA 164, January 11, 1993.) But the motion contained no explanation what the investigator would investigate, let alone that investigation of Cook's character, record, background, family life, mental and medical health conditions should be investigated.

When the State filed a motion to dismiss the petition, it noted that the supplemental petition "does not explain what kind of plan should have been developed" for mitigation.

(RA 187, December 3, 1993 at 17.) Notwithstanding that opportunity, when counsel Williams filed a Second Supplement to the post-conviction petition, which was explicitly stated to be intended to rebut the State's motion to dismiss, he did not respond to the State's raising of this deficiency relating to trial counsel's lack of mitigation efforts.

There is no evidence in the record and no indication that either Mr. Williams or any investigator took any action at all to investigate the mitigation case which could have been presented at trial. Thus, while he represented Cook, Williams did no preparation to present a case of "prejudice" under *Strickland v. Washington*, 466 U.S. 668 (1984).

Counsel Williams then moved to withdraw due to a conflict. (RA 196, April 20, 1994 Stipulation for Substitution of Counsel.) In the motion, Williams submitted a statement by attorney Michael Terribile that he would accept appointment and was familiar with the case. (*Id.*) Before the court-ordered evidentiary hearing, which was to be explicitly directed to the claim that trial counsel had been ineffective, the court granted Williams' motion to withdraw and appointed Terribile as counsel. (ME May 25, 1994.) In the court's minute entry, it specifically noted that it was taking the position that "Mr. Terribile joins in every pleading filed by Mr. Williams and will not require him to file any additional motions to accomplish such." (*Id.*) Terribile had replaced Williams as Cook's counsel.

Despite being granted a hearing on the claim of trial counsel's failure to investigate and develop a mitigation plan, Mr. Terribile took no action to investigate the mitigation case which could have been presented at trial. It is obvious that he conducted no mitigation investigation, because (i) he presented no such evidence at the evidentiary hearing conducted for the post-conviction proceedings; and (ii) subsequent investigations have revealed an extensive, compelling mitigation case. Rather than take responsibility as Cook's *only* attorney of record, Terribile relied upon conflicted counsel to tell him which witnesses should be presented. *See* Decl. of Michael Terribile, dated March 30, 2009,

attached as Ex. 29 ¶ 2.

On December 2, 1994, an evidentiary hearing was held on, *inter alia*, the claim that Cook's trial counsel was ineffective. Post-conviction counsel presented testimony from several witnesses about appointed Counsel Keller's incompetency to defend major cases, including capital cases; his suitability only to handle simple matters like changes of plea; his unwillingness, let alone inability, to conduct a jury trial; and his failure to know current law, and citation of outdated authorities. (RT 2 December, 1994, at 20, 21; 30-34; 38, 39; 43-45; 62-66; 75, 76.) Unfortunately, although post-conviction counsel presented evidence of Keller's general incompetency, he did not adduce explicit testimony about Keller's failings in not investigating or preparing a mitigation case. (*See generally id.*)

Claude Keller testified at the evidentiary hearing. He acknowledged that he had not previously handled a capital case. (RT 2 December 1994 at 53.) Keller acknowledged that between his original retention in the summer of 1987, and April of 1988 when Cook asked to represent himself, he had not settled on a defense; and indicated that among the possibilities was "diminished capacity" (*Id.* at 52), which is not a defense in Arizona. He did not testify explicitly that he had undertaken no action whatsoever to investigate or prepare a mitigation case, but that fact was implicit from his testimony that he had done virtually no investigation of any kind. In fact, Terribile did not ask any questions about whether Keller had conducted any mitigation investigation.

Keller also acknowledged that he had been drinking regularly and heavily during the period of his representation of Cook. He said that he would drink four or five nights out of seven; and that he would take "three or four or maybe five" drinks on those nights. (*Id.* at 91.)

The first defense investigator, Evan Williams (who was himself replaced for inaction on Cook's case), testified at the post-conviction hearing that Keller never gave him specific instructions on what Keller wanted him to do, or who he wanted Williams to

interview. (*Id.* at 106.) As with Keller, Williams did not testify explicitly that he had done nothing to investigate or prepare a mitigation case, but the fact that he had not was implicit from his testimony related to guilt-phase investigations. Not surprisingly, Terribile also failed to ask any questions about whether Williams conducted any mitigation investigation.

Cook testified at the post-conviction hearing. His testimony included:

A. That the only topic Keller ever discussed with him was an insanity defense. He didn't want to talk about the facts of the case. (RT 2 December 1994, at 142-146.)

B. That on some early court appearances he could smell alcohol on Keller's breath. (*Id.* at 146.)

C. That Keller's arguments to the court during motion hearings would ramble. He would not make any specific arguments. He would not understand his own arguments. He would get lost and the judge would have to lead him back to where he had drifted off path. (*Id.* at 147.)

D. That he had asked Keller to get statements from the police and other witnesses, but was told that Keller would rely on the police reports alone, and did not intend to interview the witnesses. (*Id.* at 147,48.)

E. That when he became convinced that Keller was incompetent, the trial judge had already said that no further continuances would be granted. Cook testified that he believed that the only options available to him were that Keller would represent him, or he would have to represent himself. He further testified that if the Court had asked why he wished to waive counsel, he would have said that Keller was not competent to put on a defense, that he was not happy with the way that Keller was handling the case, and that he was not happy that Evan Williams had so much control in the case as he did. Also, if asked, he said he

would have pointed out that Keller had not interviewed witnesses. (*Id.* at 152-54.)

The Court denied the petition for post-conviction relief, in a written order which did not make any findings of fact or conclusions of law. (ME 108.) The court did make a statement from the bench on various aspects of the facts and the issues. (RT 3 February 1995.) These statements, as material to the claim presented here, included:

A. That there was no showing about the second prong of the *Strickland* rule on effectiveness of counsel; that there had been no indication of defenses that could have been raised or witnesses who could have been called. (*Id.* at 26.)

B. That as to the first prong of the *Strickland* test, whether counsel had been deficient, that perhaps there might have been a "flurry of activity" immediately before the trial. (*Id.* at 27-28.) By this the court apparently meant that counsel's ineffectiveness which was so evident up until that time might be remedied by such a "flurry."

After relief was denied, Terribile failed to present the issue of ineffective trial counsel in a motion for rehearing to the trial court. Under Arizona law in effect at the time, in order to obtain a final judgment on a claim in thankspost-conviction proceedings, which could be presented to the Arizona Supreme Court in a petition for review, the trial judge must be asked to reconsider the specific claim. *State v. Bortz*, 169 Ariz. 575, 578, 821 P.2d 236, 239 (App. 1991) (under former Ariz. R. Crim. P. 32.9 [the former version being applicable to Cook's case because of when he had filed his petition for post-conviction relief] "only those claims preserved in the motion for rehearing" following denial of post-conviction relief by the trial court may be reviewed on appeal). Terribile had no strategic reason for not asking the trial court to reconsider its decision on this claim. Ex. 29 ¶¶ 4, 6, 8. Nor was he aware of the fact that failure to raise a claim would prevent a federal court from reviewing it during habeas corpus proceedings. *Id.* ¶ 7.

Because Mr. Terribile did not raise the claim to the trial court in the motion for rehearing, Cook's claim of ineffective assistance of trial counsel involving a mitigation case was not reviewed by the Arizona Supreme Court, and was later not reviewed on the merits by this Court in Cook's application for habeas corpus. This Court held that the claim was procedurally defaulted because it had not been exhausted in state court. *Cook v. Schriro*, No. 97-CV-146-PHX-RCB, Doc. No. 39 at 13-15 (D. Ariz. Sept. 17, 1999).

B. The Compelling Mitigation Case That Should Have Been Developed by Trial and Post-Conviction Counsel

It is now known that a thorough mitigation case could have been presented, because in recent years such a mitigation case – a starkly compelling one – has been disclosed through the kind of investigation which should have occurred before Cook's trial.[6]

i. Cook's Infancy and Childhood

Wanda Meadows, at age seventeen, married a drug addict and alcoholic named Gordon Cook. Decl. of Wanda Dunn, dated April 8, 2010, attached as Ex. 7 ¶ 4. They had a daughter named Debrah. *Id.* ¶ 4. Eleven months later, in 1961, Wanda gave birth to Cook three months' prematurely. He weighed three pounds, two ounces at birth. *Id.* ¶ 8. While Wanda was pregnant with Cook, she consumed alcohol and was physically abused by Gordon. She received no prenatal medical treatment. *Id.* ¶ 6; Decl. of Donna Marie Schwartz-Watts, dated Nov. 21, 2010, attached as Ex. 1 ¶ 15.

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[6] The information which follows could not have been presented in Cook's 1997 petition for habeas corpus, because it was not until the Federal Public Defender for the District of Arizona was appointed co-counsel for Cook in 2009, with its financial and personnel resources to carry out the necessary investigative and professional investigations and evaluations, that a proper mitigation investigation could be accomplished. It was in the process of preparing for clemency, *see, e.g.*, Doc. No. 110, that facts were uncovered to support an application such as is made here.

Even as an infant, Cook was not safe from abuse: his father Gordon beat him and Debrah with a belt and burned them. When Cook was only five months old, Gordon burnt Cook's penis with cigarettes. *Id* ¶ 9. Cook's mother was a "predator and sex abuser," mentally ill, and a "prescription pill junkie." Decl. of Debrah Howard, dated Nov. 15, 2010, attached as Ex. 8 ¶ 5; Decl. Kathy Lynn Dunn, dated Feb. 14, 2011, attached of Ex. 10 ¶ 4; *see also* Ex. 7 ¶ 17. A counselor reported he had "never talked to a colder, more heartless person in his many years of social work." Wyoming State Hospital Records, 1980-81, attached as Ex. 23 at 26.

After a period of homelessness, Wanda left and divorced Gordon. She gave Cook and Debrah to their grandmother Mae and step-grandfather Jim Hodges when the children were only five and six years old. Ex. 7 ¶ 10. Cook and Debrah were neglected and repeatedly abused by their grandparents, both physically and sexually. Ex. 7 ¶ 10; Ex. 8 ¶ 8; Ex. 1 ¶¶ 18-19.

Their step-grandfather Jim repeatedly sexually abused Cook and Debrah, and also forced them to have sex with each other at very young ages. Ex. 1 ¶ 18; Ex. 8 ¶ 8; Ex. 7 ¶ 10. Jim took pornographic pictures of Cook and his sister engaging in forced sexual activity on the family's living room floor. As just a little boy, Cook also witnessed his sister being sexually abused by their grandfather, and would hear Debrah crying in bed. Ex. 1 ¶ 18; Ex. 8 ¶ 8; Ex. 7 ¶ 10.

Cook and his sister also suffered physical abuse and neglect by their grandparents. As punishment, Cook and his sister would be tied to chairs. Ex. 7 ¶ 10; Ex. 1 ¶ 19. Both grandparents drank a lot of alcohol and dragged Cook and his sister in and out of taverns. The grandparents also failed to properly feed the children, often giving them things like a single piece of pie for dinner. Once, Cook got sick from eating his first real meal of cottage cheese and fruit. After he was sick, his grandparents forced him to eat his own vomit off the ground. Ex. 8 ¶ 7.

While Cook and Debrah were living with their grandparents, Wanda would occasionally visit them. When she did, she would sexually abuse Cook. Cook would be asleep on the couch and wake up to find his clothes removed and his mother fondling him. Cook's mother would also beat her young son, and then fondle him to "make him feel better." Ex. 1 ¶ 21. Eventually, Wanda remarried. Her new husband was a man twenty-three years older than she, who had many children of his own from several different relationships. Ex. 8 ¶ 9; Ex. 7 ¶ 13; Letter from Patricia Golembieski, dated Mar. 22, 2011, attached as Ex.21. He was controlling and abusive. Ex. 10 ¶ 6. Wanda moved to California with her husband, and Cook and his sister sent to live with their mother and her new family. Ex. 1 ¶ 22; Ex.8 ¶ 9; Ex. 7 ¶ 13.

Escaping his grandparents did little to improve life for Cook or Debrah. Their stepfather believed "they had bad genes or were from bad seed." Ex. 21. They were treated as outcasts. Ex. 21; Ex. 8 ¶ 10; Ex. 7 ¶ 13. Cook's stepfather was vicious with a belt, beat Cook, and yelled at him regularly. Ex. 8 ¶¶ 10, 13; Ex. 7 ¶ 13. He also beat the children with what he called "The Board of Education." He would make the children drop their trousers and bend over, and then he whipped them with the board. Ex. 8 ¶¶ 10 13; Ex. 7 ¶ 13. Once when Cook was getting beaten with a belt by his stepfather, Cook grabbed onto the belt for dear life. His stepfather flung him back and forth in the air. Ex. 8 ¶ 13.

Sexual abuse pervaded Cook's newly-blended home, too. There simply were no boundaries in this family. Cook and his younger half-brother were sexually abused by an older stepbrother. Ex. 1 ¶ 27. Wanda sexually abused one of her stepsons. Ex. 10 ¶ 5. Cook's sister and stepsister were sexually abused by their stepbrothers. Ex. 8 ¶ 17. Cook's stepfather asked his own daughter, Cook's stepsister, to have sex with him. Ex. 21.

As a result, Cook's "home" between ages nine to fourteen was not only physically

and sexually abusive but was also mentally and emotionally abusive. Wanda suffered from bipolar disorder. Ex. 8 ¶ 5; Ex. 7 ¶ 17. While Cook was growing up, she attempted suicide on numerous occasions. Ex. 1 ¶ 28; Ex. 8 ¶ 11. Once when Wanda attempted to overdose on pills, she made Cook sit next to her bed. She told him she wanted him to watch her die. After Wanda's suicide attempts, Cook's stepfather would blame Cook and his sister, telling them it was their fault that their mother wanted to kill herself. Ex. 1 ¶ 28; Ex. 8 ¶ 11.

When he was not quite fifteen, Cook's mother gave custody of him to the State of California. Ex. 7 ¶ 14; *see also* McKinley Children Center Records, 1976-77, attached as Ex. 27. He spent the remainder of his teenage years bouncing from one foster home to another. Just like Cook's mother and the rest of his family, the State of California also failed to protect Cook from harm. Decl. of Cynthina Kline, dated as Mar. 11, 2011, attached Ex. 11 ¶ 7.

Cook's first stop in the child welfare system was at the McKinley Home for Boys in San Dimas, California, where he spent nearly two years. Ex. 27. While there, Cook was sexually abused by Howard Bennett, Jr., a house parent. Bennett used his position of trust to develop a "big brother" type of relationship with Cook, plying young Cook with cigarettes. Declaration of Howard Smith Bennett, dated Mar. 27, 2009, attached as Ex. 17 ¶ 5. Bennett took advantage of Cook's vulnerability and trust in him for his own sexual gratification. Bennett reports: "I invited Cook into my room for a cigarette and began to touch him." *Id.* ¶ 6. Bennett admits to masturbating Cook and having him perform oral sex. *Id.* ¶ 6.

At McKinley, there was a "peek-a-boo room" which was used as a "time out room." Declaration of David Overholt, dated Nov. 23, 2010, attached as Ex. 15 ¶ 4. This room had a one-way mirror and Cook, along with other boys, would be subjected to abuse while adults watched from the other side. The administrator during Cook's time at

McKinley was dismissed after allegations regarding sexual misconduct arose. *Id.* ¶ 3. Cook was forced to spend time in the "peek-a-boo room," naked and handcuffed to the bed, while Bennett would sexually abuse him. Ex. 1 ¶ 30.

Cook was even circumcised at age fifteen, Ex. 27, at the instruction of Bennett, Ex. 1 ¶ 32. Unsurprisingly, Bennett is now a registered sex offender in California, and is currently serving a 214-year prison sentence for raping, molesting, and sexually exploiting five young boys ranging from ages seven to fifteen in Pierce County, Washington. *See California v. Bennett*, State of California Department of Justice, *Megan's Law Homepage*, Photograph of Howard Bennett, attached as Ex. 19; "Convicted Child Molester and Rapist Gets 214 Years-Judge Says the Case 'Cries Out for an Exceptional Sentence,'" *The News Tribune*, Feb. 20, 1998 (NewsBank), attached as Ex. 18.

In addition to being sexually abused by a house parent, Cook was gang raped by several of the boys at McKinley. These boys were "Bennett's enforcers," and they would hogtie and then rape Cook when he would not submit to Bennett's sexual assaults. Ex. 1 ¶ 31. Cook ran away from McKinley on several occasions. Ex. 27. While on the streets, Cook resorted to prostitution to survive. Life on the streets was hard, and during that time, Cook was raped and threatened at gunpoint. Ex. 1 ¶ 31.

While at McKinley, Cook also experienced ongoing rejection by his mother and family. Cook's records indicate that his family promised him several times that he could move back home. However, each time they found an excuse not to take him. Without telling Cook, Wanda even left California and moved to Lake Havasu, Arizona, leaving Cook behind at McKinley. Ex. 27. After leaving McKinley at age sixteen, Cook spent his last two years as a child going from one group home to another. School records indicate that Cook lived with one group parent named Arlis Benton (now deceased) and another named Margaret Hayes. School Records, 1977-79, attached as Ex. 28. Because the State of California lost his records, the number of other facilities in which Cook resided is

unclear. Affidavit of Custodian of Records Re: Case File Unavailable for Public Inspection Re: Missing File, dated March 1, 2011, attached as Ex. 16. Even though Cook had escaped McKinley, he still did not escape his abuser. Bennett tracked him down at another group home and met with him. Ex. 17 ¶ 7. Bennett claims that he went there to apologize, but Cook recalls it as a last chance for Bennett to abuse him.

Cook spent the latter part of his childhood with Westside Youth Home parents Lisa and Tom Maas, who broke the cycle of abuse. Ex. 1 ¶ 36. Tom Maas, who has fostered over fifty children, says that Cook was one of his "top kids." Declaration of Thomas Monroe Maas, dated March 18, 2011, Ex. 12 ¶ 4. Lisa Maas loved Cook very much and knew that his childhood was "a nightmare." Letter to the Clemency Board from Lisa Maas, attached as Ex. 20. Cook excelled in the structured environment of the group home. Ex. 12 ¶ 4. He had a dry sense of humor, and loved nature and photography. *Id.* ¶ 5. Although Cook could function in a structured environment, as a child with severe symptoms and psychological issues resulting from childhood trauma, Cook needed "a higher level of care" than what he had been provided. Ex. 11 ¶ 7.

In 1979, just before turning eighteen, Cook left California for Lake Havasu in yet another attempt to be reunited with his mother. Unsurprisingly, Wanda did not want him and sent her son to live with another family. Cook moved to Idaho and stayed with his childhood friend Jack, and Jack's mother Barbara Williamson. Ex. 1 ¶ 37; Decl. of Jack Donohue, dated March 18, 2011, attached as Ex. 13 ¶¶ 12-13.

ii. Cook's Life as an Adult

Cook enlisted in the Army Reserves, but only served from December 1979, until March 1980. As is often the case with severely abused and neglected children, Cook coped in this world by self-medicating with alcohol and drugs. During his brief time in the Reserves, he struggled with his alcohol addiction and attempted suicide. As a result, the Army honorably discharged Cook, reporting that he lacked the ability "to adjust to the

stress of military life, as evidenced by [his] . . . self-inflicted injury." Army Records, 1979-80, attached as Ex. 24.

Cook returned to Idaho in the spring of 1980, but still had difficulty adjusting. He battled alcoholism and drug addiction. He was suicidal and was hospitalized several times for attempting to end his life. Ex. 23; Idaho State Hospital Records, 1981-82, attached as Ex. 22; Ex. 13 ¶ 17. Cook's friend Jack once talked Cook out of "jumping out of the car" he was driving, and then took Cook to the county hospital. Ex. 13 ¶ 17. Within a year, Cook moved and was living in Wyoming, where he again attempted suicide. Ex. 23 at 1. He was treated at the Wyoming State Hospital for depression and alcoholism. After being discharged, he returned to Idaho.

Less than one year later, there was another suicide attempt and another admission, this time to the Idaho State Hospital. Cook placed a loaded shotgun against his throat but could not reach the trigger. This attempt was the result of Cook feeling rejected, as it was only a few days after his relationship with a girlfriend ended. He stayed in the hospital for three months—long enough for the social worker to observe that "he seems to have difficulty coping with stress or any type of problem which arises for which he does not have an immediate solution." Ex. 22 at 16.

During that time, Cook had "many ups and downs"; at times, he would be "very impulsive, act[ing] without thinking." *Id.* at 17. Cook "relied very heavily on friends and [their] approval." *Id.* Cook eventually left the hospital against professional advice and, on a quest to be loved, became involved with a hospital staff member. *Id.* Unable to cope, he voluntarily reentered the state hospital only a few days later, after yet another attempted suicide by overdosing on pills. *Id.* at 19. At the end of March 1983, after having been in the hospital for only one week, Cook left. *Id.* at 20.

Cook, now twenty-one, returned to Lake Havasu, Arizona. Again, he was rejected by Wanda, as her husband would not even allow Cook into their home. Decl. of Patricia

Rose, dated Feb. 10, 2011, attached as Ex. 14 ¶ 4. Cook lived a transient lifestyle in Mohave County. One of Cook's friends, Patti Rose, said Cook was a "big time alcoholic," and when he drank, he simply "melted into the scenery." *Id.* ¶ 5. Between 1983 and 1987, Cook was regularly seen by mental health professionals, whose diagnoses included depression, acute psychosis, and alcoholism. In September of 1983 he was hospitalized based on a suicidal gesture, and given a diagnosis of schizophrenia and alcohol abuse. Ex. 1 ¶ 55. In August of 1984, Cook was admitted to the emergency room for inflicting wounds on his forearm with a razor blade. *Id.* ¶ 56. Then in November of 1984, he was again hospitalized with a diagnosis of acute psychosis and alcohol ingestion. *Id.* ¶ 57.

Because of his mental health issues, Cook had a hard time keeping a job. Ex. 14 ¶ 6. Once, Patti saw Cook living under a bridge, filthy and hungry. *Id.* ¶ 7. She describes Cook as "a beaten, broken individual—it was as if you took the spirit out of a dog." *Id.* ¶ 2. Cook lived a very sad life. *Id* ¶ 8.

In 1986, Cook met and developed a relationship with a woman named Barbara and her two children. Ex. 1 ¶ 59. Barbara and her children offered some semblance of stability and hope to Cook. His relationship with Barbara lasted more than a year—longer than with any other woman before her. During their relationship, Cook had frequent grand mal seizures in which he sometimes rocked in the fetal position, had full body tremors, and foamed at the mouth. Barbara took Cook to the hospital or called an ambulance on several occasions. He was very paranoid and sometimes talked about things that made no sense or were way off topic. He lost track of time and had difficulty with his memory. *See* Application for Execution Clemency by Daniel Wayne Cook, dated March 25, 2011, at 19-20.[7]

[7] The Arizona Board of Executive Clemency is an agency of the State of Arizona, established under Ariz. Rev. Stat. Ann. § 31-401. Its records are publicly available.

Unfortunately for Cook, the relationship with Barbara did not last. It came to an end in March 1987. Ex. 1 ¶ 59. Cook's problems were ultimately too much for Barbara, and Cook learned that Barbara was not going to move from Kingman to Lake Havasu as they had planned, and instead was living with another man. Report of Eugene R. Almer, M.D, dated Dec. 14, 1987, attached as Ex. 26, at 4. Once again, Cook spiraled into a depression and numbed his pain in the only way he knew how—with drugs and alcohol. The weekend of the crime, Cook quit his job in a moment of anger and despair because his boss told him "not to bring his personal problems to work." *Id.* at 3.

Before the night of the crime, Cook had been using crystal methamphetamine. Ex. 1 ¶ 62. He continued using it on the day of the crime, along with Valium. Cook and his accomplice consumed close to four cases of beer on that day, and also smoked marijuana. *Id.*

iii. Cook's mental health history

Cook's history is replete with mental health problems and deficiencies. At the time of the crime, Cook had, and continues to have, post-traumatic stress disorder (309.89). *See* Ex. 1 ¶¶ 81-86; DSM-III-R, pp. 247 – 251. A principal criterion for this diagnosis is exposure to a traumatic event that is outside the range of usual human experience and would be markedly distressing to almost anyone. Cook was exposed to multiple-such traumas:

- Being burned on his penis with a cigarette by his father;
- Being sexually molested by his step-grandfather;
- Observing his step-grandfather molesting his sister;
- Being sexually molested by his mother;
- Being sexually molested by Howard Bennett while at the McKinley Home;
- Being sexually assaulted on the streets;

- Being the victim of physical abuse such as being forced to eat his own vomit, being tied to chairs, and being beaten regularly with a belt.

Id. ¶ 82.

At the time of the crime Cook had, and continues to have, organic mental syndrome, not otherwise specified (294.80). *See Id.* ¶ 87; DSM-III-R, pp. 119. This diagnosis indicates impairment in the etiology or pathophysiologic process which is unknown, and the organic mental syndrome is not classified as a delirium, dementia, or the other organic mental syndromes listed in the DSM-III-R. *Id.* ¶ 87. In Cook's case "he has impairment in cognitive functioning as manifest by abnormal neuropsychological testing and a history of a closed head injury, use of substances that can cause cognitive impairment, a premature birth, and maternal use of alcohol during fetal development." *Id.* ¶ 88.

A neuropsychological evaluation completed by clinical psychologist and neuropsychological expert Tora Brawley, Ph.D., in May of 2010 concluded that Cook had deficits in verbal fluency, verbal learning, copying of a visual complex figure, and manual speed. *See* Letter from Tora Brawley, Ph.D. to Robin Konrad, dated Sept. 30, 2010, attached as Ex. 3. Dr. Brawley found that Cook's frontal lobe dysfunction was present at the time of his offense. *Id.* at p. 5. He also has other clinical symptoms associated with cognitive dysfunction including migraine headaches and self-reports of memory loss. Cook had been prescribed the anticonvulsant Dilantin® because of a history of seizures. Ex. 1 ¶ 89. Dr. Brawley's evaluation noted that Cook has an extensive history of neurological insults/events to include several head injuries, seizures, vascular headaches, attention deficit symptoms and serious substance abuse. Ex. 3 at p.3.

At the time of the crime, Cook had amphetamine delusional disorder (292.11). *See* Ex. 1 ¶ 91; DSM-III-R, p.137. The diagnosis of amphetamine delusional disorder requires organic delusional syndrome developing shortly after the use of amphetamine. Rapidly

developing persecutory delusions are the predominant clinical feature for this diagnosis. Ex. 1 ¶ 91. A manifestation of this disorder was that Cook was using crystal amphetamine at the time of the crime. Cook's co-defendant Matzke stated that Cook was telling the victim to take them to his leader. Cook accused the victim of being a spy. Matzke also reported that Cook was referring to Oliver North and the CIA, and that Cook kept asking Carlos about his leader in Nicaragua. Such statements were not reality based. *Id.* ¶ 92.

The materiality of the above history, and the fact that Cook was prejudiced by it not having been unearthed before trial, is demonstrated by the prosecutor in the case, Eric Larsen. After being informed of the above matters, he furnished a declaration stating that "Had I been informed of this mitigating information regarding Mr. Cook's severely abusive and traumatic childhood and his mental illnesses, I would have not sought the death penalty in this case." Decl. of Eric Larsen, dated Nov. 22, 2010, attached as Ex. 2 ¶ 9.

C. Habeas Claim 3(a): Trial counsel was ineffective for failing to investigate and develop a mitigation plan

Consistent with the requirement in *Martinez*, Cook can demonstrate that his "underlying ineffective-assistance-of-trial-counsel claim is a substantial one." 132 S. Ct. at 1318.

i. Trial counsel's performance was deficient

In *Strickland*, the Court set out the instructions for reviewing claims of ineffective assistance of counsel. First, a court "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. A defendant in a criminal case is entitled to effective representation at every critical stage of the prosecution. Pre-trial preparation and investigation, including for a mitigation presentation at a capital sentencing, is a critical stage of the prosecution.

Mr. Cook did not receive effective representation during this critical stage. *Powell v. Alabama*, 287 U.S. 45 (1932); *Cf. Williams v. Taylor*, 529 U.S. 362, 390 (2000).

Under the Sixth Amendment, capital defense trial counsel have an obligation to conduct an investigation, which includes identifying evidence favorable to the defendant's case and preparing to rebut the State's evidence.[8] "In preparing for the penalty phase of a capital trial, defense counsel has a duty to 'conduct a thorough investigation of the defendant's background' in order to discover all relevant mitigating evidence." *Robinson v. Schriro*, 595 F.3d 1086, 1108 (9th Cir. 2010) (*quoting Correll*, 539 F.3d at 942). "*At the very least*, counsel should obtain readily available documentary evidence such as school, employment, and medical records, and obtain information about the defendant's character and background." *Robinson*, 595 F.3d at 1108 (emphasis added; citations omitted).

This duty includes "conduct a thorough investigation of the defendant's background," *Wiggins*, 539 U.S at 522 (internal citations omitted), immediately upon appointment to the case.[9] "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to . . .

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[8] *See Rompilla v. Beard*, 545 U.S. 374, 386 n.5 (2005) ("Counsel's obligation to rebut aggravating evidence extended beyond arguing it ought to be kept out"); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor'"); ABA Guideline 11.4.1(D)(7) (1989) (instructing that counsel should secure expert assistance where necessary for "rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial").

[9] ABA Guideline 11.8.3.A (1989) ("preparation for the sentencing phase, in the form of investigation, *should begin immediately upon counsel's entry into the case*") (emphasis added); *see also Scott v. Ryan*, No. 97-cv-1544-PHX-PGR Tr. Oct. 5, 2012 at 78, Expert Testimony of Thomas Gorman, J.D. (opining that a defense attorney's obligation in a capital case is to "immediately start collecting mitigation" to present it as soon as possible).

the penalty." *Correll v. Ryan*, 539 F.3d 938, 942 (9th Cir. 2008) (*citing* ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp)); *see also Porter v. McCollum*, 130 S. Ct. 447, 452-53 (2009) (noting that capital defense counsel has "obligation to conduct a thorough investigation of defendant's background") (citations omitted).

This duty exists because "'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse.'" *Wiggins*, 539 U.S. at 534 (citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)).Capital defense counsel "must conduct sufficient investigation and engage in sufficient preparation" so that all available mitigation can be presented at sentencing. *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002). When there are "tantalizing indications" of mitigating evidence, a reasonable attorney investigates further. *Stankewitz v. Woodford*, 365 F.3d 706, 716, 720 (9th Cir. 2004) (*citing Wiggins*, 539 U.S. at 527).

One needs compare the record in this case to but one Supreme Court case to demonstrate that the "ineffectiveness" prong of *Strickland* is fulfilled in this case. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Supreme Court held counsel ineffective for making a simple but prematurely-abandoned mitigation investigation. The Court there held:

- A decision not to expand an investigation beyond a presentence investigation and a Department of Social Services report indicating foster home involvement "fell short of professional standards that prevailed" and of American Bar Association Standards. *Id.* at 424. Here, no such investigation was undertaken other than to have an evaluation for competency to stand trial;
- It was unreasonable for counsel to have "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his

history from a narrow set of sources." *Id.*

- "[A]mong the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.*
- Counsel has an important and substantial role to raise mitigating factors not only for sentencing but also "to the prosecutor initially." *Id.* Had the proper mitigation investigation occurred, and raised to the prosecutor initially in Cook's case, the prosecutor *would not have sought the death sentence.* Ex. 2.

Of particular relevance to this case was the *Wiggins* Court's especial emphasis upon, and extended discussion about, the failure of counsel to pursue, develop and present the "powerful evidence of repeated sexual abuse" which Wiggins had suffered. *Wiggins*, 539 U.S. at 533. As explained *infra*, Cook's repeated and persistent sexual abuse from family and custodial adults is particularly mitigating of the offenses of which Cook was convicted.

This case is remarkably similar to *James v. Ryan*, 2012 U.S. App. LEXIS 4100 (2012):

- Here, as in *James*, defense counsel "failed to conduct even the most basic investigation of [Cook's] social history." *Id.* at *67.
- Here, as in *James*, defense counsel "failed to investigate [Cook's] mental health [other than to determine competence to stand trial]." *Id.* at *69.
- Here, as in *James,* defense counsel "failed to investigate [Cook's] history of drug abuse." *Id.* at *71.

This case is also similar to *Detrich v. Ryan*, 2012 U.S. App. LEXIS 8935 (2012):

- Here, trial counsel had done nothing to begin preparing a mitigation case as late as two weeks before trial. In *Detrich*, the Ninth Circuit noted that waiting until *one* week before trial had constituted ineffectiveness in *Terry Williams v. Taylor*, 529

U.S. 362, 395 (2000). *Detrich,* 2012 U.S. App. LEXIS 8935, at *34. Here, counsel's lack of action up to *two* weeks before trial does not rescue him from a finding of ineffectiveness as mandated by *Terry Williams, supra*.

- Here, as in *Detrich*, defense counsel "did not employ a mitigation investigator nor did he ask his investigator, who in any event was not qualified to do a life history investigation, to investigate mitigating evidence. *Id.* at *34, 35.
- Here, as in *Detrich*, the ineffectiveness in not conducting a mitigation investigation "was all the more unreasonable in light of the indications in [here, the competency evaluation report] that [Cook's] past likely contained many mitigating circumstances." *Id.* at *36.
- Here, as in *Detrich*, counsel's "failure to consult a medical health expert also fell below professional standards. The 1989 ABA guidelines provided that an attorney 'should secure the assistance of experts where it is necessary or appropriate for . . . presentation of mitigation.' " *Id.* at *37, 38.

ii. Cook was prejudiced by trial counsel's deficient performance

Second, a court must determine prejudice. "The court must then determine whether, *in light of all the circumstances*, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690 (emphasis added). In death penalty cases, "the question is whether there is a reasonable probability that, absent the errors, the sentencer. . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). In conducting its analysis, a court reviewing an ineffectiveness claim "must consider the totality of the evidence" and consider how the factual findings at trial were impacted by the errors. *Strickland*, 466 U.S. at 695; *Wiggins*, 539 U.S. at 534.

As described by the Court in *Strickland*, "the benchmark for judging any claim of

ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686. The Eighth Amendment demands that all relevant evidence bearing on a capital defendant's character, propensities, and record be considered by the sentencer in determining the appropriateness of the penalty. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality); *Wiggins*, 539 U.S. at 535. If the sentencer is deprived of this evidence due to the Sixth Amendment failings of counsel, the sentencing proceeding is unfair, the sentence itself is suspect, and one cannot have confidence in the outcome of the proceedings. *See Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (noting that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective").

The Ninth Circuit has explained that a "'reasonable probability' of prejudice exists 'even if the errors of counsel cannot be shown by a preponderance of the evidence to have undermined the outcome'; indeed, a 'reasonable probability' need only be 'a probability sufficient to undermine confidence in the outcome.'" *Detrich*, 2012 U.S. App. LEXIS 8935 at *47.

The State will doubtless argue that because Cook replaced Keller two weeks before a firm trial date that he was not prejudiced and has no claim of ineffectiveness of trial counsel. This is incorrect. There *can* be a claim of ineffectiveness of trial counsel, even though a prisoner takes over his own representation, if it meets both the performance and prejudice prongs of *Strickland*, 466 U.S. 668 (1984). *E.g. United States v. Fessel,* 531 F.2d 1275 (5th Cir. 1976) (claim that the ineffective assistance of counsel before self-representation prevented the preparation and presentation of an adequate defense); *State v. Dunster,* 278 Neb. 268, 276, 769 N.W.2d 401, 408 (2009) ("defendant may maintain a claim for ineffective assistance of counsel for any acts or omissions that occurred before

the defendant elected to proceed pro se); *Hance v. Kemp,* 258 Ga. 649, 373 S.E.2d 186 (1988) (because claim "relates primarily to the performance of his attorney before Hance sought to act as co-counsel").

Here, appointed counsel's failure immediately to undertake the investigation and preparation of a mitigation case – a task that is very time consuming, and virtually impossible for a defendant to accomplish from a jail cell, starting only weeks before trial – severely prejudiced Cook. Indeed, a timely and adequate mitigation investigation would have developed evidence of Cook's social history and mental illnesses in a way that was never presented to the prosecutor or the judge before a sentence of death was imposed. The Supreme Court has explained that prejudice will be demonstrated where "there is a reasonable probability that *at least one juror* would have struck a different balance." *Wiggins*, 539 U.S. at 537 (emphasis added). In Cook's case, although he was not sentenced by a jury, he has put forth information that would have struck a different balance with the prosecutor. Cook has demonstrated that had Keller conducted a mitigation investigation and presented it to the prosecutor, then the death sentence would not have been sought. *See* Ex. 2 ¶ 9.

Moreover, during the penalty-phase of his trial, the judge discounted the limited information related to Cook's mental health because "there was no connection between Cook's prior mental problems and the murders." *Cook v. Schriro*, 538 F.3d 1000, 1012 (9th Cir. 2008). While it was unconstitutional for the sentencer to impose a restriction on its consideration of mitigating evidence for failing to demonstrate a lack of causal connection to the crime, *see .e.g.*, *Tennard v. Dretke*, 542 U.S. 274, 285 (2004), Cook can demonstrate that the crime for which he was convicted is rooted in his horrendous social upbringing. As the Ninth Circuit has recently explained, the Arizona courts have noted that "family background may be a substantial mitigating circumstance when it is shown to have some connection with the defendant's offense-related conduct," and it is

constitutionally permissible for a sentencer to give a defendant's family background "little or no weight or value" where it is not connected to the offense. *Towery v. Ryan*, 673 F.3d 933, 944-45 (9th Cir. 2012). In the instant case, Cook's family history is substantial mitigation where the exact horrific acts that were done to Cook as early as infancy through his childhood were then done to the victims in his case.

At trial, evidence was presented that the victims were tied to chairs and sexually abused, and at least one was burned with cigarettes and had his foreskin stapled. *State v. Cook*, 821 P.2d 731, 736-37 (Ariz. 1991). Had Cook's counsel undertaken a proper mitigation investigation and developed Cook's social history, evidence would have been revealed that as a baby, Cook's father burned his penis with cigarettes Ex. 7 ¶ 9; that at age 5 or 6, Cook's grandfather tied him up to chairs as punishment Ex. 7 ¶ 10; Ex. 1 ¶ 19; that at the same age, Cook's grandfather forced Cook and his year-older sister to have sex with each other and Cook saw his grandfather sexually abuse his sister Ex. 1 ¶ 18; Ex. 7 ¶ 10; Ex. 8 ¶ 8; that Cook's mother sexually abused him as a child Ex. 1 ¶ 21; and that when he was 15, Cook was sexually abused by a male foster care worker who asked that he be circumcised Ex. 1 ¶ 30-32; Ex. 17 ¶ 6; Ex. 27; and that Cook was hogtied and raped by other boys in foster care Ex. 1 ¶ 31. While Cook maintains that a sentencer must consider and give mitigating effect to all social history under the Eighth Amendment, he has demonstrated a clear connection between his upbringing and the crime.

Moreover, had Keller conducted any mitigation investigation, he would have been able to provide the psychiatrist who conducted a competency evaluation with information to support specific findings that Cook suffers from post-traumatic stress disorder and brain damage, Ex. 1 ¶ 80, and that at the time of the crime, Cook was suffering from amphetamine delusional disorder, amphetamine intoxication, and alcohol intoxication, *id.* ¶¶ 91-94. Even though Cook ultimately represented himself, this information should have been developed well before trial and could have been presented to the sentencer. Indeed,

Cook was denied his request for expert assistance to prepare for his sentencing. *Cook*, 538 F.3d at 1011. Therefore, he was left with only the information developed pretrial by his ineffective attorney. "Evidence of mental disabilities or a tragic childhood can affect a sentencing determination even in the most savage case." *Lambright v. Schriro*, 490 F.3d 1103, 1127 (9th Cir. 2007). The information related to brain damage, post-traumatic stress disorder, and his mental state at the time of the crime is all classic mitigation information that should have been developed before trial. *See, e.g.*, *Robinson v. Schriro*, 595 F.3d 1086, 1110-11 (9th Cir. 2010) (describing "classic mitigation evidence" as, *inter alia*, impoverished background, unstable and often abusive upbringing, multiple episodes of childhood sexual abuse, personality disorder); *Correll*, 539 F.3d at 944 (describing as "classic mitigation evidence" history of drug abuse and extremely troubled childhood).[10]

D. Cook's Post-Conviction Counsel was Ineffective, Therefore Constituting Cause to Overcome his Defaulted Claim 3(b)

As *Martinez* instructs, this Court should consider the two-prong test established in *Strickland* to determine whether post-conviction counsel was ineffective. 132 S. Ct. at 1318. "To present a claim of ineffective assistance at trial *in accordance with the State's procedures*, then, a prisoner likely needs an effective attorney." *Id.* at 1317 (emphasis added). In determining whether post-conviction counsel's actions were reasonable, this

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[10] Also of note, the trial court found that while a lack of felony convictions can be considered mitigating, it nevertheless "found that not to be a mitigating factor because of what it concluded was an extensive misdemeanor record." (RT Aug. 8, 1988 at 19-20.) Cook's misdemeanor record primarily involved charges of disorderly conduct. (RA 125.) Had Keller performed effectively as required under the Sixth Amendment, the trial court would have been aware that Cook's misdemeanor record correlated to his history of traumatic abuse, mental illness, and brain damage, which could have been mitigated and explained through expert testimony. *See* Ex. 1 ¶¶ 78-79 (noting that substance abuse is a common complication of post-traumatic stress disorder and explaining need for expert at sentencing); Ex 3 at p. 6 (noting that Cook's brain damage, coupled with alcohol or drug use, makes him more susceptible to poor judgment and impulsivity).

Court should look to the ABA Guidelines. During post-conviction proceedings, "counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases." ABA Guideline 11.9.3.B (1989). Moreover, "Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues . . . ." ABA Guideline 11.9.3.C.

Here, Cook's post-conviction counsel fell short of their duties as capital post-conviction attorneys. Although Cook's first post-conviction attorney John Williams (who is now deceased) alleged in the petition that trial counsel should have investigated and developed a mitigation plan, Williams failed to state facts to support the claim. No facts were ever developed in support of this meritorious claim. Once Williams withdrew from the case due to a conflict, Terribile had an ethical duty to represent Cook from that point forward in Cook's post-conviction proceedings. Instead of undertaking his own review of the case and directing the necessary investigation to present the claims for which a hearing was granted, he relied solely upon the advice of conflicted counsel. Ex. 29 ¶¶ 2-4. *Cf. Manning v. Foster*, 224 F.3d 1129, 1135 (9th Cir. 2000) (finding that post-conviction attorney tainted by a conflict of interest could be cause to overcome default).

Terribile did nothing to effectively represent his client during the post-conviction proceedings. He played no role in determining how to investigate, present, or preserve issues, nor was he aware of whether any claim would be barred from federal review. Ex. 29 ¶¶ 3, 4, 7, 9. Under *Martinez*, Cook might as well have not had counsel appointed. *See, e.g.*, *Martinez*, 132 S. Ct. at 1317 (noting that if a prisoner has no counsel during post-conviction proceeding "[t]he prisoner, unlearned in the law, may not comply with the State's procedural rules" and is "in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record").

"It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227

(9th Cir. 1999); *see also Correll*, 539 F.3d at 942; *Lambright v. Schriro*, 490 F.3d 1103, 1118 (9th Cir. 2007). In order to prove the claim that trial counsel failed to conduct a complete mitigation investigation, Terribile was *required* to present the evidence that trial counsel should have uncovered and presented. Yet he put on no lay or expert witnesses to show what evidence would have been presented had trial counsel properly investigated Cook's mitigation case. There was no strategic reason for not presenting support for the claim of ineffective assistance of trial counsel. *See* Ex. 29. Based on Terribile's failure to support one of the claims on which a hearing was set, his performance was deficient.

Further, he failed to follow the rule that is required to preserve the issue for federal review by raising it in the motion for rehearing to the trial court. *See, e.g.*, *Bortz*, 821 P.2d at 239 (under former Ariz. R. Crim. P. 32.9 [applicable to Cook's case] only claims preserved in a motion for rehearing following denial of post-conviction relief by the trial court may be reviewed on appeal); *Cf.* Commentary to ABA Guideline 11.9.3 (1989) (noting that post-conviction's counsel duty in representing a capital defendant should "become familiar with the procedures of the given jurisdiction and act accordingly"). His lack of familiarity with procedural rules was unreasonable and resulted in the functional equivalent of Cook representing himself.

Moreover, Terribile's failures during Cook's post-conviction proceedings were inherently prejudicial. *See, e.g.*, *Correll*, 539 F.3d at 951 ("deficient performance and prejudice questions may be closely related"). Here, Terribile's failure to provide *any* support for the meritorious claim of ineffective assistance of trial counsel resulted in an incomplete record in state court. As the trial court noted, "There is no evidence of witnesses who could have been called that would have testified in a way that was beneficial to the Defendant. I am really left with nothing other than just speculation as to what could have happened had Keller done a better job." (RT 3 February 1995 at 26-27.) As explained *supra* in Cook's underlying claim for relief, there was a wealth of mitigating

evidence that trial counsel failed to uncover during his representation of Cook. Had Terribile effectively presented this claim in Cook's post-conviction proceedings, there is a reasonable possibility that Petitioner would have obtained relief. *See supra* at 28-32.

Terribile's actions were further prejudicial in that he failed to preserve this claim for review by the federal courts. If "effective trial counsel preserves claims to be considered on appeal and in federal habeas proceedings" *Martinez*, 132 S. Ct. at 1318 (citations omitted), then so too would effective post-conviction counsel preserve claims to be considered on appeal and in federal habeas proceedings. Terribile's failure to preserve this issue for review by the federal courts was ineffective. Because Cook can demonstrate cause to overcome his procedurally defaulted Claim 3(a), this Court should grant relief.

IV. This Court Should Grant Cook Relief, or in the Alternative, an Evidentiary Hearing

Post-conviction counsel was ineffective in two ways: in failing to adequately prosecute the ineffectiveness-of-trial-counsel claim at the evidentiary hearing *and* failing to complete the trial court post-conviction proceedings by including this claim in the required motion for rehearing. As a result, the record was not fully developed in the state court, thus fulfilling the prerequisite to a district court hearing, established in 28 U.S.C. § 2254(e).[11] Cook has presented facts that, if true, entitle him to relief; he should therefore be granted a hearing on his claim. *See Scott*, 567 F.3d at 584.

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[11] Section 2254(d) is not applicable in the instant case because the district court found that the claim was procedurally defaulted and therefore it was not adjudicated on the merits in state court due. *See, e.g.*, *Scott v. Schriro*, 567 F.3d 573, 584 (9th Cir. 2009) (remanding case for a hearing where there was cause to overcome procedurally defaulted claim and noting that issue should be decided *de novo* "because there is no state court determination on the merits to which the district court can defer").

This Court may consider new evidence so long as Cook was "was not at fault in failing to develop the evidence in state court," *Holland v. Jackson,* 542 U.S. 649, 652-53 (2004). Here, Cook was not at fault in any failure to adequately develop the record in post-conviction proceedings. If *Martinez v. Ryan* establishes cause for a total failure to exhaust because of ineffectiveness of post-conviction counsel, it surely encompasses the requirement that a petitioner not have been at fault for purposes of § 2254(e), for shortcomings in developing a record.

Moreover, the Supreme Court has long recognized that there is no rational distinction between a default in presentment of a claim and the failure to develop the factual basis of a claim. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) (deciding that the failure to present a claim in state court and the failure to develop the factual basis of the claim in state court would be adjudicated under the same cause and prejudice standard because it is "irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim"). *Keeney* of course has been supplanted by § 2254(e)(2), but not in any respect material here. Since the enactment of § 2254(e)(2), the Supreme Court has equated the element of diligence needed to qualify for a federal hearing under § 2254(e)(2) with the typical showing of "cause" for procedural default. *See Williams v. Taylor,* 529 U.S. 420, 444 (2000) ("Our analysis should suffice to establish cause for any procedural default petitioner may have committed in not presenting [the claim in state court proceedings] in the first instance."). As *Keeney* and *Williams* recognized, there is no rational distinction between a default in the presentation of a claim and the failure to develop the claim. If Petitioner were able to demonstrate that his post-conviction counsel rendered ineffective assistance in failing to present the claim of ineffective assistance of trial counsel, he would necessarily exempt those claims from the evidentiary limitations of § 2254(e)(2).

V. Conclusion

For all the reasons stated herein, Cook respectfully requests that this Court grant his motion for relief from judgment, and grant him relief on Claim 3(a) presented in his habeas proceedings.

RESPECTFULLY SUBMITTED this 5th day of June, 2012.

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Certificate of Service

I hereby certify that on June 5, 2012, I electronically transmitted the foregoing to the Clerk's Office using the ECF system for filing. I certify that all participants in the case are registered CM/ECF users and that service of this document will be accomplished by the CM/ECF system.

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